THE ORIGINAL UNDERSTANDING OF "EQUAL PROTECTION OF THE LAWS"

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When Adam delved and Eve span,
Who was then the gentleman?**

I. INTRODUCTION

The equal protection explosion of the past twenty years has been the Constitution's equivalent of the atomic bomb. To change the meta-

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This paper is an update of an article of the same name by these authors in 50 COLUMBIA LAW REVIEW 131 (1950), several sections of which are substantially reproduced here by permission. At that time it was done in connection with the then pending case in the United States Supreme Court of Sweatt v. Painter, 339 U.S. 629 (1950) in which they were amici. Mr. Munro is Judge of the Superior Court, Lafayette, Indiana, and Mr. Frank is a practicing attorney in Phoenix, Arizona. Mr. Chester H. Johnson, a law student at Arizona State University, has aided in the 1972 revision.

The 1950 article covered all then discovered original material. The leading secondary works available to the authors at that time included H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908) (present edition reprinted 1965); J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1956) (used in manuscript form in 1950); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding,* 2 STAN. L. REV. 5 (1949); Graham, *The "Conspiracy Theory" of the Fourteenth Amendment,* 47 YALE L.J. 371 (1938).

The contributions to this field since 1950 have been large. *See, e.g.,* G. CROSSKEY, POLITICS AND THE CONSTITUTION 1083-1118 (1953); R. HARRIS, THE QUEST FOR EQUALITY 24-36 (1960); J. TENBROEK, EQUALITY UNDER LAW (1965) (first edition published in 1951 under title: THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT); Bickel, *The Original Understanding and the Segregation Decision,* 69 HARV. L. REV. 1 (1955); Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority,* 22 U. CHI. L. REV. (1954); Graham, *The Early Antislavery Background of the Fourteenth Amendment,* 1950 WIS. L. REV. 479, 610; Graham, *Our "Declaratory" Fourteenth Amendment,* 7 STAN. L. REV. 3 (1954). Regrettably, this kind of listing fails to salute some real accomplishments. The Graham work in particular is deeply illuminating of the growth of the intellectual understructure of abolitionism.

** Sullivan, *The Antecedents of the Declaration of Independence,* 1 ANN. REP. AM. HIST. ASS'N 65, 80 (1902). The author credits this jingle, originating about the time of Wat Tyler's rebellion, as the first popularization of the idea of the equality

phor, in 1950 equal protection was a minor stream, a kind of lesser tributary in a flowing constitutional law. Today it is the Mississippi.

The race relations revolution and one man-one vote are the lasting heritage of the Earl Warren years on the Supreme Court. Much else was important, but these are vast. They permit no turning back; so far as such things are ever predictable, these immense changes are forever. Nor are they the end; now equal protection spreads to the law of poverty as well. These are the contemporary applications of equal protection of the laws. They are the manifestation of equal protection one hundred years after the amendment of which it is a part.

We shall talk about the history of that constitutional provision here, but we must add perspective to history. The phrase is only a part of a section of the amendment. It cannot be completely isolated; to see its history whole, one must necessarily put it into the context of the amendment as a whole.

Further, so that we do not exaggerate the importance of our inquiry, we must look at the relationship of the history itself to the immense events of the past two decades. Has the history either unleashed or restrained the great events of these years? Has it merely been neutral?

To describe the Civil War as the Second American Revolution is apt enough, and yet the label obscures reality. This was a two-way revolution. Specifically it was the revolt by the southern region against the established government; but it quickly became as well a revolt of northern forces against southern hegemony in government. Jefferson Davis revolted against Thaddeus Stevens, but in the course of a hard war, Thad Stevens was also revolting against Davis and all he stood for.

This revolution was, in the most awful and real sense, a revolution of guns and death, a true military convulsion. As is customary with revolutions, it discarded much of the legal system which it found, and substituted a legal order of its own. The three Civil War amendments,

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of man and attributes its popularity to Wycliffe. The same conception was of course, current among intellectuals many centuries earlier. See the valuable work of F. WORMUTH, THE ORIGINS OF MODERN CONSTITUTIONALISM c. 2 (1949). The conception of equality as the bedrock of liberty is everywhere; see for relations of Locke and the Declaration of Independence to abolitionism, J. TENBROEK, EQUALITY UNDER THE LAW (1965). For another of the endless illustrations, the Easter Monday, 1916, call to the Easter rebellion in Ireland, declares that "The Republic guarantees religious and civil liberty, equal rights and equal opportunity to all its citizens. . . ." From unpublished reprint.

adopted both to take and to perpetuate the fruits of the revolution for the victors, were the charter of the new order. Reconstruction was the device of the victors to govern the conquered territory, a device not radically different from the immediate post-World War II occupations.

The termination of the reconstruction was the great counterrevolution. While revolutions are normally of violence, violence, while likely, is not essential. Revolution by force unseated and beheaded Charles I and ruled the country; the Glorious Revolution of 1688 put an end to the Stuarts a second time and forever without any war at all. So in America, the Second American Revolution unseated southern power and utterly changed the complexion of the country. Reconstruction enforced the new mandate. The counterrevolution, ending without significant military action, set the country on a new path as surely as did the accession of William and Mary in England 200 years before.

These changing seasons of government, in very rapid order, dominated the development of the fourteenth amendment. Nowhere is this rapidity more dramatic than the course of events relating to the Negroes. In 1860, slavery was solidly entrenched in the United States. In a short five years had come the progression: the freeing of slaves used for military purposes by the army; the prohibition against returning slaves who crossed Union lines; the termination of slavery in the District of Columbia; the abandonment of fugitive slave laws; the Emancipation Proclamation; the first equal rights laws for the District of Columbia; the establishment of schools for all in the District; the admission of Negroes into the military forces; the elimination of restrictions against Negroes carrying the mails; the prohibitions of exclusion of Negroes from transportation in the District; and the thirteenth amendment itself.[1]

Two more amendments, the fourteenth and fifteenth, quickly followed. They were accompanied by a series of civil rights acts and by active reconstruction aimed at establishing Negro freedom in the South. This program met incredibly large obstacles to effectiveness, including the southern resistance, the discovery by many of the northern bloc that their interests were best served by collaboration and numerous other factors. These led to the abandonment of the whole effort to

1. The summary is taken from H. WILSON, HISTORY OF ANTI-SLAVERY MEASURES 1861-65, at 346-52 (1865).

dominate the South by troops or by law after 1877, when the counter-revolution had prevailed.

This means that the entirety of the active life of the Second American Revolution was, realistically, from about 1861 to 1877 at the outside. Insofar as the period of turbulent reform was directed at slavery, the active years may be measured as January 1, 1863 (Emancipation Proclamation) to the Civil Rights Act of 1875. In terms of sheer time span, comparison with other revolutions shows a highly comparable active life, a period of overwhelming dominance followed in these instances by exhaustion of early dynamism and a replacement by another form of government.

	BEGIN	END	YEAR SPAN
Puritan Revolution in England	1641	1660	19
American Revolution, Lexington to Constitutional Government	1775	1789	14
French Revolution to Napoleon's Empire	1789	1804	15
Civil War to End of Reconstruction	1861	1877	16

It is a quality of revolution that events reshape the law rather than that the law controls the revolution.

This reshaping of the law by the Second American Revolution gave birth to the thirteenth, fourteenth and fifteenth amendments as the new American Constitution. They were the legal structure for consolidating, perpetuating, and controlling the results of that revolution. They were as radical in their conception as the 1791 revolutionary constitution of France.

The counterrevolution derailed the amendments as an instrument for perpetuating the revolution. Any effort to comprehend the history of the fourteenth amendment in the last third of the nineteenth century and the first half of the twentieth by purporting to relate it to original purposes is simply hopeless. It altogether fails to take into account that the counterrevolution changed the legal system fundamentally, just as the amendments themselves changed the system which they replaced.

Speaking broadly, the function of the thirteenth amendment was to free the slaves. Prior to that amendment there were two principal cate-

gories of persons in the United States, the slave and the free.[2] Emancipation did not necessarily move the Negroes from the one class to the other. In ancient civilizations, "the world was not a place inhabited solely by free persons and slaves. Between men of these extremes of status stood special classes which lived outside the boundary of slavery but not yet within the circle of those who might rightly be called free."[3] In this respect, antiquity might be reproduced, and a new class might be created by which the ex-slave would be placed in a social limbo, equivalent perhaps to that of the less happy castes of India. If the range of status from slavery to complete freedom may be thought of as a scale, the reconstruction generation had to decide where within that scale the freedman should be placed.

The driving force of the thirteenth amendment was something more than to strike off the manacles and end the slave trade. Its key sponsors would have been appalled to discover that they were substituting a caste system for a slave system. As Speaker of the House Schuyler Colfax said in a speech at the opening of the 39th Congress, "I call them free men, not freedmen";[4] but the rest of the century never witnessed the creation of truly free men.

The counterrevolution took full-fledged freedom out of the thirteenth amendment. It was thereafter applied to allow a caste system holding Negroes as a separate group with permanent disabilities.[5] Not until the most recent times has any legal significance been given to the removal of the "badge of slavery," as distinguished from slavery itself.[6]

The fifteenth amendment is the last of the three, and this is no accident. As other devices failed, this amendment was intended to give the Negro the possibility of looking after himself as well as the opportunity of holding the Republican Party, as the Negro's instrument of

2. There was of course a small class of free Negroes in the North and South whose status varied from state to state.

3. Westermann, *Between Slavery and Freedom*, 50 AM. HIST. REV. 213, 214 (1945).

4. O. HOLLISTER, LIFE OF COLFAX 270-71 (1887).

5. The discussion here follows G. MYRDAL, AN AMERICAN DILEMMA ch. 31 (1944).

6. *Compare* Hodges v. United States, 203 U.S. 1, 17 (1906); Plessy v. Ferguson, 163 U.S. 537, 542 (1896); Civil Rights Cases, 109 U.S. 3 (1883), *with* Griffen v. Breckenridge, 403 U.S. 88, 105 (1971); Sullivan v. Little Huntington Park, 396 U.S. 229, 235-36 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968); United States v. Shackney, 333 F.2d 475, 485-86 (2d Cir. 1964) (dictum).

freedom, in office.[7] After 1877, by one device or another, this policy was robbed of all meaning until it was revived again in recent decisions, new civil rights acts, and militant voter registration.[8]

We come then to the late nineteenth and pre-Warren twentieth century interpretation of the fourteenth amendment. We do so realizing that the thirteenth amendment for very nearly a hundred years had been shrunk to its most minimal meaning, extinguishing slavery but substituting a kind of serfdom, and that the fifteenth amendment had been even more drastically reduced to a dead letter.

It is no surprise, therefore, to know that the fourteenth amendment, after the counterrevolution, was so totally reshaped as to have only a minimal resemblance, and at times not even that, to its original purposes. The forces of counterrevolution here, too, were too strong for the exhausted forces of the revolution. Like the thirteenth and fifteenth amendments, the fourteenth was not repealed. There was no need. Rather, the successor social order demanded an entirely new interpretation and this amendment, like the others, was rewritten by interpretation to accommodate. Twenty-five years after each of the three other revolutions tabulated above, there was little still alive of the Articles of Confederation, or the French Constitution of 1791, or Cromwell's Instrument of Government. In the same way, by 1900 there was not much left of the Second American Constitution.

The five sections of the fourteenth amendment deal with distinguishable problems:

Section 3 intended to keep out of federal public life all persons who had previously taken oath to support the Constitution and then engaged in the Civil War on the southern side. It evaporated four

7. This multiple point is made in many places; for illustration, see D. DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 352 (1970).

8. South Carolina v. Katzenbach, 383 U.S. 301 (1966) (sustaining the constitutionality of the Voting Rights Act of 1965); Terry v. Adams, 345 U.S. 461 (1953) (holding pre-primary elections of a local political organization subject to fifteenth amendment); Smith v. Allwright, 321 U.S. 649 (1944) (holding membership rules in statewide Democratic Party subject to fifteenth amendment); United States v. Classic, 313 U.S. 299 (1941) (holding that the right to vote in a state congressional primary may be protected by Congress from private or state interference); Civil Rights Act of 1957, 71 Stat. 634 (codified in scattered sections of 5, 28, and 42 U.S.C.); Civil Rights Act of 1960, 74 Stat. 86 (codified in scattered sections of 18, 20, and 42 U.S.C.); Voting Rights Act of 1965, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971, 1973-73p) (Supp. IV 1969), *as amended*, Voting Rights Act Amendments, 84 Stat. 314, 315 (codified in 42 U.S.C. § 1973) (1970).

years from the effective date of the amendment, losing its consequence with the Amnesty Act of 1872.[9]

Section 4 affirmed the public debt of the United States and provided that neither Confederate war debts nor any claims for loss or emancipation of slaves should ever be paid. It has served as a permanent bar.

Section 2 was contemplated as a chief instrument of perpetual Republican power. The most cynical portion of the amendment, it walked the difficult line created by the fact that the victorious states did not want Negroes to vote within their boundaries, while Negro votes were essential to Republican dominance of future Congressional elections in the South. The problem was intensified by the so-called "three-fifths formula" of art. I, section 2 of the original Constitution, which had counted three fifths of all slaves for the purpose of calculating congressional representation. The thirteenth amendment thus increased the Negro base of congressional representation by the additional forty percent.

Section 2 of the fourteenth amendment reversed this, providing that a state should lose as a basis for representation all Negroes not allowed to vote. This, theoretically, solved all the problems. Northern states could bar Negro voting at no cost, because the numbers were too small to matter. The southern states could either let Negroes vote and take the Republican consequences, or bar them and lose Congressional seats.

The proposal was too smart by far. It was a dead letter from the beginning, and never served either to aid Negro voting or diminish representation. Indeed, its only practical effect was the opposite; it did operate to increase southern representation by the forty percent.

The fifth section, providing that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article," was originally contemplated as the most important part of the amendment, a matter to which this discussion will return. This hits the real difference between the original Bill of Rights and the thirteenth, fourteenth, and fifteenth amendments. The original Bill of Rights was fundamentally preservative, its object being to protect what that generation conceived of as existing liberties. The Civil War amendments

9. Act of May 22, 1872, ch. 193, 17 Stat. 143.

were not merely protective, they were generative, intended to create liberties for a vast class which did not have them at all, and section 5 was the energy of that generating system. It was much used until 1875, after which a process of narrow interpretation and outright invalidation and destruction of its exercise reduced it to insignificance until the civil rights acts of most recent times. For a full seventy-five years, this provision, the absolute heart of the amendment, was dead for there was no political power capable of exercising the small authority left.

The interpretation of section 1 of the fourteenth amendment, which has been the most litigated portion of the Constitution, is against the background just outlined. Two thirds of the rest of the amendment of which it was a part had been wiped out by events and interpretation, and this included the key element, the enforcement section. Moreover, the obliteration of the remainder and the treatment of the thirteenth and fifteenth amendments had the consequence of eliminating a political atmosphere which would have any energy devoted to making something meaningful of section 1 of the fourteenth amendment.

Hence the result: section 1 of the fourteenth amendment[10] rapidly lost even the faintest resemblance to the original contemplation. It became a vital part of American constitutional law, but in a fashion wholly disembodied from its first design.

Specifically:

1. It soon became popular belief that the primary purpose of the entire amendment was to make Negroes citizens. Generations of high school students recite the litany that the thirteenth amendment freed the slaves, the fourteenth made them citizens and the fifteenth gave them the right to vote. The truth is that the first sentence of the amendment, which has this effect, was added almost as an afterthought, after the amendment had already left the Joint Committee on Reconstruction and had passed the House. The due process clause was al-

10. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of 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.

most ignored in the course of adoption.[11] This clause, of course, became the most important in the amendment, and much of what the sponsors of the amendment intended to be covered by the privileges and immunities clause has been absorbed by interpretation into due process.

2. Privileges and immunities to be protected from state interference were intended by the two major sponsors of the section to include at least the first eight amendments of the Constitution, and perhaps a good deal more.[12] The extreme vagueness of this phrase, however, permitted its quick reduction by interpretation to a virtual nullity.[13] It has been of no consequence since. Moreover, this vital clause was to gain its life through the enforcement provisions of section 5, and the legal and political emasculation of that provision left privileges and immunities a dead fish on the beach.

The failure to give requisite weight to the last section has led to one of the great debates of recent American constitutional law, a debate in which both sides are, in this view, on historically irrelevant ground. Justice Black, in his dissent in *Adamson v. California*, advanced the great thesis, "that one of the chief objects [of section 1] was to make the Bill of Rights applicable to the States."[14] The historical evidence makes this view, at least as to privileges and immunities, solidly correct.

On the other hand, Professor Charles Fairman, in his immense essay,[15] reaches the opposite conclusion. The most solid peg of his argument is the fact that the "re-founding fathers" of the 1860's could not have meant anything of the sort because they repeatedly sanctioned

11. No reference to due process was found which gives the term more than a procedural connotation.

12. Mr. Justice Black, dissenting in Adamson v. California, 332 U.S. 46, 68, 92 (1947) (app.); H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1965). Not only did the legislative leaders make the point categorically, but also it had front page press display. N.Y. Times, May 24, 1866, p. 1, col. 5. Some evidence that this interpretation was not generally conprehended is offered in Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949), discussed more fully below.

13. The Slaughter-House Cases, 88 U.S. (16 Wall) 36 (1873). Boutwell, a member of the Joint Committee on Reconstruction, observed in his memoirs: "The part relating to 'privileges and immunities' came from Mr. Bingham of Ohio. Its euphony and indefiniteness of meaning were a charm to him." 2 G. BOUTWELL, REMINISCENCES OF SIXTY YEARS 41 (1902).

14. 332 U.S. 46, 71 (1947).

15. Fairman, *supra* note 12.

state constitutions which did not apply all of the Bill of Rights to the states. Yet Senator Howard, Senate leader for the measure, did say precisely that the phrase made the Bill of Rights applicable to the states and Representative Bingham, actual inserter of this language in section 1, later categorically supported what became the Black position. As Professor Fairman says, Howard could not have intended to invalidate his own Michigan state constitutional practice which permitted prosecution on information rather than grand jury indictment. Professor Fairman also says, with accuracy equal to Justice Black's, that traditional state freedom "repels any thought that the federal provisions in grand jury, criminal jury, and civil jury were fastened upon them in 1868."[16]

Each of these great spokesmen is historically correct as far as he goes, though they appear in utter conflict. Each, with profound respect for both of them, is aside from the historical point. One hundred years of atomization of the fourteenth amendment into words and phrases totally obscures its original integration as part of a single, multifaceted plan for reconstruction.

For historical purposes, privileges and immunities in section 1 cannot be separated from the enforcement provisions of section 5. It was contemplated that the two clauses together permitted Congress, as it might see fit by statutes, to apply the Bill of Rights to the states. Congress was at that moment in the business of adopting civil rights acts of various types and under various labels. It never occurred to Senator Howard or Representative Bingham that the privileges and immunities clause—the Bill of Rights—would become self-enforcing by judicial decisions. Of course Senator Howard did not contemplate invalidating the conventionalities of Michigan criminal law; no bill to this (as it would have seemed to him, absurd) effect was ever contemplated. Representative Bingham made his expository analysis in 1871 not as an abstraction, but in the course of a debate on specific civil rights legislation.[17]

When section 5 dried up and blew away, its elimination created a power vacuum. That vacuum was later partially filled by judicial ac-

16. *Id.* at 137.

17. Bingham's remarks on the applicability of the Bill of Rights to the states were made in the course of debates before the House on what subsequently became the Act of April 20, 1871, ch. 22, 17 Stat. 13. *See* CONG. GLOBE, 42d Cong., 1st Sess., app. 83, col. 3, and 84, cols. 1 and 2 (1871).

tion which hitched judicial enforcement of parts of the Bill of Rights to the due process clause. This was fifty years after the Civil Rights Act of 1875.[18]

Howard's and Bingham's original conception of the Bill of Rights as privileges and immunities thus finally slipped into a cloak of constitutional protection in a totally twisted way. The protection was an exercise of judicial power; they thought of legislative authorization. The language applied was due process; they thought of privileges and immunities. The coverage was selective and partial, and came to be an outright rejection of parts of the Bill of Rights and the substitution of the "ordered liberty" concept of selectivity;[19] these are all concepts unrecognizably alien to Howard and Bingham.

Any conception that the due process clause, judicially interpreted and enforced without supportive legislation, incorporates the Bill of Rights, has no basis at all in the events of 1866 to 1875. There may be abundant basis in other historical growth, or in policy, or in philosophy, or in some other source; it may have become a comfortable custom. However, the correlation to the original intent of the fourteenth amendment is zero.

3. Partly this is because the due process clause itself was totally remolded by interpretation. It was almost ignored in the course of its adoption; no historical reference has been found which gives it more than a procedural connotation. It became by interpretation the most important language of the amendment and, as noted, some of what was contemplated as privileges and immunities was absorbed by interpretation into due process.

4. As Graham has shown, the term "person" was never explicitly said to include corporations. In view of the very limited meaning given due process, there was little reason why anyone would have wanted to include corporations as persons.[20] If the sponsors of the amendment had any notion of including corporations within the protection of the section, it was probably as "citizens" under the privileges and immunities clause.[21]

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18. Gitlow v. New York, 268 U.S. 652 (1925).

19. Palko v. Connecticut, 302 U.S. 319 (1937).

20. Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371 (1938). *See also* Boudin, *Truth & Fiction About the Fourteenth Amendment*, 16 N.Y.U.L.Q. REV. 19 (1938).

21. In 1871 Bingham, principal draftsman of section one of the amendment, urged

II. EQUAL PROTECTION

The original understanding of the equal protection clause must be read against its background.

Before the exploration of that background, warnings must be given. The generalities of the fourteenth amendment, as reported from Committee, were voted upon by 218 congressmen, were discussed in hundreds of speeches and countless editorials in the election of 1866, and were thereafter voted upon by some thousands of state legislators. Even if the times had been calm and conditions static, the general phrases of the amendment could not have meant even approximately the same thing to all who voted upon them; and in fact, interpretations did diverge widely.

The rapidity with which abolition proceeded makes it particularly misleading to point to single examples of extant conditions with the assurance that the fourteenth amendment meant either to forbid or to perpetuate them. For example, when the amendment was drafted, Massachusetts gave completely equal rights to Negroes, including their acceptance without segregation in the common schools. But Indiana barred them from the schools altogether, forbade them to make enforceable contracts, did not let them testify in court, and excluded Negro newcomers from the state.[22]

The fourteenth amendment was a merger of ideals and politics resulting from the desire to assure the rewards of victory to the various interests represented by the prevailing political factions in the Civil War and to maintain those factions in office. The Civil War precipitated a complete political and economic revolution in both the South and North which has led historians to call it the Second American Revolution. The thirteenth, fourteenth, and fifteenth amendments must be analyzed in part as the Second American Constitution.

Although the Republican Party, taking the nation as a whole, was

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a bill to declare corporations citizens for privileges and immunities purposes. This accords with the position taken by Webster in Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 549 (1839), discussed in C. SWISHER, ROGER B. TANEY ch. 18 (1935). For a brief account of the Bingham bill, see McLaughlin, *The Court, the Corporation, and Conkling*, 46 AM. HIST. REV. 45, 51 (1940).

22. Indianans were completely aware that equality meant a total change in their own treatment of Negroes. *See, e.g.*, Speech of Governor O. P. Morton of Indiana, Sept. 29, 1865 (Lib. Cong. pamphlet at 13, 14); *Report of Supt. of Public Instruction*, IND. Doc. J. 337-39 (1865-66).

still a minority group at the close of the Civil War, once the South was made impotent the way was clear for Republican dominance. The party itself was a coalition of three major groups—the northern manufacturers hungering for high tariffs, the farmers of the middle west desiring free lands, and the abolitionists.[23] As is frequently the case, the product of this conglomeration contained elements designed to placate each. Tariffs were raised; free land was made available to the farmers; and the Civil Rights Act of 1866 was passed to satisfy the abolitionists.[24] The fourteenth amendment was also a result of the convergence of these divergent interests in the Republican Party.

Many felt that a variety of problems would be solved by granting the ballot to Negroes, for it was thought that the concomitant political power would be sufficient to protect their rights.[25] As a further value, Stevens saw the ascendancy of the Union Party in the South as a result of such enfranchisement.[26] Moreover, if the Negro were to vote Republican, he deserved Republican protection as much as the industrialists and farmers.[27] Thus, Republicans could unanimously support an equal rights amendment as well as an amendment for equal suffrage in the southern states. The climate was not yet ripe for the North to impose equal suffrage upon itself, for few northern states gave Negroes the ballot and the Radicals doubted that such an amendment would be ratified.[28]

Two different proposals were introduced by the Republicans to attain their objectives. One of these was Bingham's equal rights amendment reported out of the Reconstruction Committee in February 1866. This

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23. 2 C. BEARD & M. BEARD, THE RISE OF AMERICAN CIVILIZATION 31 (1935).

24. 2 S. MORISON & H. COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC ch. 1 (1942). For an account of the economic situation of the South at the close of the war, see W. HESSELTINE, THE SOUTH IN AMERICAN HISTORY 482-89 (1943). For recognition that a new economic order was dependent upon the Republicans, see Address of Representative Boutwell, *Reconstruction and Its Relations to the Business of the Country*, Dec. 27, 1866 (Lib. Cong. pamphlet); CONG. GLOBE, 42nd Cong., 1st Sess. 339 (1871) (speech by Representative Kelly).

25. CARL SCHURZ PAPERS 279 (1913); 2 MCPHERSON'S SCRAPBOOK, ELECTION 1866 at 26.

26. CONG. GLOBE, 39th Cong., 2d Sess. 252 (1867).

27. 1 MCPHERSON'S SCRAPBOOK, ELECTION 1866, at 143-44.

28. *Cf.* Editorial, Baltimore American, Jan. 2, 1866. *See* House, *Northern Congressional Democrats as Defenders of the South During Reconstruction*, 6 J. SOUTHERN HIST. 46 (1940); Simpson, *Political Significance of Slave Representation 1787-1821*, in 7 J. SOUTHERN HIST. 315 (1941).

proposal was soon postponed on the floor of the House because of the adverse sentiment it provoked.[29]

On the political problem of suffrage, Blaine introduced an amendment which was successfully carried through the House in February 1866, with the aid of Stevens.[30] The Blaine amendment was ingenious. Instead of imposing Negro suffrage, it merely reduced a state's representation proportionately to the classes excluded. This would force the southern states either to enfranchise Negroes or to accept a sharply reduced representation, but would have little or no effect upon the northern states with their tiny Negro population. The Blaine amendment was defeated in the Senate by Sumner with a provocative two-day speech in which he declared that he would never permit a provision to enter the Constitution which implied that there might be less than complete equality.[31] Thus, both the equal rights and suffrage proposals initially met defeat.

The problem was solved by redrafting both proposals and combining them as sections one and two of the amendment, while adding a third section to keep prominent Confederates out of office and a fourth section to guarantee payment of the northern, but not the southern, war debt. This combination passed both houses as the fourteenth amendment, and accompanying legislation made its ratification by southern states a prerequisite to their readmission to Congress.

Section 1 of the fourteenth amendment as it was thus passed contains the equal protection clause. Before the original meaning of it is discussed, we shall consider the source of the phrase; what men were associated with it; and why this particular language came into the Constitution at all.

"All men are created equal" and "equal protection of the laws" are phrases which, though closely related, have had distinct histories and have served very different purposes in the course of slavery and freedom.

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29. For an account of the consideration of the Bingham amendment at this stage, see H. Flack, *supra* note 12, at 56-65 and J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 91-96 (1956).

30. For an account of the Blaine amendment, see H. Flack, *supra* note 12, at 97 *et seq.*

31. The addresses on this topic are included in 10 WORKS OF CHARLES SUMNER 282, 338 (1874) (hereinafter cited as SUMNER). His central theme was "Equal Rights of All, at the ballot box as in the court room." *Id.* at 124.

Because of the first phrase, the Declaration of Independence became the rallying cry and the greatest verbal symbol of the abolitionists. With cheerful disregard of the fact that it had been penned by slaveholders, the abolitionists pre-empted the "created equal" slogan so successfully that their adversaries were finally forced into head-on attack on the slogan itself and even on the Declaration.[32]

Like most great slogans, "created equal" provided no solution for concrete cases once slavery itself was abolished. For these cases, *e.g.*, whether a freedman had a right to ride a streetcar, the abolitionists needed an instrument more precise than their historic broadside.

The transition from a slogan to a legal tool originated in a controversy over the admission of Negroes to Massachusetts schools. In 1845, the Massachusetts Legislature provided that Negroes should be educated in public schools. The bill was passed under the vigorous leadership of Henry Wilson, prominent industrialist and abolitionist who later became United States Senator and Vice President and who had led the successful fight for repeal of the Massachusetts law against miscegenation. In the state senate in 1844 and 1845, he had advocated the admission of Negroes onto railroad cars and had carried the fight for schools. His argument in the state senate, which constantly reiterated the theme of equality, was that Negroes should have "the full and equal benefits of our public schools."[33]

Boston responded to the Wilson bill by establishing public but separate schools for Negro children. The validity of that arrangement came before the Massachusetts Supreme Court in 1849 in *Roberts v. Boston*.[34] Counsel for Roberts was Charles Sumner, a follower of Henry Wilson. Sumner's oral argument,[35] distributed through abolitionist ranks as a pamphlet, provided the intellectual material for the transition of "equality" from aphorism to legal tool.

Sumner contended that separate schools were incompatible with both the statutes and constitution of Massachusetts. Since no word in either source specifically dealt with the problem, he was forced to work from generalizations, and the fundamental generalization which he chose was the passage in the Massachusetts constitution that "All men

32. *See* 2 *id.* at 331 n.2.
33. E. NASON, LIFE OF HENRY WILSON 50 (1876).
34. 59 Mass. (5 Cush.) 198 (1849).
35. For a complete reprint of this argument, see 2 SUMNER, *supra* note 31, at 327.

are born free and equal." Recognizing the difference between a slogan and a proposition of law, Sumner said:

> Of Equality I shall speak, not as a sentiment, but as a principle. . . . Thus it is with all moral and political ideas. First appearing as a sentiment, they awake a noble impulse, filling the soul with generous sympathy, and encouraging to congenial effort. Slowly recognized, they finally pass into a formula, to be acted upon, to be applied, to be defended in the concerns of life, as principles.[36]

For the purpose of creating the "formula, to be acted upon, to be applied," Sumner made the first known use in English of the phrase "equality before the law."[37] He discussed the origins of equality in sentiment, finding its traces in Herodotus, Seneca, and Milton,[38] and then took up the transition into formula through the French Revolution and its predecessor philosophers. Diderot and Rousseau, he explained, had acclimated the French to the sentiment, and the Revolutionary Constitution in 1791 took a new step. Its first article declared, "Men are born and continue free and equal in their rights," thus marking the first occasion in which equality of rights was made a legal consequence of "created equal." Sumner traced the rest of the French experience: the Constitution of February 1793, which had declared "The law ought to be equal for all"; the Constitution of June 1793, providing "All men are equal by nature and before the law"; and finally, the memorably crisp phrase in the Charter of Louis Phillipe, "Frenchmen are equal before the law."

This principle of equality of rights, Sumner declared, was the real meaning of the Massachusetts constitutional provision which gave

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36. *Id.* This transition did not finally occur until the fourteenth amendment was ratified. W. GUTHRIE, LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 110 (1898), observed that by it, equality passed from "a mere theory or sentiment" into "organic law."

37. As will be shown, the phrase was already familiar in French as "Égalité devant la loi."

38. H. BRANNON, THE FOURTEENTH AMENDMENT 317 (1901), would give Cicero a prominence in the development of the idea of equality which Sumner disregarded in this argument. Sumner's primary concentration in developing the origins of equality on classical and French sources is probably due to his own study in France. Trumbull referred to Blackstone as a starting point: "[T]he restraints introduced by the law should be equal to all, or as much so as the nature of things will admit." CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866), quoting 1 W. BLACKSTONE, COMMENTARIES, 126, 127 (1807 ed.). On equality as an idea in political thought, see *Equality*, 5 ENCYC. SOC. SCI., 102 (1968).

equal rights to every human being.[39] No distinctions whatsoever could validly be made because of race, and hence separate schools were illegal.

The Massachusetts court rejected Sumner's argument, but the legislature thereupon overruled the court and explicitly provided that Negroes should be admitted without separation into public schools.[40] The argument, however, outlasted the case. "Equality before the law," used interchangeably with "equal rights," was a proposition by which particular proposals concerning freedmen could be measured.

Sumner, as the foremost theoretician of the abolitionists in high office, was the center of the move to write his formula into the Constitution. When the thirteenth amendment was before the Senate in 1864, its sponsors chose to use the language of the Northwest Ordinance as the base of their draft.[41] Sumner expressed no strong objection, since his first object was extinction of slavery by any formula; but he did suggest as a substitute for purposes of consideration a proposal that, "All persons are equal before the law, so that no person can hold another as a slave."[42] The Sumner phraseology, obviously careful, would write into the Constitution not merely the extinction of slavery but *also* the principle of equal rights, the demand of radicals everywhere.[43]

39. "He may be poor, weak, humble, or black,—he may be of Caucasian, Jewish, Indian, or Ethiopian race,—he may be of French, German, English, or Irish extraction; but before the Constitution of Massachusetts all these distinctions disappear. He is not poor, weak, humble, or black; nor is he Caucasian, Jew, Indian, or Ethiopian; nor is he French, German, English, or Irish; he is a MAN, the equal of all his fellowmen." 2 SUMNER, *supra* note 31, at 341-42.

40. MASS. GEN. LAWS, ch. 256, § 1 (1855).

41. Article VI of the Northwest Ordinance provided: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes, whereof the party shall have been duly convicted." Act of July 13, 1787, 1 Stat. 51.

42. CONG. GLOBE, 38th Cong., 1st Sess. 1482 (1864).

43. Though the Sumner words were not adopted, the central idea of equality was generally in men's minds in connection with the thirteenth amendment. Representative Marcy opposed the thirteenth amendment because his constituents "do not believe that the black man is equal to the white," (*id.* at 2950), while Representative Orth supported it as a practical application of the proposition that "all men are created equal." CONG. GLOBE, 38th Cong., 2d Sess. 142 (1865). Thereafter the idea stayed at the forefront of discussion. A Pennsylvania State Equal Rights League signed its correspondence, "Yours for justice and equality before the law." Letter to Stevens of Nov. 1, 1865, in STEVENS MANUSCRIPTS (Lib. Cong. 1865). One of Sumner's correspondents wrote, "let us dictate no distinction of color or person, all equal before the law." J. JAMES, *supra* note 29, at 31, quoting SUMNER'S MANUSCRIPTS.

Representative Justin Morrill of Vermont scribbled a note to Sumner asking for ad-

Two proposals were the direct parents of the equal protection clause. On December 6, 1865, Representative Bingham of Ohio proposed an amendment authorizing Congress "to secure to all persons in every State of the Union equal protection in their rights, life, liberty, and property."[44] It is, so far as we know, the first use of the phrase "equal protection" in a proposed constitutional amendment.[45]

The other proposal originated in the Senate and was the product of three bills. The first, S. 9, was sponsored by Senator Wilson and invalidated all laws "whereby or wherein any inequality of civil rights and immunities" existed because of "distinctions or differences of color, race or descent."[46] By whatever political agreement there may have been between Senators Trumbull and Wilson,[47] it developed that

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vice as to the best way to incorporate this sentiment into law: "Then as to apt phrase, can you leave all in a jural phrase. Say — all citizens of U.S. resident [in] said States are equal in their civil rights, immunities & privileges and equally entitled to protection in life, liberty and property . . . ." J. JAMES, *supra* note 29, at 31, quoting SUMNER'S MANUSCRIPTS. There is no doubt that Sumner found this formulation adequate. For example, he proposed that southerners take an oath that they would "discountenance and resist any laws making any distinction of race or color; and . . . strive to maintain a State government . . . where all men shall enjoy equal protection and equal rights." 10 SUMNER, *supra* note 31, at 22.

44. CONG. GLOBE, 39th Cong., 1st Sess. 14 (1865).

45. The Massachusetts Constitution of 1780 contained the phrase in a different context in its Article III: "And every denomination of Christians, demeaning themselves peaceably, and as good subjects of the Commonwealth, shall be equally under the protection of the law." And see similarly ME. CONST. art. I, § 3 (1819); N. H. CONST. art. VI (1792).

Conceptions similar to equal protection also existed in other early state constitutional provisions. Requirements of a uniform system of taxation in effect require equal protection in a narrow field. Levy v. Smith, 4 Fla. 154 (1851); State v. Lathrop, 10 La. Ann. 398 (1855); Milwaukee & Miss. R.R. v. Supervisors, 9 Wis. 431, 449 (1855); *cf.* Smith v. Judge 12th District, 17 Cal. 548, 555 (1861). The common law distinction between general and special legislation was ancient, Holland's Case, 76 Eng. Rep. 1047 (K.B. 1597); and distinctions in terms of the reasonableness of classifications in interpretations of provisions of this kind were becoming explicit before 1865. Hingle v. State, 24 Ind. 28 (1865); Reed v. State, 12 Ind. 641 (1859); *cf.* Madison & Ind. R.R. v. Whiteneck, 8 Ind. 217, 240-43 (1856).

The expression "equal protection" had been used by Bingham as early as 1857 in a fashion indicating that he then made no distinction between it and due process. CONG. GLOBE, 34th Cong., 3d Sess. 140 (app. 1857). On this and other occasions before the war, Bingham developed extensively a trinitarian theme of "privileges and immunities," "due process," and "equality," CONG. GLOBE, 34th Cong., 1st Sess. 124 (app. 1856); *id.*, 34th Cong., 3d Sess. 140 (app. 1857); *id.*, 35th Cong., 2d Sess. 984-85 (1859). We find the actual phrase "equal protection," however, used only on the occasion mentioned.

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

47. Although this is somewhat of a speculation, Trumbull was facing re-election in

within a few days from the introduction of S. 9, Wilson introduced a new bill, S. 55, the first section of which was substantially the same as S. 9, and asked that it be referred to Trumbull's committee.[48] S. 55 was never heard of again; but on the first day after the Christmas recess in 1865, Trumbull introduced S. 61, which was a broader bill containing verbatim the vital language of the earlier bill.[49] S. 61 was reported back quickly from Trumbull's committee and speedily became the Civil Rights Act of 1866.

As introduced by Trumbull, S. 61 reduced the somewhat lengthy language of section 1 of S. 55 (née S. 9) to a phrase forbidding "discrimination in civil rights or immunities among the inhabitants of any State . . . on account of race, color, or previous condition of slavery." Section 2 of S. 55, retained virtually intact by Trumbull in S. 61, named specific rights to be enjoyed "without distinction of color or race," and concluded that all inhabitants should have "full and equal benefit of all laws and proceedings for the security of person and estate." In this form, S. 61 passed the Senate. As Trumbull said, its object was "to break down all discrimination between black men and white men."[50] Senator Howard of Michigan, one of the drafters of the thirteenth amendment and a member of the Joint Committee on Reconstruction which was shortly to prepare the fourteenth amendment,

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Illinois early in 1866 and needed the strength which might come from participating spectacularly in Reconstruction policy. In the campaign, a major issue developed as to whether Trumbull was really the author of the sentence in the Civil Rights Act of 1866 declaring Negroes to be citizens, but Trumbull made no claim to drafting the rest of the Act. *See* McPHERSON'S SCRAPBOOK, ELECTION OF 1866, at 122-32.

48. CONG. GLOBE, 39th Cong., 1st Sess. 108, 111 (1865). Section two of S. 55, (Library of Congress printed bills collection) provided:

> All inhabitants of any State or Territory of the United States, without distinction of color or race, shall be entitled to make and enforce contracts, to sue, be parties, and give evidence in all courts and causes, to lease, purchase, hold, sell, and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person and estate.

49. CONG. GLOBE, 39th Cong., 1st Sess. 129, 184 (1866). For general historical surveys of events in Congress during the Thirty-Ninth Congress, see W. BARNES, THE THIRTY-NINTH CONGRESS (1867) (amounts to extended summary of the *Globe*); H. WILSON, HISTORY OF RECONSTRUCTION MEASURES, 1865-68 (1868); H. BEALE, THE CRITICAL YEAR (1930) (conservative viewpoint); 5 J. RHODES, HISTORY OF THE UNITED STATES ch. 30 (1906) (radical); 2 J. BLAINE, TWENTY YEARS OF CONGRESS (1884); 2 F. FESSENDEN, WILLIAM PITT FESSENDEN (1907); A. MILLER, THADDEUS STEVENS ch. 20 (1939).

50. CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866).

concurred: "In respect to all civil rights, there is to be hereafter no distinction between the white race and the black race."[51]

The House eliminated some of the language in S. 61. Members disagreed among themselves as to what the phrase "civil rights or immunities" might mean, and this vagueness caused it to disappear from the bill,[52] though the "equal benefits" phrase remained. Bingham opposed the bill on the floor of the House, being the only Radical to do so, on the ground that it should await a broader constitutional foundation than the thirteenth amendment. He insisted that there must be a new amendment which would eliminate all "discrimination between citizens on account of race or color in civil rights."[53]

Immediately after passage of the Civil Rights Act of 1866, the Joint Committee on Reconstruction presented the fourteenth amendment. The actual drafting of the first section was done by Bingham. For the equality clause he had before him two precedent phrases, his own "equal protection in their rights" and the Wilson-Trumbull civil rights language, "equal benefits of all laws." It seems clear that he combined the two phrases and thus arrived at the formula "equal protection of the laws." More important, he avoided the quandary that he himself had seen in the Senate draft of the Civil Rights Act, which had granted equality in vague categories of cases. Bingham dropped the

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51. *Id.* at 504.

52. For various statements of doubt as to meaning, see CONG. GLOBE, 39th Cong., 1st Sess. 1117, 1121, 1268-71, 1290-93 (1866) (remarks of Wilson, Rogers, Kerr, Bingham).

53. *Id.* at 1291, 1293. This thought, as we have elaborated it a little in the summary in note 62, *infra,* is criticized as unsupported in Bickel, *The Original Understanding and the Segregation Decision,* 69 HARV. L. REV. 1, 27 n.54 (1955). Prof. Bickel, referring to our attribution to Bingham of the view that the proposed Civil Rights Act needed a constitutional basis, says that Bingham does "not express this opinion attributed to him, nor does he do so anywhere else, and in the light of the full text of his speech and of his motion, it is doubtful that he held it."

We stand chastened but of the same opinion still. *See, e.g.,* the passage in Bingham's speech referring to the heart of the civil rights bill. He refers to the evils it sought to correct and said, "I should remedy that not by an arbitrary assumption of power, but by amending the Constitution of the United States, expressly prohibiting the States from any such abuse in the future." CONG. GLOBE, 39th Cong., 1st Sess. 1291. Referring to the then pending fourteenth amendment proposals which he was sponsoring, he expressly held them out as the sound way to enforce the Bill of Rights, *id.* 1292. Graham, *Our "Declaratory" Fourteenth Amendment,* 7 STAN. L. REV. 3, 15 n.59 (1954) gives the Bingham position the same reading as do we, saying of Bingham's opposition, ". . . Bingham insisted another amendment to be both necessary and desirable."

limitations, making the equality coextensive with the broad claims of Negro rights espoused by his fellow dominant members of the Reconstruction Committee, Stevens and Howard.[54]

When the fourteenth amendment reached the floor, and indeed when it was before the country, only general attention was given to the first section, and particularly the equal protection clause. Primary attention of all was on the political sections.[55]

The principal statements made on the floor of Congress concerning the first section were to the effect that it put the Civil Rights Act of 1866 beyond the reach of repeal.[56] Randall, as a leading Democrat in opposition, protested that "equality in every respect between the two races" should not be ordered by Congress.[57] The typical House statement on equal protection was so general as to have no particular meaning.[58] Senator Howe, a prominent Republican, listed as elements of equal protection the right to hold land which has been purchased, the right to collect wages, and the right to appear in court and give testimony; but he stressed that "these are not the only rights," and added, as an example of a denial of equal rights, Florida's discrimination between the races in educational systems.[59] Senator Howard, floor leader for the amendment in the Senate, summarized the meaning of the clause thus: "[It] abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another." Howard finally reduced the clause to the familiar phrase: "It establishes equality before the law . . . ."[60]

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54. The Stevens proposal had been that all laws should be "equally applicable to every citizen, and no discrimniation shall be made on account of race and color." CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865). The Howard view was that "in respect to all civil rights . . . there is to be hereafter no distinctions between the white race and the black race." *Id.* at 504.

55. Republicans were jubilant over the fact that the South would lose twenty-five of its seventy-five representatives unless it admitted Negroes to suffrage, and that Confederate leaders would be disqualified from office. Only ten of several hundred newspaper clippings related to section one of the amendment. MCPHERSON'S SCRAPBOOK, THE FOURTEENTH AMENDMENT.

56. *See, e.g.*, opening statement of Stevens in support of the amendment, CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

57. *Id.* at 2530.

58. *E.g.*, the observations of Representative Farnsworth, which consist largely of elaborate repetition of the phrase. *Id.* at 2539.

59. *Id.* at 217, 219 (app.).

60. *Id.* at 2766. After passage by Congress, the amendment went to the state legislatures for ratification. What few fragments there are relevant to the interpre-

We conclude that the fundamental working legal theory of equality before the law, or equal rights, or equal protection, based on well-established tradition, was formulated for American law by Sumner, and popularized under his leadership.[61] The actual language of equal protection found its way into the Constitution from the Sumner draft of the thirteenth amendment, to the Wilson draft of the Civil Rights Act of 1866, through Trumbull as public sponsor of the Civil Rights Act and certainly through Bingham.

To this group of the four "insiders" must be added the eleven majority members other than Bingham of the Joint Committee on Reconstruction, from which the amendment actually emerged. The total number of "insiders" is thus fifteen, and a central inquiry is the determination of the meaning of equal protection to them.

This group had a unified meaning as to the nature of the equal right to testify, to sue and to hold property. Their stand on other specific questions is outlined in sections following. On the broader question of whether equal protection would, under any circumstances, permit laws making distinctions based on race or color, there is less uniformity and less precise evidence. We conclude that of the fifteen, eight, Sumner, Wilson, Bingham, Howard, Stevens, Conkling, Boutwell and

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tation of equal protection have not been very helpful. Typical is the fairly meaningless comment of Governor F. F. Low of California in recommending ratification to his state legislature: "This section declares 'equality before the law' for all citizens, in the solemn and binding form of a constitutional enactment, to which no reasonable objections can be urged." CALIF. SEN. J. 49 (1867-68). Governor Curtin of Pennsylvania, in his message recommending ratification, thought the meaning of section one too obvious for serious comment. 1 PA. EXEC. DOCS. (Jan. 2, 1867).

61. Sumner's strenuous opposition to the amendment went to the representation provisions; see his immense speech, "The Equal Rights of All," discussed in D. DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 243-47 (1970).

Harris alludes to the long background when he says, "[T]he idea of the positive duty of government to afford positive protection of civil rights to the individual person by equal laws was a common part of the American political tradition and its vocabulary long before the rise of the Abolitionists and, of course, long before Bingham and his fellow Radicals saw to its inclusion in the fourteenth amendment." R. HARRIS, THE QUEST FOR EQUALITY 22 (1960).

Graham puts it well: "What was taking place was one of the most subtle and evanescent of all the possible changes in law and government, a transubstantiation of values from the ethical to the civil and constitutional plane. It was a delicate, uneven and above all a continuing change—a 'constitutionalization' of the old law of nature." Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3, 8 (1954). *See also* Kelly, *The Fourteenth Amendment Reconsidered*, 54 MICH. L. REV. 1049, 1052 (1956).

Morrill, probably accepted an interpretation of equal protection which precluded any use whatsoever of color as a basis of legal distinctions.[62] Trumbull, Fessenden and Grimes on some occasions countenanced some types of segregation, at least as to miscegenation.[63] The positions of Harris, Williams, Blow and Washburne are unascertained.[64]

III. INTERPRETATION OF EQUAL PROTECTION DURING RECONSTRUCTION

The *Slaughter-House Cases* in 1873 gave this interpretation to the equal protection clause: "We doubt very much whether any action of a State not directed by way of discrimination against the Negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency [the black codes], that a strong case would be necessary for its application to any other."[65] This was narrow construction with a vengeance, and Justice Miller, its author, quickly re-

62. Nothing need be added to the text references as to Sumner, Wilson, Howard, and Stevens. Conkling's position is established by his regular support of the Sumner Civil Rights Bill of 1875, discussed at length *infra,* as is Morrill's and Boutwell's; and in addition Boutwell, as a typical Massachusetts abolitionist, held the view that he would positively require intermingling of the races to break down prejudices. CONG. GLOBE, 43d Cong., 1st Sess. 4116 (1874). Morrill consistently opposed any distinctions based on color. *Id.* at 2240. The case as to Bingham is less clear, because his preoccupation with his own amendment was largely with the privileges and immunities clause. We know that he thought appropriate language should eliminate "all discrimination between citizens on account of race or color in civil rights." CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866). Since Bingham opposed the Civil Rights Act solely because he thought it should await passage of the fourteenth amendment, we assume that he thought the amendment would at least cover that wide area of state discriminatory legislaton; *see* note 53 *supra.*

63. These three Senators shortly split off from the radical wing of the Republican Party, being among the seven Republicans who supported Johnson on impeachment. Both Fessenden and Trumbull believed that the Civil Rights Act and the amendment did not affect anti-miscegenation legislation. CONG. GLOBE, 39th Cong., 1st Sess. 322, 505 (1866). Grimes saw no inequality in segregated transportation, CONG. GLOBE, 38th Cong., 1st Sess. 3133 (1864), although Trumbull seems to have had the opposite point of view on this question. *Id.* at 3132. W. SALTER, LIFE OF J. W. GRIMES 276-322 (1876), covers the years 1865-67 in Grimes' life and reveals no substantial interest in either the amendment or reconstruction.

64. All four were routine Radicals. Harris and Williams each served only one term in the Senate, and Blow served two terms in the House. Harris, Blow, and Washburne came to Congress with strong anti-slavery backgrounds. We have found no statements by any of the four which would give an indication of the breadth of equal protection to them.

65. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873).

canted.[66] It was obvious from the discussion of the amendment, its background, and its contemporary interpretation, that the clause reached all racial classifications, including groups other than Negroes.[67]

Miller's observation, however, certainly did not conflict with contemporary understanding as to economic regulatory action unrelated to racial distinctions. Although there is little doubt that Republicans would have approved of restraints upon regulation of business had they thought of it, we have not found anywhere even a single intimation that this possibility did in fact occur to them.[68] In other words, there was no contemporary understanding of the relation of equal protection to business regulation.

A. *Equality in the Courts and Commerce*

Under the pre-rebellion black codes, the free Negro's position differed little from that of the slave, except that a freedman had the right to the fruits of his own labor, usually the right to hold personal property, and in a few states the right to hold real property.[69] Also, he ranked a step above the slave in the law courts. The slave, of course, could not sue in the courts, since any rights of action arising out of transactions in which he was involved were the property of his master.[70] The free Negro could own rights of action, but like a minor, could frequently enforce them only by a suit through a guardian or next friend, a white man; and he could be a witness only in actions where only Negroes were involved.[71]

In criminal law, the status of the free Negro was about on a par with that of the slave. Frequently statutes imposing liability on one

66. C. FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 186, 187 (1939).

67. *Cf.* Ho Ah Kow v. Nunan, 12 F. Cas. 252 (No. 6546) (C.C. Cal. 1879) (equal protection extended to Chinese); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

68. There is, however, clear evidence that Congressmen were aware that the language was broader than the immediate evil faced. CONG. GLOBE, 39th Cong., 1st Sess. 1063-64, 2766 (1866) (statements of Howard and Stevens).

69. *See, e.g.*, COBB'S NEW DIG. LAWS GA. 993, 995 (1851) [hereinafter cited as COBB].

70. LA. CIVIL CODE, arts. 174, 175, 177 (1838). One of the rare exceptions to this proposition is Sally's Guardian v. Beaty, 1 Bay 260 (S.C. 1792), in which a slave was held to have the right to purchase and emancipate another slave. The leading collection of materials on legal aspects of the slavery system is 4 H. CATTERALL, JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO (1926).

71. COBB, *supra* note 69, at 973, 985, 988, 999; MISS. REV. CODE, ch. 33, art. 62 (1857).

imposed it on the other as well. Arson, burglary, mayhem (against a white person), rape or attempted rape (against a white person) were typical capital crimes both for slave and for free Negro.[72] Preaching the gospel, using insulting language to white persons, assembling together to learn to read and write: these were typical misdemeanors for the Negro, slave or free.[73] Except in capital cases, the Negro, slave or free, was tried by a jury of slaveholders, who could convict by a majority vote.[74]

The black codes after the war perpetuated or created many discriminations in the criminl law by applying unequal penalties to Negroes for recognized offenses and by specifying offenses for Negroes only.[75] Laws which prohibited Negroes from keeping weapons or from selling liquor were typical of the latter. Examples of discriminatory penalties were the laws which made it a capital offense for a Negro to rape a white woman, or to assault a white woman with intent to rape, or the ingenious bit of foresight by which the South Carolina Legislature made it a felony without benefit of clergy "for a person of color to have sexual intercourse with a white woman by impersonating her husband."[76]

In addition to the discriminations of the criminal laws, post-war black codes hedged in the Negroes with a series of restraints on their business dealings of even the simplest form. Though in many states the Negro could acquire property, Mississippi put sharp limitations on that right.[77] But most restrictive were the provisions concerning contracts for personal service. Many statutes called for specific enforcement of labor contracts against freedmen, with provisions to facilitate

72. LA. BLACK CODE, CRIM. OFFENSES § 7 (1806); COBB, *supra* note 69, at 987.

73. MISS. REV. CODE, ch. 33, art. 84 (1857); LA. BLACK CODE § 40 (1806); COBB, *supra* note 69, at 1001, 1005.

74. COBB, *supra* note 69, at 986; MISS. REV. CODE, ch. 33, art. 68 (1857).

75. For a collection of the black codes, see E. MCPHERSON, HANDBOOK OF POLITICS FOR 1868, at 29-44 (1868); 1 W. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION ch. 4 (1906). These codes were never in effect for a substantial length of time. E. MCPHERSON, *supra*, at 36-38.

For the most valuable contemporary description of the South in the immediate post-Appomattox period, see 2 SEN. DOC. No. 2, 39th Cong., 1st Sess. (1865) (report by Major General Carl Schurz). Although it is frankly partisan in its radical viewpoint, it is nevertheless important to an understanding of the fourteenth amendment, for it is what the Radicals believed and acted upon.

76. 13 S.C. STAT. 277 (1865).

77. MISS. LAWS 82 (Reg. Sess. 1865).

capture should a freedman try to escape. Vagrancy laws made it a misdemeanor for a Negro to be without a long-term contract of employment; conviction was followed by a fine, payable by a white man who could then set the criminal to work for him until the benefactor had been completely reimbursed for his generosity. Minors were remembered in compulsory apprenticeship laws which arranged for long-term instruction in the arts of hoeing and cotton-picking. Not infrequently there were provisions that the former owner should have first call upon the labor of an ex-slave.[78]

Congress of necessity had given considerable thought to the problems facing the southern states. As arbiter of procedure for federal courts and as legislator for the District of Columbia, Congress had faced essentially the same problems in converting from a slave system to a free one. In 1862 congressional action applicable to the District abolished slavery,[79] repealed the black codes,[80] and prohibited exclusion of witnesses on account of color.[81] On July 2, 1864, there was passed Senator Sumner's amendment to the Civil Appropriation Bill which provided that witnesses could no longer be excluded on account of color in the federal courts.[82]

Congress began the uprooting of these codes outside the District of Columbia with the Civil Rights Act of 1866. It provided:

> [C]itizens, of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[83]

As can be seen, that Act dealt explicitly with the inequalities of the black codes in criminal and commercial law, and its principles passed into the equal protection clause. Indeed, Stevens occasionally defined Negro equality in terms of these obvious discriminations: "the same

78. ALA. ACTS 120 (1865-66); 13 S.C. STAT. 302 (1865) (employees forbidden to leave master's premises without permission).

79. 12 Stat. 376 (1862).

80. 12 Stat. 407 (1862).

81. 12 Stat. 539 (1862).

82. 13 Stat. 351 (1864).

83. 14 Stat. 27 (1866).

law which punishes one man shall punish any other for the same offense; . . . the law which gives a verdict to one man shall render the same verdict to another, whether he is Dutch, Irish, or Negro."[84] He assured Congress when he presented the fourteenth amendment that Negroes would be subject to equal punishments, and would receive equal "means of redress" and equal right to testify.[85] The Act and the amendment obliterated the commercial discriminations by giving Negroes equal rights to contract and to be subject to no vagrancy laws which did not apply to whites.

Considerable doubt exists as to whether the equal protection clause was meant to confer equality in jury service. The Civil Rights Act of 1866, which was quite explicit in its language, said nothing of jury service; "equal benefit of all laws and proceedings for the security of person and property" was the only language under which jury service could conceivably come. Representative Wilson, floor leader for the Bill, stated in debate that the Act would not affect jury service.[86] During the passage of the fourteenth amendment itself, no discussion of this point was had. Congress first acted to admit Negroes to juries in the District of Columbia in 1867,[87] labeling its bill an "equal rights" measure, although it had enacted five years earlier a provision requiring colored persons there to be subject to the same laws as free whites.[88] The Civil Rights Act of 1875 contained the first explicit provision for nondiscrimination by states in jury service, indicating a subsequent judgment by the authors of the amendment that jury service was included.[89] The Supreme Court promptly upheld the Act as

84. Address by Senator Stevens at Lancaster, Pennsylvania, Sept. 27, 1866, in 1 MCPHERSON'S SCRAPBOOK, CAMPAIGN OF 1866, at 48.

85. This subject was exhaustively considered in S. REP. No. 25, 38th Cong., 1st Sess. (1864) (Committee on Slavery and Freedmen).

86. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866). Representative Wilson should not be confused with Senator Wilson. See also the editorial to the effect that jury duty is not a civil right. MCPHERSON'S SCRAPBOOK, CIVIL RIGHTS BILL OF 1866, at 41.

87. CONG. GLOBE, 40th Cong., 1st Sess. 727 (1867). The measure was pocket vetoed and then repassed in the next session as a measure "for the further security of equal rights." CONG. GLOBE, 40th Cong., 2d Sess. 51, 96 (1867). Again pocket vetoed, it finally was passed in Grant's administration. 16 Stat. 3 (1869).

88. 12 Stat. 407 (1862).

89. 18 Stat. 336 (1875). Repealed, Act of June 25, 1948, c. 645, § 21, 62 Stat. 862. Senator Carpenter ably opposed this provision, contending that jury service was a political, and not a civil, right; but he was overridden by his colleagues. *See* note 163 *infra*.

within the equal protection clause.[90] It seems fair to conclude that, while Congress did not have jury service in mind in 1866 as a civil right, the language of the amendment was broad enough to cover jury service in the apparent absence of any intent to the contrary.

Cases speedily came to lower courts testing the meaning of the Act, and it was interpreted as expected. A Delaware court held that Negroes could not testify regardless of the Act,[91] but Justice Swayne in a federal circuit court held to the contrary.[92] George Ruby, a freedman beaten up by a New Orleans mob for teaching school, made history in Louisiana by being allowed to testify in the resultant assault case.[93] The attorney general of Tennessee declared that he would resist the Civil Rights Act by keeping Negroes out of the tippling house and billiard trade; but the Memphis criminal court speedily overruled him with the pronouncement that "Negroes of Memphis may now open as many billiard saloons as they want."[94]

In its criminal law aspect, the clause was the broadest possible generalization. To some it was the American equivalent of the pledge of Magna Carta: "We will sell to no man, we will deny to no man, we will delay to no man right or justice."[95]

B. *Segregation*

For the most part, the rights discussed above raise no possibility of reconciling equality with separation of Negroes from whites. The right to testify, for example, could not rationally be made a right to testify only in the presence of Negroes. On the other hand, a right to equal transportation could, at least without being as irrational, be a right to separate transportation.

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90. *Ex parte* Virginia, 100 U.S. 339, 345 (1879). Justice Field, dissenting, espoused the Carpenter position that jury service was a political right. *Id.* at 367, 368. Professor Bickel is less reserved on this question. He asserts that the equal protection clause, ". . . as originally understood, was meant to apply neither to jury service, nor suffrage, nor anti-miscegenation statutes, nor segregation." Bickel, *Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955).

91. MCPHERSON'S SCRAPBOOK, CIVIL RIGHTS BILL OF 1866, at 149.

92. United States v. Rhodes, 27 F. Cas. 785 (No. 16,151) (C.C. Ky. 1866).

93. MCPHERSON'S SCRAPBOOK, CIVIL RIGHTS BILL OF 1866, at 115, 116.

94. *Id.* at 109, 119.

95. "Nulli vendemus, nulli negabimus, aut differemus rectum vel justifiam." The clause was given this florid interpretation by Bingham and Edmunds. CONG. GLOBE, 42nd Cong., 1st Sess. 697 (1871); *id.* at 81, 83 (app.).

Segregation, with its legal corollary of "separate but equal," is a term which our generation has applied loosely as a unitary concept to cover the entire area in which separation of the races is feasible. This concept has been applied to such disparate situations as separation in transportation, schools, drinking fountains, housing, churches, hotels, restaurants, theaters, health services, employment opportunities, and cemeteries.[96]

Difficulty exists in discovering the original meaning of equal protection as it relates to this problem because it never occurred to a substantial number of persons in the decade under study to approach this question in any such unitary way. Three distinct views can be identified. The abolitionist view of equality, represented by Sumner, permitted absolutely no distinctions of any kind based on color. Directly opposite was the view of the opponents of the Civil Rights Act and the fourteenth amendment with their rough slogan of "no nigger equality."[97] Both of these groups may fairly be described as having a unitary concept of segregation. The abolitionists were against it in every context, though on this point no direct discussion among them has been found for the critical year of 1866. Some conservatives approved of segregation in all respects,[98] professing to believe that equal protection obliterated every restraint on intermingling.[99] This interpretation of equal protection probably was taken by them only as conventional opposition party Cassandras, for after the amendment was adopted

96. *See* G. MYRDAL, AN AMERICAN DILEMMA ch. 28 (1944).

97. Senator Saulsbury of Delaware consistently represented this view. CONG. GLOBE, 38th Cong., 1st Sess. 1141, 1364 (1864). Contrast the resolution of the Republican state convention at Syracuse, New York, in 1866, declaring that the fourteenth amendment terminated the old maxim "This is a white man's government," 1 MCPHERSON'S SCRAPBOOK, ELECTION OF 1866, at 3, with the opposition slogans: Placard of the Seventh Ward Johnson Club in New York City at a Union Square rally, "No Negro equality," *id.* at 79; Address of General Spinola at a Johnson meeting in New York, "Every man who . . . rejects the Negro as his equal . . . will sustain the President," *id.* at 61; or the editorial of the *St. Louis Republican* supporting the Johnson veto of the Civil Rights Act, "The President put his foot down on nigger equality." MCPHERSON'S SCRAPBOOK, CIVIL RIGHTS BILL OF 1866, at 54.

98. For example, Senator Hendricks of Indiana, a conservative, said that giving Negroes the right to testify, to be jurors, or to be in the same streetcars with white persons was all of one erroneous piece: "These all stand upon the proposition that the negro is the equal of the white man." CONG. GLOBE, 38th Cong., 1st Sess. 839 (1864).

99. *See, e.g.*, remarks of Senators Cowan and Johnson, CONG. GLOBE, 39th Cong., 1st Sess. 500, 505 (1866).

the conservatives frequently gave a very narrow construction of the terms they had once thought so broad.

Between these two extreme positions was a middle group which, in the years 1865-68 in particular, never had to take a stand on the problems as a whole because its outlines were not clearly perceived. Segregation, as compared, for instance, with twenty days' hard labor for preaching the gospel, is a fairly refined development in the history of discrimination. In the South, with slavery just abolished, discrimination against the Negro which angered Congress was of a much cruder kind.

It is not surprising that Congress, concerned with securing to the freedman the most fundamental rights of life, liberty, and property, should not have devoted much time in its first post-war sessions to considering where he should sit in theaters and trains. Because the problem of segregation was never squarely faced during the incubation period of the amendment, the task of interpreting mass opinion on equal protection with absolute assurance becomes impossible. This difficulty is heightened by acceptance in the middle group of a formula which evades precise analysis. Under that middle approach, there were three types of equality with corresponding rights: political equality, civil equality, and social equality. The equal protection clause was clearly not intended to include the right to vote.[100] Putting the question of political equality aside, this group made a hazy division between the other two terms, believing that equal protection granted "civil equality" but not "social equality." A typical example of a use of this conception by a supporter of the amendment is Greeley's observation: "You can't make all men equal socially. One is stronger, better, brav-

100. The history of the amendment proves conclusively that the Radicals were unable to deal with the suffrage problem at that time except by the circumlocutions of section two of the amendment. The whole reason for Radical opposition to the amendment was its failure to give complete and equal suffrage. The majority of the Massachusetts House Committee recommended against the amendment because it permitted disfranchisement of Negroes, while the minority favored ratification but asked for an additional amendment on universal suffrage. MASS. LEG. DOC., H. R. REP. No. 149, 4, 15 (1867). It follows that Nixon v. Herndon, 273 U.S. 536 (1927), invalidating a Texas statute barring Negroes from voting on the ground that the statute denied equal protection, was not in accord with the original understanding of equal protection; but the subsequent decision in Smith v. Allwright, 321 U.S. 649 (1944), returned to the original plan of the war amendments by invalidating a similar Texas statute under the fifteenth amendment rather than the fourteenth. For further consideration of the voting problems, *see* notes 190-91 *infra* and accompanying text.

er than the other. Now what I want is that all men should be equal before the law. I want the black man to have his rights all over the South. The law should know nothing about a man's color."[101]

One central theme emerges from the talk of "social equality": there are two kinds of relations of men, those that are controlled by the law and those that are controlled by purely personal choice. The former involves civil rights, the latter social rights. There are statements by proponents of the amendment from which a different definition could be taken, but this seems to be the usual one. Frequently, of course, the terms were used with no content at all, as when a Pennsylvania Republican simply told his audience that the amendment granted civil rights but not social rights;[102] but when analysis began, the explanation given above usually appeared.

Thus, in one debate Senator Harlan of Iowa explained that the right of Negroes to use the streetcars did not involve social equality since the right was legal in origin.[103] Normally the hotelkeeper's responsibility not to discriminate was explained in terms of a distinction between taking a Negro into the hotel or dining room, as distinguished from putting him into a particular room or at a particular table: the hotelkeeper's obligation to take customers rested on law, but the right to choose one's own tablemate was "social."[104] Stevens himself stressed the vital distinction between matters of law and matters of taste: "This doctrine does not mean that a Negro shall sit on the same seat or eat at the same table with a white man. That is a matter of taste which every man must decide for himself. The law has nothing to do with it."[105]

Thus the original distinction appears to have been that the law should know no distinctions of color, but that personal taste should be left to govern itself. In this, the practical difference between the abolitionist and the middle position was that the abolitionists as a moral matter encouraged complete intermingling even though this entered the zone of taste, while the middle group lacked any such fervor.

Because the civil-social distinction was misty, it is easiest to diagnose original opinion by studying its application to concrete cases.

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101. 1 McPherson's Scrapbook, Election of 1866, at 117-18.
102. 2 McPherson's Scrapbook, Election of 1866, at 37.
103. Cong. Globe, 38th Cong., 1st Sess. 839 (1864).
104. *See, e.g.*, 2 Cong. Rec. 4082 (1874) (remarks of Senator Pratt of Indiana).
105. Cong. Globe, 39th Cong., 2d Sess. 252 (1867).

1. *Geographical segregation.* Restrictions of Negroes to particular regions of the country or to particular areas in a city by limiting their right to buy and live on particular pieces of property is the most obvious kind of segregation to have been forbidden by equal protection. As has already been noted, Illinois and Indiana excluded all Negro immigration into the state prior to the Civil War; and the southern states by old and new codes for freedmen excluded them from particular areas and from buying real estate.

Section 1 of the Civil Rights Act of 1866 provided that "citizens, of every race and color . . . shall have *the same right,* in every State . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . ."[106] President Johnson, in his veto message, specifically challenged the right of Congress to "abrogate all State laws of discrimination between the two races in the matter of real estate."[107] The veto was overridden, and it was proclaimed by every advocate of the fourteenth amendment that it carried the principles of the Act into the Constitution.

There are many points of doubt in the determination of the original understanding of the fourteenth amendment, but on this one we think there is no room for serious difference of opinion. In view of the specific grant in the Civil Rights Act of "the same right" to hold and use property, no distinctions whatsoever based on race or color could be made in respect to this right. Geographic segregation was completely forbidden.

2. *Segregation in transportation.* The type of segregation most frequently considered between 1865 and 1875 was segregation in transportation. Before the Civil Rights Act of 1866, attention focused largely on transportation in Washington. Thereafter, the issue was widespread as Negroes sought to utilize the privileges they thought the Act had given them. The central legal theory of the attack on segregated transportation was that transportation companies had a common law duty to take all comers and that making any distinctions in the operation of this duty because of color denied an equal right to contract for transportation. The vital distinctions are highlighted by Senator Reverdy Johnson of Maryland, perhaps the ablest constitutionalist of the conservative faction:

106. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (emphasis added).

107. 6 J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 405, 407 (1897).

> It may be convenient, because it meets with the public wish or with the public taste of both classes, the white and the black, that there should be cars in which the white men and ladies are to travel, designated for that purpose, and cars in which the black men and black women are to travel, designated for that purpose. But that is a matter to be decided as between these two classes. There is no more right to exclude a black man from a car designated for the transportation of white persons than there is a right to refuse to transport in a car designated for black persons white men.[108]

The matter was repeatedly before Congress. The Senate voted against segregated transportation in one form or another at least six times from 1863 to 1875. In 1863, Congress amended the charter of the Alexandria and Washington Railroad and provided that "No person shall be excluded from the cars on account of color."[109] A year later the Washington and Georgetown Railroad, a street railway in the District of Columbia, excluded a Negro army officer from a car. The District Committee, after an investigation in response to a request by Sumner, reported that no legislation was necessary; the officer could sue because "colored persons are entitled to all the privileges of said road which any other persons have."[110] The company attempted to propitiate this sentiment by putting on more cars for the exclusive use of Negroes, a concession which gave Sumner no comfort because "whenever they exclude a colored person from any one of their cars they do it in violation of law."[111]

Sumner thereupon embarked upon a crusade to eliminate streetcar segregation in the District. He successfully carried an amendment to the charter of the Depot and Ferry Co. Railway by a vote of 24 to 6, that "no person shall be excluded from any car on account of color."[112] He lost, 14 to 16, an effort to put a similar provision into the Washington and Georgetown Railway charter because some Radicals thought it unnecessary in view of the clarity of the law; but finally he achieved complete victory in 1864 and 1865 when he carried an amendment to the Metropolitan Railway Company's charter by which the prohibition against exclusions from any car because of color was "extended to every other railroad in the District of Columbia."[113]

108. CONG. GLOBE, 38th Cong., 1st Sess. 1156 (1864).
109. Act of Mar. 3, 1863, ch. 110, § 1, 12 Stat. 805.
110. SEN. REP. No. 17, 38th Cong., 1st Sess. 1 (1864).
111. CONG. GLOBE, 38th Cong., 1st Sess. 817 (1864).
112. CONG. GLOBE, 38th Cong., 2d Sess. 294 (1865).
113. CONG. GLOBE, 38th Cong., 1st Sess. 3131-35 (1864).

All this debate upon the whole issue of segregation in transportation took place before the enactment of the fourteenth amendment. Those who opposed the measures contended that segregation was perfectly valid. Senator Saulsbury of Delaware, for example, said such legislation would be "a war against nature and nature's God."[114] More restrained Senators, such as Grimes and Doolittle, argued merely that there was no harm in separation.[115] Those who supported the legislation did so on grounds of equality. Senator Wilson denounced the "Jim Crow car"—to make Negroes stand on a front platform, he said, was "in defiance of decency."[116] Sumner observed of Massachusetts that there "the rights of every colored person are placed on an equality with those of white persons. They have the same right with white persons to ride in every public conveyance in the commonwealth."[117] He asked the same rule of equality for the District.

The first of the Sumner amendments came before the Supreme Court in *Railroad Co. v. Brown*,[118] a case which is an important part of this history. On February 8, 1868, Catharine Brown, colored, bought a ticket on the Alexandria and Washington Railway. That company, its charter containing the amendment providing that "no person shall be excluded from the cars on account of color," maintained two identical and connected cars, using one for colored and the other for white passengers. When Mrs. Brown attempted to sit in the "white" car, she was ejected with great violence.

The episode attracted immediate attention because Mrs. Brown was in charge of the ladies' rest room at the Senate. An immediate Senate investigation was undertaken to explore whether the company's charter should be repealed. One hearing was held in the shanty in which Mrs. Brown lived and was recuperating. The Committee concluded that the company had violated its charter. It recommended against repeal of the charter because it thought compensation by judicial proceedings would be adequate, but it concluded: "If the result of the legal proceedings which Mrs. Brown has instituted should not be satisfactory, or if the conduct of the said Company in the future shall not

114. *Id.* at 1141.
115. *Id.* at 1159, 3133.
116. *Id.* at 3132.
117. *Id.* at 1158.
118. 84 U.S. (17 Wall.) 445 (1873).

be satisfactory, the resolution can be taken from the table, and the charter of the Company repealed."[119]

The company, contending that segregation was "reasonable and legal," asked for a charge to the jury that it was under no obligation to plaintiff to do more than offer separate but equal cars. The trial court rejected the charge, and the Supreme Court unanimously affirmed, rejecting the "separate but equal" argument as "an ingenious attempt to evade a compliance with the obvious meaning of the requirement."[120] The Court declared that the object of Congress was not merely to afford transportation for Negroes, which anyone selling transportation would of course want to give them if they had the money to buy it. Rather:

> It was the discrimination in the use of the cars on account of color, where slavery obtained, which was the subject of discussion at the time, and not the fact that the colored race could not ride in the cars at all. Congress, in the belief that this discrimination was unjust, acted. It told this company, in substance, that it could extend its road into the District as desired, but that this discrimination must cease, *and the colored and white race, in the use of the cars, be placed on an equality.* This condition it had the right to impose, and in the temper of Congress at the time, it is manifest the grant could not have been made without it.[121]

Clearly "in the temper of the Congress at the time," segregation in transportation was "discrimination," not "equality." We believe that the equal protection clause, in the eyes of its contemporaries, froze into constitutional law the existing common law obligation of transportation companies to take all comers and to eliminate any possibility of their segregation. Congress decided so often in this period that color classifications were not permissible for purposes of transportation that it is difficult to understand how equal protection could possibly be given another meaning. In 1872, under the leadership of Carpenter, the Senate passed a bill forbidding the making of any distinctions because of color by railroads, inns, and theaters; the conservative opposition confined its attack—unsuccessfully—to the inns and theaters sections,

119. SEN. REP. No. 131, 40th Cong., 2d Sess. 3 (1868).

120. Railroad Co. v. Brown, 84 U.S. (17 Wall.) 445, 452 (1873). *See also* Brief for Plaintiff, found in the United States Supreme Court Library.

121. Railroad Co. v. Brown, 84 U.S. (17 Wall.) 445, 452-53 (1873) (emphasis added).

apparently conceding the point as to transportation.[122] By the Civil Rights Act of 1875, Congress made a final attempt to obliterate completely segregation in transportation.[123]

3. *Segregation in hotels and theaters.* The hotel and theater problem was considered much the same as the transportation problem. As to all of these facilities, the Radicals believed that there was a common law right to admittance which had obtained constitutional status. There was this difference in some minds: the common law right of transportation was wholly "civil" while the right to a hotel was partially "social." It was felt that the innkeeper must accept a Negro applicant, give him a room and access to the dining room, and in no way treat him as an inferior guest. On the other hand, the white person renting a room or taking a table had his own right to decide whom he would have as his guest in what had become, for the moment, his own room and his own table; and the Radicals conceded that such a guest could exercise dominion as he chose in the selection of his own guests and companions.[124]

There was an even more substantial difference as to theaters. Though highly regulated, theaters were not subject to a common law right of general use, as were trains or hotels. We find no thinking directed squarely at the consequences of this fact, but the inclusion of theaters in the Civil Rights Act of 1875 seems to have been based on a theory that since theaters were extensively regulated they were creatures of the law, and therefore subject to the requirements of equality.[125]

4. *Segregation in education.* To understand the relation of equal protection to education, it is necessary to recall two crusades, abolitionism and the public school movement, both of which began major ag-

122. CONG. GLOBE, 42d Cong., 2d Sess. 3730, 3734-36 (1872). After a proposed amendment by Thurman was defeated, the measure passed the Senate but was unsatisfactory to the extreme radicals because it did not go far enough. *Id.* at 3737-40. Its provisions were eventually included in the broader Sumner Civil Rights Bill.

123. This Act forbade interference with "the full and equal enjoyment" of any "public conveyances on land or water." Act of Mar. 1, 1875, ch. 114, §§ 3-5, 18 Stat. 335.

124. *See* note 104 *supra* and accompanying text.

125. Sumner's legal theory was expressed thus: "Show me, therefore, a legal institution, anything created or regulated by law, and I show you what must be opened equally to all without distinction of color." CONG. GLOBE, 42d Cong., 2d Sess. 242 (1871). Inclusion of theaters may reflect a Puritan attitude that theaters exist wholly by legal suffrance. *Cf.* 1 C. BEARD & M. BEARD, RISE OF AMERICAN CIVILIZATION 465-66 (rev. ed. 1935).

gressive development in the 1830's. The rapid spread of abolitionism from a few print shops and meeting places occurred because the whole society was ripe for a wave of good works, such as land reforms, suffrage, temperance agitation, women's rights, and many other ameliorative movements. As abolition was a crusade, so was the movement for public schools, which was spread throughout the North in the years between 1830 and the Civil War. Frequently the abolitionists and the public school men were the same people. There was no limit to the social good which was expected of the schools by their sponsors. Said Thaddeus Stevens, as Pennsylvania leader of the free school movement: "What earthly glory is there equal in luster and duration to that conferred by education?"[126]

The public school system made much less headway in the South. The children of the well-to-do went to private academies, while others usually had little or no schooling at all. By the census of 1850, illiteracy among native whites was twenty percent in the South, three percent in the Midwest, and less than one percent in New England.[127]

In New England particularly, education was the vehicle for the indoctrination of Puritan morality, and nowhere was its use as an auxiliary to other crusades more fully appreciated. Hence in the wake of the northern troops came the schoolteachers of the Freedmen's Aid Societies, ready to make abolition a success by educating the South.[128] A substantial part of post-war education in 1865 and 1866 was in the hands of these societies; the task of teachers included a mingling of education and propaganda for children and adults.[129]

To these societies with a blind confidence in the capacity of education to solve all of the nation's social ills, nothing was impossible; and

126. J. WOODBURN, THE LIFE OF THADDEUS STEVENS 49 (1913).

127. C. EATON, FREEDOM OF THOUGHT IN THE OLD SOUTH ch. 3 (1940).

128. "We must plant a 'Yankee school' in every Southern county, if we expect the rising generation of the recent slave States to march arm in arm with Massachusetts in the future." FREEDMEN'S RECORD 159 (1866). The most vivid record of the work of northern educational agencies is in their publications, particularly the *American Freedman* and the *Freedmen's Journal.* Their work was very substantial, the American Freedman's and Union Commission operating 307 schools with 774 teachers and 40,744 students, requiring $769,000 in cash and supplies in 1866. AMERICAN FREEDMAN 9 (1866).

129. Typical is a report from one teacher: "Every member of my school subscribed without any hesitation to the third clause, relating to profanity; and all but three have now taken the first pledge, relating to intoxicating drinks. But the tobacco clause is the lion hardest to overcome." AMERICAN FREEDMAN 26 (1866).

this is an important element in the social psychology from which the fourteenth amendment emerged. In this philosophy, of course, schools should be mixed rather than segregated. The constitution of the American Freedmen's and Union Commission, a central agency for these educational societies, specifically provided that "No schools or supply depots shall be maintained from the benefits of which any person shall be excluded because of color."[130]

Like the objects of many of the rest of the pre-Civil War crusades, commingled education was easier to dream than to achieve.[131] At the close of the war Negroes were excluded from education altogether in states both north and south. The first task was to achieve *any* kind of Negro education, and in the South efforts to do even this were sometimes met by violence or ostracism.[132]

As will be shown, there is room for substantial difference of opinion concerning the dominant intent of the Reconstruction as to mixed schools; but it does seem clear that if the schools were to be separate, genuine equality was required. Governor Morton of Indiana, at the same time that he recommended ratification by his state of the amendment, recommended that the state terminate its policy of barring Negroes from public education and that tax funds proportionate with their number be allocated for their benefit.[133] On the specific ground that the South was not offering opportunities for Negro education, Representative Donnelly sponsored an amendment to the Freedmen's Bureau Bill to permit the Bureau to aid education: "[W]e must make all the citizens of the country equal before the law . . . [and] we must offer equal opportunities to all men."[134] Senator Howe, in

130. *Id.* at 18.

131. At the same time, the whole psychology of the period must be seen in terms of the starry-eyed hopefulness with which the abolitionists approached the educational task. They objected to the name of "The Freedman's Spelling Book" because it implied that freedmen were a class apart. *Id.* at 32. A Miss Mary Hosmer, who ran a mixed school of sixty students at Summerville, S.C., became a heroine of the organization and her story was told under the triumphant heading, "It can be done." *Id.* at 76. Extended instructions were prepared on just how the teachers should handle mixed schools, *id.* at 38, and the New England Freedmen's Aid Society listed as one of its primary objectives, "To encourage white children to come into our schools, if they show any willingness to do so." *Id.* at 173. The fact is that few whites attended mixed schools during Reconstruction. Boyd, *Some Phases of Educational History in the South since 1865* in STUDIES IN SOUTHERN HISTORY & POLITICS 257 (1964).

132. MCPHERSON'S SCRAPBOOK, CIVIL RIGHTS BILL OF 1866, at 10.

133. 9 BREV. LEG. REP. 20, 26 (Ind. 1867).

134. CONG. GLOBE, 39th Cong., 1st Sess. 589 (1966).

one of the leading Senate addresses in support of section 1 of the fourteenth amendment, explained in detail that the equal protection clause would illegalize a Florida system whereby Negroes paid taxes for educational purposes without getting full benefits in return.[135]

The confused picture in respect to mixed schools from 1865 to 1875 is a product of several factors. In the first place, there was genuine difference of opinion in the North on the merits. To the abolitionists, to New England, and to the Freedmen's Aid Societies, it was clear that equality banned compulsory segregation. Yet to Governor Morton, also a good Republican, the schools in his state should remain separate "in the present state of public opinion."[136] In the second place, so long as the South made going to school optional, collisions were avoided by voluntary choices. Although the Freedmen's Aid Society threw its schools open to anyone who chose to come, it was only occasionally that white students attended. In the third place, the issue was a difficult one and its resolution could usually be postponed without the necessity of decision.

One measure of the contemporary radical attitude of the requirement of equality can be seen in the acts of the reconstruction governments in the South. In each reconstruction convention, mixed schools were debated, and in South Carolina, Florida, Mississippi and Louisiana they were authorized. The South Carolina constitution, for example, provided that all public schools "shall be free and open to all . . . without regard to race or color."[137] In the debate on this clause, opposition was expressed on the ground that the whites would not attend under such circumstances; the answer was made that this was a necessary part of securing to everyone his full political and civil equality.[138]

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135. *Id.* at 219 (app.).

136. *See* note 133 *supra.*

137. S.C. CONST. art. X, § 10 (1868).

138. 2 W. FLEMING, *supra* note 75, at 187-89. Southerners seem to have held the view that "equality" required unsegregated education. In 1873 a group of Louisiana conservatives, headed by General P. T. Beauregard and determined to try to end Reconstruction by making full compliance with the demands of the war amendments, recommended "that hereafter no distinction shall exist among citizens of Louisiana in any of our public schools or State institutions of education." The movement foundered largely because of adverse reaction among upstate Democrats. *See* Williams, *The Louisiana Unification Movement of 1873*, 11 J. SOUTHERN HIST. 349 (1945).

In addition to the provisions on education, these constitutions contained general provisions guaranteeing, "equal civil and political rights and public privileges," ALA.

The attitude of Congress toward mixed schools in the reconstructed states prior to the consideration of the Civil Rights Bill of 1875 was inconclusive. When Arkansas was to be readmitted, Senator Henderson offered an amendment to the enabling bill which would have permitted the state to establish separate schools, but it lost, 5 to 30.[139] Language which seems to have been incompatible with separate schools passed the Senate but was finally lost.[140] On the other hand, in the bill to readmit six other states in 1868 the school problem was carefully left alone after obvious deliberations; and no state constitution approved by Congress as "in conformity with the Constitution of the United States in all respects" provided for segregated schools.[141] The dominant view seems to have been Trumbull's: the proper protection of freedmen was assured by giving them the ballot, which was required in each instance.[142]

The District of Columbia was one place where segregation in schools was primarily the problem of Congress. As rapidly as the slaves were freed, schools were established for them in the District, and by 1864 the statutes provided for a proportional distribution of funds.[143] Thus before the equality movement began its post-war activity, separate schools in the District were already a going institution which the radicals were never quite able to upset.

In the movement to remove racial discrimination in the District, leadership fell to Sumner, and he had to place the various remedies in their proper order. A year after the fourteenth amendment passed

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CONST. art. I, § 2 (1867); or "the same" rights and privileges, LA. CONST. art. 2 (1868); or prohibiting "distinctions" on account of race or color, S.C. CONST. art. I, § 39 (1868). There were instances of a prohibition on discrimination in places of business or public resort, LA. CONST. art. 13 (1868); and a prohibition on distinctions in public institutions, MISS. CONST. art. I, § 21 (1868).

139. CONG. GLOBE, 40th Cong., 2d Sess. 2748 (1868).

140. *Id.* at 2901, 2904.

141. *Id.* at 2858. In most of the reconstruction constitutional conventions, proposals were made to require or to prohibit separate schools. In seven the constitution as adopted contained no specific provision on this point. In Louisiana and South Carolina the constitution required mixed schools, and in Florida the requirement was implied. See LA. CONST. arts. 135, 136 (1868); S.C. CONST. art. 10, § 10 (1868); FLA. CONST. art. 9, § 1 (1868). None required separate schools. *See generally* Supplemental Brief for the United States on reargument as Amicus Curiae, at 72-76, 97-98, Brown v. Board of Educ., 347 U.S. 483 (1954).

142. CONG. GLOBE, 40th Cong., 2d Sess. 2602 (1868). "They have got it now, and they will not give it up. They will protect themselves."

143. Act of June 25, 1864, ch. 156, § 18, 13 Stat. 191.

Congress, a Negro still could not hold office or be a juror in the District. Sumner chose first to eliminate these restrictions.[144] With two pocket vetoes delaying this statute, it was not until 1870 that Sumner reached the District school question on his agenda. He introduced a bill "to secure equal rights in the public schools in Washington" which was reported out of the District Committee but was not considered.[145]

Later in that Congress, Sumner secured an amendment in Committee to a District school bill, providing that "no distinction on account of race, color, or previous condition of servitude shall be made in the admission of pupils in any of the schools under the control of the Board of Education."[146] The amendment precipitated general Senate discussion. Though he professed complete agreement with its principle, Patterson, the author of the bill, asked that the amendment be deleted on the ground that it was impolitic. Harris of Louisiana supported Sumner on constitutional grounds, saying, "We have adopted the principle of equality in the Constitution of the United States, and I think this is a proper place to enact a law in accordance therewith." Sumner contended that intermingling in schools would work satisfactorily, as it had in transportation. In any case, equality required it: "Every child, white or black, has a right to be placed under precisely the same influences, with the same teachers, in the same school room, without any discrimination founded on color." Sawyer argued that the amendment was required in the name of equality, and Wilson agreed.[147]

Harris and Sawyer were "reconstructed Southerners" and could be expected to echo Sumner. An independent thought came when Matt Carpenter of Wisconsin, one of the foremost constitutional lawyers in the Senate, added his view:

> Mr. President, we have said by our constitution, we have said by our statutes, we have said by our party platforms, we have said through the political press, we have said from every stump in the land, that from this time henceforth forever, where the American flag floats, there shall

144. Sumner expressed his intention to clean up the District of Columbia problems one at a time. CONG. GLOBE, 40th Cong., 2d Sess. 39 (1867).

145. CONG. GLOBE, 41st Cong., 2d Sess. 3273 (1870) (S. 361).

146. CONG. GLOBE, 41st Cong., 3d Sess. 1053 *et seq.* (1871) (S. 1244).

147. The statements referred to in the text are found in the debates, *id.* at 1054, 1055, 1058, 1061.

> be no distinction of race or color or on account of previous condition of servitude, but that all men, without regard to these distinctions, shall be equal, undistinguished before the law. Now, Mr. President, that principle covers this whole case.[148]

According to Carpenter, it was absurd to draw the line at the schoolroom after Negroes had been given the right to vote, to serve on juries, and to become judges. He insisted that there was no question of social equality, for in the management of a public institution distinctions of color could not be made. The bill, however, was put aside without action of any sort.

In 1872 Sumner brought a similar proposal to the floor of the Senate, but its opponents again caused the measure to be dropped. Sumner then turned to his general civil rights bill, which forbade segregation in schools and elsewhere throughout the nation, including the District. The District problem was thus merged with the question of segregation in schools generally.

Final consideration of mixed schools during Reconstruction came in connection with the Civil Rights Act of 1875. More than any other major measure of reconstruction, this bill was Sumner's.[149] It was a bill to forbid segregation in conveyances, theaters, inns, and schools.

The core of the Sumner position on segregation, as he expressed it in the course of debate, was this:

> Then comes the other excuse, which finds Equality in separation. Separate hotels, separate conveyances, separate theaters, separate schools, separate institutions of learning and science, separate churches, and separate cemeteries—these are the artificial substitutes for Equality; and this is the contrivance by which a transcendent right, involving transcendent duty, is evaded. . . . Assuming what is most absurd to assume, and what is contradicted by all experience, that a substitute can be an equivalent, it is so in form only and not in reality. Every such attempt is an indignity to the colored race, instinct with the spirit of Slavery, and this decides its character. *It is Slavery in its last appearance.*[150]

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148. CONG. GLOBE, 41st Cong., 3d Sess. 1056 (1871).

149. This measure, which was the last serious effort of the abolition movement to control the country's policy toward Negroes, occupied Sumner's efforts for four years. Almost his last words, as he lay dying and semiconscious in his home in Washington, surrounded by white and colored friends, were "Don't let it fail, my bill, the Civil Rights Bill." W. SHOTWELL, LIFE OF CHARLES SUMNER 717 (1910).

150. CONG. GLOBE, 42d Cong., 2d Sess. 382, 383 (1872) (emphasis added).

Sumner introduced his bill at three sessions in 1870 and 1871. In 1872 he momentarily attached it to an amnesty bill for Confederates with the deciding vote of Vice-President Colfax being cast in its favor; but since the amnesty measure required a two-thirds vote by virtue of section 3 of the fourteenth amendment, the Democrats were able to defeat it in order to avoid the civil rights provisions.[151] Sumner was away from the Senate for the first part of the year 1873. In December of that year, he introduced the measure for the last time, and it passed the Senate shortly after his death in 1874.[152]

The debate over the measure which eventually became the Civil Rights Act of 1875 resulted in the most thorough analysis of the segregation problem during the Reconstruction. Sumner himself rested the claim for the legality of such legislation on both the thirteenth and the fourteenth amendments, claiming that the right not to be segregated was both a privilege of a citizen and an aspect of equality.[153] A contemporary Ohio Supreme Court decision which had upheld separate schools in that state was urged upon the Senate as sound, but was specifically repudiated by the floor leader for the bill.[154] The case in which Sumner had originally presented his views on equality in the schools, *Roberts v. Boston*, was cited by the opposition without persuasive effect.[155] After Sumner's death, Frelinghuysen of New Jersey, as new floor leader for the bill, declared that separate schools should be tolerated only if voluntarily accepted by both races. He rejected the possibility that separate schools would ever in fact be equal, saying, "we know that if we establish separate schools for colored people, those schools will be inferior to those for the whites."[156]

151. For a summary of these events, see W. SHOTWELL, *supra* note 149, at 200, 675 *et seq.* On one occasion, while Sumner was absent, the Democrats did accept such a compromise proposal where the school section was deleted. *See* CONG. GLOBE, 42d Cong., 2d Sess. 3729-42 (1872).

152. 2 CONG. REC. 4176 (1874).

153. CONG. GLOBE, 42d Cong., 2d Sess. 728 (1872).

154. State *ex rel.* Garnes v. McCann, 21 Ohio St. 198 (1871), was specifically disavowed by Senator Frelinghuysen. 2 CONG. REC. 3452 (1874). The Supreme Court, in Plessy v. Ferguson, 163 U.S. 537, 544, 545 (1896), upholding the validity of a segregated transportation system, relied on *McCann* and Roberts v. Boston, 59 Mass. (5 Cush.) 198 (1850), in reaching its result, and did not mention a contemporary Iowa case, Clark v. Board of Directors, 224 Iowa 266 (1868), also discussed by Senator Frelinghuysen, which points in an opposite direction.

155. CONG. GLOBE, 42d Cong., 2d Sess. 3261 (1872).

156. 2 CONG. REC. 3452 (1874).

After Sumner's death, it was generally accepted that the basis of the bill was the equal protection clause. Frelinghuysen declared that the bill sought "freedom from all discrimination before the law on account of race, as one of the fundamental rights of United States citizenship." At the point when he was most precisely dealing with his claimed authority, he said: "We have the right, in the language of the Constitution, to give 'to all persons within the jurisdiction of the United States the equal protection of the laws.' "[157]

With Sumner's death, Edmunds of Vermont became the ablest of the New England school of constitutionalists. He declared that if the segregation principle triumphed, communities might decide that "the foreign born shall be taught in one house by one teacher and the native born in another." To take such a view, he said, would permit segregation of Catholics from Protestants, of Methodists from Congregationalists. He rejected "the slave doctrine that color and race are reasons for distinction among citizens."[158]

The foregoing expressions should not mislead the reader into thinking that the New England position was the dominant one among those who carried the Civil Rights Act in the Senate. That New England point of view, in essence, was that separate schools necessarily bred intolerance and should not be permitted even if both races desired it. However, the work of the Freedmen's Commission had in fact resulted in the existence of schools which Negroes attended and whites did not; and in cases where the entire population was willing to accept separate schools, the majority was willing to let them do so. It was thus contemplated that separate schools would be forbidden by law but that if whole communities chose to waive their rights under the statute, there would be no one to complain.[159]

The critical judgment of the Senate on the school question came on an amendment by Sargent which would have permitted separate but equal schools. On May 22, 1874, that amendment failed, 26 to 21, the majority including Senators Boutwell, Conkling, and Morrill, all three of whom had been members of the committee which drafted the fourteenth amendment.[160] The next day the bill itself passed the

157. *Id.* at 3451.

158. CONG. GLOBE, 42d Cong., 2d Sess. 3260 (1872).

159. "[L]et the individuals and not the superintendent of schools judge of the comparative merits of the schools . . . ." 2 CONG. REC. 4151 (1874) (statement of Senator Howe).

160. *Id.* at 4167.

Senate by a vote of 29 to 16, with nine of the majority being members who had participated in the passage of the fourteenth amendment.[161]

The passage of the Civil Rights Act by the Senate represents a contemporary constitutional judgment that segregation in conveyances, theaters, inns, and schools violated either the privileges and immunities clause or the equal protection clause. While reference was frequently made to both provisions, the total impression of the debate is that the violation was thought by most to be of equal protection.[162] It is important that the bill as passed was restricted to regulations of institutions which were direct creatures of the law, as schools, and those which were thought of as having common law duties to take all comers, as inns and carriers, or were traditionally subject to regulation, as theaters. Sumner's original proposal had included churches and cemeteries, to which Carpenter had successfully led the opposition on constitutional grounds.[163] This abandonment, of course, may have represented a judgment as much of politics as of law, but it does represent the continued judgment of the decade that equal protection did not extend to purely personal relationships with no common law base.

The result in the House was a different story. Almost a year elapsed between the time of consideration in the Senate and in the House. In that interim there was sufficient change of sentiment to cause the House to delete the school clause, and the measure passed onto the statute books without it. The provisions forbidding separate conveyances, inns and theaters and requiring equality in jury service remained.[164]

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161. *Id.* at 4176. H. FLACK, *supra* note 12, at 270-71, lists Allison, Boutwell, Conkling, Edmunds, Howe, Morrill of Vermont, Stewart, Washburne, and Windom.

162. The clauses neither should nor can be completely torn apart. They are, after all, parts not only of one plan, but of one sentence. It was perfectly natural, therefore, for Senator Carpenter to believe in "equal protection" of one's "privileges and immunities." CONG. GLOBE, 42d Cong., 2d Sess. 762 (1872). During the debates on the various proposals which finally emerged as the Civil Rights Act of 1875, greater reliance naturally was placed on the privileges and immunities clause before it was gutted by the decision in the Slaughter-House Cases, 830 U.S. (16 Wall.) 36 (1873). Thereafter a shift in debate occurred toward reliance on equal protection.

163. CONG. GLOBE, 42d Cong., 2d Sess. 758-67 (1872). Carpenter's point of view as to cemeteries is of particular interest. An argument had been made that any incorporated private business was sufficiently the creature of the law to be subject to the fourteenth amendment. He rejected this view, contrasting schools where he thought Congress would prohibit segregation, and private cemeteries which must be left alone. *Id.* at 763.

164. Act of March 1, 1875, ch. 114, § 1, 18 Stat. 335.

The House had on a previous occasion voted to require mixed schools[165] and the judgment on this occasion to omit that requirement was the product of many factors. The principal new element seems to have been the position of the George Peabody Fund. Peabody, an American merchant who founded what eventually became J.P. Morgan & Co., established a fund of over $3,000,000 to aid education in the South. As the Freedmen's Aid Societies ran out of money and collapsed, the Peabody Fund became the only major outside agency aiding southern education. While the Civil Rights Bill was pending, the Fund took the position that it would withdraw its aid where mixed schools were required. The principal historian of the Fund claims that this materially contributed to the change in the bill.[166] Coupled with the pressure from the Fund was the repeated assurance from southern representatives that they would end their newly founded public school systems if the Senate measure passed.[167] Perhaps for these reasons, as well as others, a leading Negro representative from South Carolina consented to eliminating the school clause in return for assurances that the rest of the bill would pass.[168]

165. CONG. GLOBE, 42d Cong., 2d Sess. 2074-75 (1872) (H.R. 1647).

166. As early as 1870, Dr. Sears, director of the funds, announced that where mixed schools were required and white children did not attend, it would help provide separate education for white children, 2 W. FLEMING, *supra* note 75, at 194. In 1874 Sears wrote a friend detailing the manner in which he had lobbied against the school provision in the Civil Rights Bill, relating interviews with House members, Senators, and finally President Grant. In Sear's presence, Grant told Butler, who was eventually in charge of the Bill in the House, that "it was unwise to attempt to force mixed schools on the South." J. CURRY, BRIEF SKETCH OF GEORGE PEABODY 64, 65 (1898). Sears consistently and effectively espoused the view that mixed education was a "calamity." *Id.* at 60-63. The abolitionists, in turn, thought very little of him, and one of them declared that Sears had imbibed southern prejudices. *Id.* at 60. Curry, who was elected Sears's successor upon the latter's death in 1881, introduces the topic of mixed schools in the little book from which these excerpts are taken with the words, "Some persons, not 'to the manor born', took the lead in organizing a crusade for the coeducation of the races." *Id.*

167. *See, e.g.*, 3 CONG. REC. 981 (1875) (statement by Representative Roberts). He states: "[A]ccording to the purpose and intention of the Amendment as disclosed in the debates in Congress and in the several state legislatures and in other ways, Congress had the Constitutional power to enact direct legislation to secure the rights of citizens against violation by individuals as well as by States . . . ." H. FLACK, *supra* note 12, at 277. *Cf.* B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 267-68 (1914) (indicating the great concern over private atrocities expressed by witnesses appearing before the committee).

168. 3 CONG. REC. 981 (1875) (remarks of Representative Cain). Professor Avins, disagreeing with this conclusion, argues that the threat of school closings "was simply a makeweight argument that those against the school clause used . . . ."

We conclude that it was accepted virtually unanimously by all who supported the fourteenth amendment that it required equal schools and that a very large number of its supporters thought that the amendment forbade segregated schools.

5. *Miscegenation.* We find it impossible to reach an assured conclusion as to the original understanding concerning segregation in matrimony, or the prohibition of miscegenation. Senator Reverdy Johnson made a typical attack on the Civil Rights Bill by suggesting that equality of the right to contract extended to the marriage contract and thus permitted miscegenation;[169] but certainly the moderately radical Senators Trumbull and Fessenden thought otherwise.[170] The abolitionists affirmatively and enthusiastically advocated miscegenation on other occasions, but not in 1866; and such an extreme Radical as Wilson of Massachusetts, who twenty-two years before had led the fight on the Massachusetts anti-miscegenation law, confined his remarks, perhaps discreetly, to the broadest possible generalities.[171]

Charges that the amendment permitted miscegenation were typically countered by the Republicans with a joke to the effect that possible elimination of anti-miscegenation statutes was not disturbing to them because Republicans had no intention of marrying Negroes.[172] Aside from the campaign oratory, it appears probable that miscegenation was so remote a possibility to the majority of persons who supported the amendment that they never seriously thought out the relationship of the two.[173]

Avins, *De Facto and De Jure School Segregation: Some Reflected Light on the Fourteenth Amendment From the Civil Rights Act of 1875*, 38 MISS. L.J. 179, 245 (1965).

169. CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866).

170. *See* note 63 *supra.*

171. *See* CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866).

172. For example, during the campaign of 1866, a Democratic meeting featured a bevy of white beauties dressed in virginal white and carrying a placard "white husbands or none." The ladies became the objects of considerable humor concerning their prospects. MCPHERSON'S SCRAPBOOK, ELECTION OF 1866, at 4.

173. Until 1967 the Supreme Court declined to review state decisions upholding the validity of statutes forbidding interracial marriages. *See* Naim v. Naim, 197 Va. 80, 87 S.E.2d 749, *vacated*, 350 U.S. 891 (1955), *on remand*, 197 Va. 734, 90 S.E.2d 849, *appeal dismissed*, 350 U.S. 985 (1956); Jackson v. State, 37 Ala. App. 519, 72 So.2d 114, *cert. denied*, 348 U.S. 888 (1954). In McLaughlin v. Florida, 379 U.S. 184 (1964), the Court invalidated a Florida statute which banned interracial cohabitation, but declined to rule on the companion statute which prohibited interracial marriages. Finally in Loving v. Virginia, 388 U.S. 1 (1967), the Court did invalidate statutes prohibiting miscegenation. Mr. Chief Justice Warren, giving the opinion for the Court, determined that the debates over the Freedman's Bureau Bill and the Civil Rights

IV. "STATE ACTION," LYNCHING, AND CONGRESSIONAL ENFORCEMENT

The interpretation commonly given the fourteenth amendment since Reconstruction has been that it applies only to affirmative state action, having no bearing upon discriminatory acts by private persons.[174] A general judgment of this sort was so totally foreign to the conceptions of those who passed the amendment that no real assessment of it can be made in terms of the attitudes during Reconstruction.

The overall judgment of Reconstructionists is best illustrated by their views on three different matters. In their minds, in addition to affirmative discriminatory acts by the states which were clearly prohibited by the amendment (for example, restrictions against Negroes in jury service), there were these different possibilities of discrimination: (a) Discrimination by public businesses subject to a common law duty to deal with all customers. Such a discrimination denied equal protection because the obligation itself had its roots in law. (b) Discrimination by private persons as to matters in which the law did not otherwise impose a legal duty, as by exclusion from a home, a hotel table, or a church. Such discrimination was wholly outside the reach of the amendment. (c) Finally, there was discrimination in the failure to enforce the law, as a result of which Negroes might be at the mercy of persons who chose to do violence to their persons or property.

It is clear beyond reasonable doubt that the fourteenth amendment was meant to enable Congress to legislate affirmatively in behalf of a racial group which a state might, because it was a racial group, choose not to protect from actions of private persons. The major discussion of congressional power under all of the new amendments came in 1870 and 1871 with the enactment of the First and Second Enforcement Acts, and the Third Enforcement Act, usually known as the Ku Klux Act.[175]

Act were inconclusive on the question of original intent. His historical analysis ended with this judgment on the debates: "While these statements have some relevance to the intention of Congress, it must be understood that they pertained to the passage of specific statutes and not to the broader, organic purpose of a constitutional amendment." *Id.* at 9.

174. W. WILLOUGHBY, CONSTITUTIONAL LAW 150 (2d ed. 1938) accurately summarizes the cases.

175. Act of May 31, 1870, ch. 114, 16 Stat. 140; Act of Feb. 28, 1871, ch. 99, 16 Stat. 433; Act of April 20, 1871, ch. 22, 17 Stat. 13.

The First and Second Enforcement Acts, though they included some legislation in support of the fourteenth amendment, such as the reenactment of the Civil Rights Act of 1866, were predominantly aimed at protection of the right to vote in enforcement of the fifteenth amendment. However, the language of the fifteenth amendment, "[t]he right . . . to vote shall not be denied by . . . any State," raises the same "state action" problems as does the language of the fourteenth, "no State . . . shall deny to any person . . . the equal protection of the laws." What is important is that Congress construed the fifteenth amendment, after extended discussion, as warranting legislation against *individual* interference with the right to vote and included provisions to that effect. It was fully recognized that if "denial" in the fifteenth amendment extended to acts of omission to enforce by the states, it had the same effect in the fourteenth amendment.[176] The First Enforcement Act, passed within two years after the fourteenth amendment was ratified and in the same year that the fifteenth amendment was ratified, was carried in the Senate by 48 to 11 and in the House by 133 to 58. It would be hard to imagine a clearer contemporary construction.

Extended contemporary debate on whether individual violence could violate the fourteenth amendment came in March, 1871, when President Grant asked for control of the Klan.[177] The resultant legislation, sponsored by Representative Shellabarger of Ohio, contained many provisions and a variety of civil and criminal penalties against individual acts. The extremest passage was section 3, providing that "where insurrection, domestic violence, unlawful combinations, or conspiracies" should hinder the execution of the state's laws, and the state should for any reason fail to enforce the laws, "such facts will be deemed a denial by such State of the equal protection of the laws." The President was authorized to use military force to correct the situation.

The Ku Klux Bill passed with large majorities after discussion which thoroughly explored the question of power. Perhaps the ablest argument against the claimed power was made by Trumbull, who had left the Radicals over the Johnson impeachment issue and who in his

176. A summary of the joint discussion of the "denial" problem in the fourteenth and fifteenth amendments is set forth in H. FLACK, *supra* note 12, at 218 *et seq.*

177. Message of Mar. 23, 1871, in 7 J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 127 (1898).

address on this issue accurately foretold the position the Supreme Court was to take on most of the issues of interpretation of the war amendments.[178]

The prevailing view, however, was that a state denied equal protection when it permitted repeated outrages against one class in the community. It was concisely put by Representative Hoar: "It is an effectual denial by a State of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection."[179] Or, as it was said by Senator Frelinghuysen: "A State denies equal protection whenever it fails to give it. Denying includes inaction as well as action."[180]

Bingham, vigorously claiming that he was the author of the relevant passages of section 1 of the fourteenth amendment, made an extended address explaining every aspect of his handiwork.[181] The most concrete measure of his position on the subject is that he himself introduced a substitute for the Ku Klux Bill before the House substantially all of which went into the final legislation. He completely endorsed the theory that by the fifth section of the amendment, Congress could reach acts of omission as well as those of commission.

The central point is too simple to warrant much exposition. By their words and votes, a decided majority of the members of Congress in 1871 recorded their opinion that a state denied equal protection of the laws when it tolerated widespread abuses against a class of citizens because of their color without seriously attempting to protect them by enforcing the law. The best answer to the question whether the con-

178. CONG. GLOBE, 42d Cong., 1st Sess. *575 et seq.* (1871). This debate is an extraordinarily lucid constitutional discussion. Illustrative of the range of opinion on the enforcement power are the remarks of Representative McHenry, denying its existence, *id.* at 429; Representative Poland, and Representative Garfield, expressing doubts, *id.* at 149 (App.), but voting for the bill. The Garfield address is of substantial importance as a direct attack from a responsible Republican on an important part of Bingham's theory of the fourteenth amendment.

179. *Id.* at 334. *See also* address of Senator Pratt. *Id.* at 502, 503, 506.

180. *Id.* at 501.

181. CONG. GLOBE, 42d Cong., 1st Sess. 81-86 (app. 1871). On the basis of a consideration of substantially all of Bingham's congressional utterances between 1860 and the termination of his service in Congress in 1873, we conclude that he was an able congressman with a strong egocentricity and a touch of the windbag. As a legal thinker he was not in the same class with the top-notch minds of his time, such as Reverdy Johnson, Lyman Trumbull, Matt Carpenter or George Edmunds in the Senate or George Hoar in the House.

temporaries of the fourteenth amendment thought it permitted legislation against lynching is that they passed just such legislation.

Contemporaries of the fourteenth amendment assumed that affirmative legislation by Congress would have a place in the enforcement of the amendment, an assumption which judicial decisions have subsequently denied. It was vaguely contemplated, of course, that on occasion there would be appeals to the Supreme Court from state judicial proceedings in which equal protection was denied,[182] but the real reach of the section was anticipated to be through measures such as the various civil rights acts passed or contemplated.

Enough has been said concerning the contemplated function of federal legislation in respect to discriminations in the affirmative operation of the law. The question remains how extensive the federal enforcement power was thought to be when a state failed in specific instances to enforce its laws.

No clear-cut answer to that question emerges from the reconstruction decade because that question was never before the country. The country did not conceive of itself as confronted with petty municipal and local problems, but rather with large scale violence against a racial group in which state governments appeared to acquiesce.

Answers were offered, however, by two members of the radical group of outstanding legal ability and integrity, Senator Edmunds and Representative George F. Hoar. Speaking about the limitation of the power of Congress to maintain a republican form of government, Hoar used words which he doubtless considered equally applicable to the power of Congress under the fourteenth amendment:

> Criminals escape punishment in Massachusetts and Vermont. A railroad company does not stand a fair chance for an impartial verdict before a Wisconsin jury. Is Congress to interfere? . . . We cannot interfere to deal with the incidental evils which attend upon republican government; but we should interfere where, we being the judges whether the case exists or not, on our oaths responsible to the great tribunal of the American people, wherever these evils have attained such a degree as amounts to the destruction, to the overthrow, to the denial to

182. *See, e.g.*, the remarks of Lieutenant Governor Greene of Rhode Island in the state senate on January 30 and 31, 1867, arguing that the amendment would slightly, but only slightly, increase the federal appellate jurisdiction. Pamphlet, Providence Daily Journal Press 1867 (Lib. Cong.).

large classes of the people of the blessings of republican government altogether.[183]

Edmunds approached the problem more directly by pointing out that legislation must be aimed not merely at discriminatory law enforcement, but at discriminations for a reason forbidden by the clause. Congress, he explained, could not penalize interferences with the equal administration of justice if it were merely the result of a private feud. It could deal with the situation if there were discrimination because a man was "a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter."[184]

The answer which Hoar's and Edmund's contemporaries probably would have given to the question emerges from their observations. Congress could legislate to correct state failures to enforce their own laws where the failure was of considerable magnitude and where the reason for the failure was racial, religious, or perhaps political bias.

V. The Place of History

The thirteenth, fourteenth, and fifteenth amendments were the new constitution which emerged from the Second American Revolution. Drafted and carried to ratification by a group of stern and willful men, they were intended to make complete changes in the American political system and to facilitate an economic revolution. One may easily challenge the wisdom of this Second American Constitution by asserting that it permitted the federal government to reach unprecedentedly far into the internal affairs of the states, giving enormous discretion to Congress; but the challenge to wisdom is no challenge to the fact that this was exactly what was intended. The Second American Constitution gave no greater power to the federal government than, for example, the commerce clause gave in the first American Constitution.

The differentiating factors in the fates of these two American constitutions were these: the economic and political elements that made up a major part of the original force behind the war amendments eventually found that the policies they once espoused were no longer useful to them,[185] while the original Constitution had the consistent support of the wealthy class. Moreover, the original Constitution was

183. Cong. Globe, 42d Cong., 1st Sess. 333, 334 (1871).

184. *Id.* at 567.

185. Hesseltine, *Economic Factors in Abandonment of Reconstruction*, 22 Miss. Val. Hist. Rev. 191 (1935).

interpreted by a Court determined to maximize its underlying purposes, while the war amendments came to a Court inclined to construe them narrowly.[186] But vastly the most important difference was that the war amendments, unlike the original Constitution, were thrust by force upon a community whose deepest mores they outraged. The net result was that the industrialist element in the original movement for the fourteenth amendment eventually found it considerably more to their liking than they had ever anticipated, but the element in the movement which had desired to use all three of the war amendments to create an America in which all citizens were truly equal was seriously disappointed.

When Chief Justice Warren came to the Supreme Court he found himself confronted with the great issue of segregation in the public schools. In the spring preceding his appointment, the Court had asked for reargument of the school cases in highly historical terms. Five questions were asked by the Court,[187] the first two being:

186. An admirer of the work of the Court says happily in respect of the reconstruction cases: "They marked the practical overthrow of the Congressional ideal for the Fourteenth Amendment within seven years after its victorious adoption. The Supreme Court thus at the outset practically annulled Section Five of the Amendment, and reduced the bill of rights section one to distant potentialities." C. COLLINS, THE FOURTEENTH AMENDMENT AND THE STATES 22, 23 (1912). *See also* Collins, *Constitutional Aspects of the Truman Civil Rights Program*, 44 ILL. L. REV. 1 (1949). Lower court opinions moved in the same direction. Charge to Grand Jury—Civil Rights Act, 30 F. Cas. 1005 (No. 18,260) (C.C.W.D. Tenn. 1875); Charge to Grand Jury—The Civil Rights Act, 30 F. Cas. 999 (No. 18,258) (C.C.W.D.N.C. 1875); Texas v. Gaines, 23 F. Cas. 869 (No. 13,847) (C.C.W.D. Tex. 1874) (opinion by Bradley foreshadowing Civil Rights Cases). Three cases are forerunners of the Supreme Court's approval of "separate but equal", Greene v. City of Bridgeton, 10 F. Cas. 1090 (No. 5754) (D.C.S.D. Ga. 1879); Bertonneau v. Board of Directors, 3 F. Cas. 294 (No. 1361) (C.C.D. La. 1878); United States v. Dodge, 25 F. Cas. 882 (No. 14,976) (D.C.W.D. Tex. 1877). *Contra*, United States v. Newcomer, 27 F. Cas. 127 (No. 15,868) (D.C.E.D. Pa. 1876) (upholding validity of Civil Rights Acts of 1875 as applied to hotels). For leading state cases on segregated schools during this period, see State *ex rel.* Garnes v. McCann, 21 Ohio St. 198 (1871), *followed in*, State *ex rel.* Stoutmeyer v. Duffy, 7 Nev. 342 (1872). *But cf.* Clark v. Board of Directors, 24 Iowa 266 (1868).

The one fairly consistent judicial adherent to the original plan of the war amendments was Mr. Justice Harlan, whose position is reviewed in Clark, *The Constitutional Doctrines of Justice Harlan* in 33 JOHNS HOPKINS UNIVERSITY STUDIES 405 (1915), and in Watt and Orlikoff, *The Coming Vindication of Mr. Justice Harlan*, 44 ILL. L. REV. 13 (1949). Oddly enough, Harlan almost failed of confirmation to his Supreme Court seat because of fears in some quarters that he would not be sufficiently radical. Frank, *The Appointment of Supreme Court Justices: Prestige, Principles and Politics*, 1941 WIS. L. REV. 172, 207-10.

187. Gebhart v. Belton, 345 U.S. 972 (1953).

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

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

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

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

Suddenly legal historians became popular as all sides sought to give answers.[188] The purely historical discussion ran to hundreds of pages of learned research as the old-time greats, Bingham, Howard, Sumner, and the rest, returned from their graves to enliven argument.

After all that historical effort, Chief Justice Warren in *Brown v. Board of Education* concluded to discard the history and rest his opinion on other grounds. He said: "The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and spirit of the amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty."[189] Noting that public education of Negroes was almost nonexistent at the time of the amendment's adoption, he concluded that, "[W]e cannot turn the clock back to 1868 when the Amendment was adopted . . . . We must consider public education in light of its full development and its present place in American life throughout the Nation."[190]

Warren never felt that the historical material was better than incon-

188. The historical team for the National Association for the Advancement of Colored People was headed by the widely respected constitutional historian, Alfred Kelly, author with W. Harbison of THE AMERICAN CONSTITUTION (1948 and later editions), supported by John P. Frank. The earlier form of this essay was liberally used.

189. Brown v. Board of Educ., 347 U.S. 483, 489 (1954).

190. *Id.* at 492-93.

clusive;[191] and pure history, deeply considered, has not a large place in any part of the constitutional civil rights debates in the Supreme Court since *Brown*. A somewhat more than casual historical discussion by Justice Goldberg, concurring in *Bell v. Maryland*,[192] a public accommodations case, drew a historical dissent from Justice Black.[193] Historical analysis reached its most comprehensive development when the Court moved away from schools to the legislative apportionment cases. Giving "one man, one vote" a basis in the understanding of the reconstruction decade requires an effort, to say the least of it; and Justice Harlan made devastating use of historical materials in his objections.[194] The recent study of Professor William Van Alystyne to the contrary badly shakes up some of the Harlan history and gives a somewhat different total picture, but the weight of the whole history remains with Harlan.[195]

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191. Loving v. Virginia, 388 U.S. 1, 10 (1967).

192. 378 U.S. 226, 286, 293-305 (1964). For discussion, see C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY ch. VI (1969).

193. Bell v. Maryland, 378 U.S. 226, 335-40 (1964) (dissent).

194. Reynolds v. Sims, 377 U.S. 533, 589 (1964) (dissent). The Court, without reference to history, held that the equal protection clause requires every state to structure its legislature so that all the members of each house represent substantially the same number of people. Mr. Justice Harlan in a vigorous dissent assailed the Court's ". . . failure to address itself at all to the fourteenth amendment as a whole or to the legislative history of the amendment pertinent to the matter at hand." *Id.* at 590. His review of the legislative history surrounding the amendment brought him to the conclusion that section 2 precluded section 1 from having any effect on suffrage. As to the House debates, he noted: "In the three days of debate . . . every speaker on the resolution, with a single doubtful exception, assumed without question that, as Mr. Bingham said . . . 'the second section excludes the conclusion that by the first section suffrage is subjected to congressional law.' This assumption was neither inadvertent nor silent. Much of the debate concerned the change in the basis of representation effected by the second section, and the speakers stated repeatedly, in express terms or by unmistakable implication, that the states retained the power to regulate suffrage within their borders." *Id.* at 599. He arrived at a similar conclusion on the Senate debates as well. *Id.* at 601-02. Mr. Justice Harlan also examined the circumstances attending ratification of the amendment by the states and readmission of the states. He argued that the "loyal" states, many of which had skewed apportionment schemes, never would have ratified the amendment had they understood it to render their own constitutions unconstitutional. *See id.* at 602-04. And he noted that six of the ten readmitted states had some form of unbalanced apportionment in their constitutions, but nevertheless were admitted. *Id.* at 606. Thus he concluded: "It is incredible that Congress would have exacted ratification of the fourteenth amendment as the price of admission, would have studied the state constitutions for compliance with the amendment, and would then have disregarded violations of it." *Id.* at 607.

195. Van Alstyne, *The Fourteenth Amendment, The "Right" to Vote, and The Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33. For discussion

There are a few other historical references. The scope of section 5, the authorization of congressional legislation to enforce the amendment, has interested Justice Brennan;[196] and Justice Stewart used the 1866 Civil Rights Act as support for the view that the thirteenth amendment gave Congress some power over discrimination in sales of property.[197]

The effect of the course of decision has been to put historical analysis of original intention of the fourteenth amendment into a secondary role, helpful or illuminating on occasion, but short of controlling.

This course by the Supreme Court seems inescapable wisdom. There is no escaping the fact, developed earlier, that the counterrevolution ending Reconstruction did wipe out the anticipated scope of all three of the Civil War amendments. The course of social and political life and of interpretation twisted the fourteenth amendment in particular beyond even a likely possibility of recognition by its sponsors.

A judge who picked up the problems of the 1950's was thus confronted with two absolutely conflicting histories. He had the history of 1866 to 1875. He also had the reversing history of 1875 to, say, 1954. The judge in 1954 was not a historical puzzle-solver, fascinated with the long-terminated truth of Who Was Shakespeare?, or Who Killed the Prince in the Tower? He needed instead to relate living problems to living law. If one did have a sure answer to intent in the 1860's, which on marginal problems is hard to find, he might still wisely be reluctant to vault over seventy-nine years of conflicting subsequent history to embrace the purpose of the first ten.

Some clauses of the Constitution permit a concept of truly historical growth, no matter how different the present is from the past. But the fourteenth amendment had no historical growth; it was absolutely cut off and replaced by a fresh start after the mid-1870's. Chief Justice Warren used great good judgment when he dropped the historical inquiry as profitless and turned to other sources of law.

VI. CONCLUSION

For whatever utility it may have, and for the sake of intellectual in-

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and references to other writers on the Harlan history, see C. MILLER, *supra* note 192, ch. VII, and particularly discussion and notes at 128-29.

196. Katzenbach v. Morgan, 384 U.S. 641, 648-51 (1966); United States v. Guest, 383 U.S. 745, 774 (1966) (concurring and dissenting opinion).

197. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

quiry on a great theme, it is possible to know, at least generally, what equal protection meant in its original conception in the reconstruction decade. Closer than this we cannot come; the extreme volatility of this revolutionary era means that understandings may have altered between passage of the amendment in 1866, its ratification in 1868, and the Civil Rights Act of 1875. Our interpretations are those of the reconstruction decade, wherever that evidence may be, and not the interpretation of any particular year.

The equal protection clause was, with the foregoing qualification, originally understood to mean the following: All men, without regard to race or color, should have the same rights to acquire real and personal property and to enter into business enterprises;[198] criminal and civil law, in procedures or penalties, should make no distinctions whatsoever because of race or color;[199] there should be no segregation of individuals on the basis of race or color as to the right to own or use land;[200] there should be no segregation of individuals on the basis of race or color in the use of utilities, such as transportation or hotels;[201]

198. Decisions in accord with the text range from one of the earliest, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (invalidating discrimination against Chinese laundrymen), to Oyama v. California, 332 U.S. 633 (1948) (invalidating a California statute setting up racial qualifications for land ownership, some of the Court resting the decision on equal protection grounds), and Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (invalidating racial restraints on fishing).

199. *Accord as to juries,* Avery v. Georgia, 345 U.S. 559 (1953); Patton v. Mississippi, 332 U.S. 463 (1947); Norris v. Alabama, 294 U.S. 587 (1935); *Ex parte* Virginia, 100 U.S. 339 (1880); Strauder v. West Virginia, 100 U.S. 303 (1880). *See also* Carsell v. Texas, 339 U.S. 282 (1950) (reversing the conviction of a Negro because members of his race had been intentionally excluded from the grand jury which indicted him). It is common knowledge that there is in fact extreme discrimination against Negroes, but by no means exclusively in the South, in every aspect of the criminal law from arrest to sentence. 1 G. MYRDAL, *supra* note 96, at pt. 6.

200. *Accord,* Buchanan v. Warley, 245 U.S. 60 (1917). *Cf.* Shelley v. Kraemer, 334 U.S. 1 (1948) (The Restrictive Covenant Cases); Corrigan v. Buckley, 271 U.S. 323 (1926). On the practical fashion in which geographical segregation is in fact secured, see Frank, *The United States Supreme Court: 1947-48,* 16 U. CHI. L. REV. 1, 21-26 (1948); "In sum, prior to the restrictive covenant cases, Negroes in Indianapolis could not move out of the areas identified. That situation is in nowise changed by the restrictive covenant cases." *Id.* at 26.

201. Since Brown v. Board of Educ., 347 U.S. 483 (1954), the Supreme Court, by means of summary per curiam decisions, has held racial segregation invalid in numerous areas. *See* Schiro v. Bynam, 375 U.S. 395 (1964) (ordinance requiring segregation in municipal auditorium); Johnson v. Virginia, 373 U.S. 61 (1963) (segregated courtroom seating); Tenner v. Memphis, 369 U.S. 350 (1962) (administrative regulation requiring segregation in airport restaurant); State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959) (statute forbidding integrated athletic contests); Park Im-

with reservations, for here there is substantial divergence, there should be no segregation in the schools.[202] It was generally understood that Congress could legislate to secure these ends, without regard to whether the particular objective was frustrated by state action or by state inaction.[203] On the other hand, the clause was meant to have no bearing on the right to vote;[204] the evidence of its contemplated effect on state anti-miscegenation laws is unclear;[205] and it was generally understood to have no bearing on segregation of a purely private sort in situations fairly independent of the law, as in churches, cemeteries, or private clubs.

What has been said goes to the measure of equal protection as a rule of law. But equal protection deserves measure as more than a rule of law, for it represents a part of a symbol, the symbol of equality. The enormous potentiality which made that symbol the banner of the abolitionists manifested itself not only in the equal protection clause but also in the remainder of the war amendments. The strongest advocates of "equality before the law" in Congress during the Reconstruction hoped to place the recent slaves, not halfway on the scale between slavery and freedom, but at a level substantially equivalent and undistinguished from that of the white population. That ultimate goal was to be achieved through equal freedom, equal privileges and immunities, equal due process, equal rights to vote, and equal protection of the laws.

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provement Ass'n v. Detiege, 358 U.S. 54 (1958) (public parks and golf courses); Gayle v. Browder, 352 U.S. 903 (1956) (statute requiring segregation on buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses).

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

203. *Contra,* Collins v. Hardyman, 341 U.S. 651 (1951) (purely private conduct beyond reach of the amendment); United States v. Harris, 106 U.S. 629 (1882) (invalidating so much of the Third Enforcement Act as applied to acts of private individuals); United States v. Cruikshank, 92 U.S. 542, 555 (1875) (in substance construing the Enforcement Act of 1870 and equal protection so as to eliminate "private violence" from congressional control). *But cf.* Katzenbach v. Morgan, 384 U.S. 641 (1966); United States v. Price, 383 U.S. 787 (1966) (finding state action where a private person conspires with state officials); United States v. Guest, 383 U.S. 745 (1966); Monroe v. Pape, 365 U.S. 167 (1961).

204. For discussion see note 194 *supra* and accompanying text.

205. *Cf.* cases cited note 173 *supra.*