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Rehabilitating *Lochner*

BERNARD H. SIEGAN*

*Section 1 of the fourteenth amendment incorporated the principles of the Civil Rights Act of 1866, which specifically protected the contract and property rights of native born citizens from discriminatory treatment by the states. As this information suggests, the Thirty-ninth Congress, which framed the amendment, was strongly dedicated to securing the material rights. The Framers regarded due process as a general guarantee for natural and fundamental rights, which included liberty of contract and of private ownership. At the time the amendment was framed and ratified, and for some time thereafter, a majority of the U.S. Supreme Court regarded due process as safeguarding vested property interests but not contractual freedom. By the time of the *Lochner* case, the Court, through the normal course of adjudication, had erased this dubious distinction and secured liberty of contract. This development was not antagonistic to the basic rationale of due process nor an unrealistic extension in meaning. It was consistent with the Framers' meaning of due process.*

INTRODUCTION

Contemporary constitutional jurisprudence has done much to rehabilitate *Lochner v. New York*.¹ In times past, this decision might be comfortably dismissed on the ground that the judiciary should not undertake the functions of a super-legislature. Today, this response is not readily available to supporters of recent substantive due

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This article will be part of a chapter in a forthcoming book by Prof. Siegan, tentatively entitled *THE SUPREME COURT'S CONSTITUTION*.

1. 198 U.S. 45 (1905). Among the most controversial rulings of the U.S. Supreme Court, this 5-4 decision was delivered in the economic due process period of 1897-1937, during which the Court struck down a considerable amount of economic legislation.

I have previously examined the law and economics of the *Lochner* decision in my book, *B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION* 110-26 (1981).

process and equal protection holdings, or to the practitioners of noninterpretivism.² However, the decision remains in difficulty with the interpretivists, and in particular with what might be considered the smoking-gun school of constitutional construction, which demands strict proof about Framers' meaning and intention. In response to such concerns, this article examines the relevant background and debates on the framing of the fourteenth amendment. The evidence is very persuasive that *Lochner* was a legitimate interpretation of original meaning. Full rehabilitation may be in order.

As the reader will recall, the case concerned freedom of contract: whether a New York statute limiting working hours in bakeries and confectionaries to ten per day and sixty per week violated the contractual freedom secured by the due process clause of the fourteenth amendment. The U.S. Supreme Court ruled (5-4) that there was not sufficient justification for the legislation to be upheld. The Court had previously sustained a Utah law limiting employment in underground mines and smelters to eight hours per day, except in cases of emergency.³ However, because the New York law covered a situation considered far less perilous by the majority, and because it allowed no exceptions, it was distinguishable from the Utah statute. Laws reducing working hours were not necessarily beneficial since they would also reduce wages, limiting the ability of the laborer to support himself and his family. As one of the dissenting Justices noted, the Court would have come to an opposite conclusion had the law limited employment to eighteen hours a day, for working a longer period would indeed be detrimental to health.⁴

In my view, such inquiry is an appropriate function for the Court under the due process clause of the fourteenth amendment, which I regard as a limitation on the powers of state government to deprive people of their liberties. However, for many others, this analysis is not acceptable unless the Framers of the clause can be deemed to have contemplated it. These critics usually deny that the Framers' conception of due process could include a state law limiting work hours. This is the issue with which this paper is concerned.⁵

This inquiry will concentrate on the framing of section 1 of the

2. See Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159; Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278 (1981).

3. *Holden v. Hardy*, 169 U.S. 366 (1898).

4. 198 U.S. at 71 (Harlan, J., dissenting).

5. In construing the Constitution, the aim should be "to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it. . . . As nearly as possible we should place ourselves in the condition of those who framed and adopted it." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 453 (1934) (Sutherland, J., dissenting).

fourteenth amendment as well as the Civil Rights Act of 1866 from which its interpretation cannot be separated. The amendment was framed by the Thirty-ninth Congress in 1866 and ratified by three-fourths of the states by 1868. Although the Framers may have considered other sections more important, only sections 1 and 5 have been judicially significant, and they read as follows:

Section 1. 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.

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

CIVIL RIGHTS ACT OF 1866

While opinion is divergent as to the full meaning of section 1, commentators agree that at the least, it was intended to authorize passage of and to constitutionalize the Civil Rights Act of 1866; that is, to make certain its provisions were permitted by the Constitution, and to place its safeguards beyond the power of any subsequent Congress to repeal. The chief purpose of this Act was to provide federal protection for the emancipated Blacks in the exercise of certain described liberties. However, it applied to all the states and benefitted other people as well. Sections 1 and 2 of the Act are pertinent to this examination and provide as follows:

Section 1. That all persons born in the United States and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey 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.

Section 2. That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding

one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.⁶

Section 3 gave lower federal courts jurisdiction under the statute, and the Supreme Court appellate jurisdiction. It provided for removal to the federal courts of suits or prosecutions under the Act commenced in state courts. Section 4 directed district attorneys, marshals, and other federal officials to institute proceedings against violators. The balance of the statute contained other provisions relating to enforcement.

In the Senate, the Civil Rights Bill was introduced on January 29, 1866 by its author, Senator Lyman Trumbull of Illinois, chairman of the Judiciary Committee, and on March 1 in the House, by Representative James F. Wilson of Iowa, chairman of its Judiciary Committee. Both were Republicans, members of the party that held substantial majorities in the two Houses. There were 42 Republicans and 10 Democrats in the Senate, and 145 Republicans and 46 Democrats in the House. At that time the eleven states that participated in the late rebellion were not represented. The Republicans overwhelmingly supported the Civil Rights Act initially when it was voted on, as well as after President Johnson's veto. The Democrats opposed it.

Determining legislative intention can at times be a very arduous undertaking. How does a court decide what motivated 128 Representatives and 33 Senators to vote for the joint resolution proposing the fourteenth amendment? Only a small fraction spoke in the debates. Moreover, speakers concerned with particular aspects emphasized them and ignored others. However, legislatures function to produce laws that generally reflect the members' will. Not every legislator is expected to be fully knowledgeable on every measure or every issue. Legislatures operate primarily through committees which are supposed to study and understand their assigned areas. Individual members consequently defer considerably to committees and their members. For some lawmakers, a vote may for the most part represent an expression of confidence in a committee or members of it that author or sponsor a measure. They may go along without fully considering or comprehending some parts of a bill if they are satisfied the authors generally mirror their prevailing concerns. Committee majorities may also reflect the party line, which can be decisive for certain lawmakers. It can also be assumed that lawmakers are aware that explanations of committee chairmen or other specially interested members will be important factors to be considered by courts interpreting legislation. For these reasons, this paper will be most concerned with the explanations and positions of

6. Act of April 9, 1866, ch. 31, 14 Stat. 27.

floor managers and other leading proponents of the measures under study.

Section 1 of Trumbull's bill was much amended before final passage of the legislation. It emerged less racially oriented than when first introduced. The following is Trumbull's original section 1, showing the subsequent changes:

Section 1. That all persons [of African descent] born in the United States and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States, [and there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color or previous condition of slavery; but the inhabitants] and such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right in every State and Territory 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.⁷

Trumbull found authority for his bill in section 2 of the thirteenth amendment, giving Congress power to enforce "by appropriate legislation" section 1 which abolished slavery. The bill would make the amendment meaningful by securing practical freedom for the former slaves. "[O]f what avail will it now be that the Constitution of the United States has declared that slavery shall not exist, if in the late slaveholding States laws are to be enacted and enforced depriving persons of African descent of privileges which are essential to freemen?"⁸ By conferring citizenship, the bill entitled the former slaves to exercise those rights guaranteed to citizens by the Constitution. A statute depriving a citizen of civil rights secured to other citizens constitutes "a badge of servitude which, by the Constitution, is prohibited."⁹

To determine what those rights were, Trumbull referred to judicial decisions defining article IV, section 2 (commonly referred to as the comity clause), which declares that "[t]he citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." He concluded that the opinion most elaborate upon this clause and containing the settled judicial opinion (except

7. See CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866). Deletions are within brackets and additions are in italics.

8. *Id.*

9. *Id.*

possibly for being excessive on rights of suffrage), was that of Supreme Court Justice Bushrod Washington, delivered in *Corfield v. Coryell*, an 1823 Federal Circuit Court case.¹⁰ Cited at various times in the debates on the Civil Rights Act and the fourteenth amendment, Washington's famous pronouncement on the meaning of the privileges and immunities clause of article IV follows:

We feel no hesitation in confining [the constitutional provision] to these privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union." But we cannot accede to the proposition . . . that, under this provision of the constitution, the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state . . .¹¹

The Illinois Senator observed that Washington's definition included all of the rights set forth in the proposed legislation. The bill did no more than protect the "fundamental rights belonging to every man as a free man and which under the Constitution as it now exists we have a right to protect every man in."¹² Actually, Washington's opinion concerned citizens of one state engaged in activities in another; Trumbull's position was that their rights should be no less in their own states than outside of them.

Representative Wilson offered similar interpretations.¹³ He likewise asserted that the law created no new rights, but would enforce the fundamental rights to which citizens were already entitled under

10. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

11. *Id.* at 551-52.

12. CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866).

13. *Id.* at 1117-19.

the Constitution, quoting also from Justice Washington's construction of the article IV privileges and immunities clause.¹⁴ The Congressman emphasized the basic character of the protections in the bill and identified them as natural rights.¹⁵

In addition to arguing as Trumbull did, that the Act was authorized under the thirteenth amendment, Wilson also contended that Congress had implied powers under the Constitution to enforce fundamental liberties of United States citizens from abridgment by the states. It was necessary to establish such authority inasmuch as the Act affected all the states and might apply to others than those whom Congress could protect under the authority of the amendment.¹⁶ According to the Congressman, the "great fundamental civil rights which it is the true office of government to protect" were named in the celebrated commentaries of England's Sir William Blackstone and New York's Chancellor James Kent. Both declared that the three absolute rights of individuals were those of personal security, personal liberty, and personal property. All of the liberties set forth specifically or generally in the proposed Civil Rights Act, Wilson concluded, either were embodied in these rights or were necessary for their enjoyment.¹⁷

Continuing this theme later in the debates, Wilson asserted the due process clause of the fifth amendment guaranteed the rights contained in the bill and Congress had implied authority to set aside state laws abridging exercise of them.

[A]n amendment to the Constitution [provides] that "no person shall be deprived of life, liberty, or property without due process of law." . . . [T]hese are the rights to which this bill relates, having nothing to do with subjects submitted to the control of the several States

The citizen is entitled to the right of life, liberty, and property. Now, if a State intervenes and deprives him, without due process of law, of these rights, as has been the case in a multitude of instances in the past, have we no power to make him secure in his priceless possessions? When such a case is presented can we not find a remedy? Who will doubt it?¹⁸

Opponents of the proposed legislation focused on the serious constitutional problems it raised. First, there was the questionable relationship between the purpose of the thirteenth amendment, which was to eliminate slavery, and the goal of the bill, which was to

14. *Id.* at 1117-18.

15. *Id.* at 1117.

16. *Id.* at 1118.

17. *Id.* at 1118-19.

18. *Id.* at 1294.

eliminate discrimination. Second was the issue of how the proposed law could apply to Blacks or Whites who were free and never affected by the amendment. Third, the opposition contended that under the *Dred Scott* decision,¹⁹ Congress did not have authority to confer citizenship on the former slaves. Fourth, it was argued that Congress could not require the states to observe provisions in the Bill of Rights inasmuch as it was solely a limitation on the federal government. And fifth, opponents doubted Congress had power to penalize persons who in good faith obeyed state laws. To survive challenge, it was evident the legislation required a firmer constitutional foundation, which in time the fourteenth amendment provided.

In the congressional debates, specific economic rights were mentioned as belonging to the freedmen or as being denied to them in the South. Senator Trumbull said that all men have the right to make contracts, buy and sell, and to acquire and dispose of property.²⁰ Senator Howard of Michigan asserted that the freedman must be able to earn and purchase property and to benefit by the "fruits of his toil and his industry."²¹ Representative Thayer of Pennsylvania was concerned that the freedmen have the ability to make contracts for their labor and be allowed to purchase a home and have the liberty to enjoy the ordinary pursuits of civilized life.²² Representative Lawrence of Ohio stated that all citizens have the right to make contracts to "secure the privilege and rewards of labor."²³ Representative Windom of Minnesota was also concerned that all citizens have the right to make contracts for their labor, to enforce the payment of their "wages and the means of holding and enjoying the proceeds of their toil."²⁴

Trumbull and Windom gave examples of laws (known as the Black Codes) abridging the rights of the freed Blacks, which the Act would outlaw. Mississippi enacted a statute authorizing local officials to prevent freedmen from carrying on independent businesses and compelling them to work only as employees. It barred freedmen from holding, leasing or renting real estate. Georgia and South Carolina prohibited any Negro from buying or leasing a home.²⁵ Representative Cook was alarmed by laws "that [a] man not supporting himself by labor shall be deemed a vagrant, and that a vagrant shall be sold."²⁶

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

20. CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866).

21. *Id.* at 504.

22. *Id.* at 1151.

23. *Id.* at 1833.

24. *Id.* at 1159.

25. *Id.* at 1160, 1759.

26. *Id.* at 1124. It has been said that the extent of the oppression of Blacks was exaggerated. H. FLACK THE ADOPTION OF THE FOURTEENTH AMENDMENT 96 (1908);

Such conditions persuaded Congress to limit certain legislative powers of the rebellious states. But Congress went much further in the Civil Rights Bill, imposing it on all states for the benefit also of individuals other than the former slaves. However, the legislators were not interested in stripping the states of all powers in the racial area. A considerable amount of congressional debate centered about the language that had originally been inserted in section 1, after the provision on citizenship, and which remained in the measure adopted by the Senate, stating that "there shall be no discrimination in civil rights or immunities . . . on account of race, color, or previous condition of slavery." Proponents of the proposed Act in both Houses insisted that neither this provision nor any other part of it related to political rights, social privileges, voting, officeholding, jury service, or school integration. However, primarily because the foregoing language was sufficiently extensive to risk some such interpretations, the Judiciary Committee voted to eliminate it while the measure was pending in the House. Representative Wilson thought that the deletion did not materially change the bill, "but some gentlemen were apprehensive that the words we propose to strike out might give warrant to a latitudinarian construction not intended."²⁷ The Senate accepted this amendment.²⁸ With this language omitted, the bill was much more confined in application. The change also diminished its racial orientation, giving it a broader libertarian character.

The congressional debates evidence the existence of dual goals for the civil rights legislation: to secure an equality of rights for Blacks as well as for other citizens. Senator Trumbull viewed the bill as affecting state legislation generally, quoting in his introductory statements from a note to Blackstone's Commentaries: "In this definition of civil liberty it ought to be understood, or rather expressed, that the restraints introduced by the law should be equal to all, or as much so as the nature of things will admit."²⁹ He subsequently denied that the bill benefits black men exclusively.

[It] applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness . . . [The only object] is to secure equal rights to all the citizens of the country³⁰

Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 13 (1955).

27. CONG. GLOBE, 39th Cong., 1st Sess. 1366 (1866).

28. *Id.* at 1413.

29. *Id.* at 474.

30. *Id.* at 599.

Still Trumbull sought to minimize the actual impact.

[I]f the State of Kentucky makes no discrimination in civil rights between its citizens, this bill has no operation whatever in the State of Kentucky. Are all the rights of the people of Kentucky gone because they cannot discriminate and punish one man for doing a thing that they do not punish another for doing?³¹

Trumbull expressed essentially the same views in his speech urging the Senate to override President Johnson's veto. Again he emphasized its racial objectives and acknowledged applicability to the rest of the population. This passage indicates the statute would impose a reasonableness standard on state legislation:

The bill neither confers nor abridges the rights of any one, but simply declares that in civil rights there shall be an equality among all classes of citizens, and that all alike shall be subject to the same punishment. Each State, so that it does not abridge the great fundamental rights belonging, under the Constitution, to all citizens, may grant or withhold such civil rights as it pleases; all that is required is that, in this respect, its laws shall be impartial.³²

In his introductory statement, Wilson asserted, "the entire structure of this bill rests on the discrimination relative to civil rights and immunities made by the States 'on account of race, color, or previous condition of slavery.'"³³ He thought the thirteenth amendment empowered Congress to protect such rights. However, he recognized that the measure might have a broader application and proceeded, as previously reported, to argue that Congress had authority to enforce the rights of others as well. It was also necessary to enact the statute "to protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men."³⁴

The Civil Rights Act was entitled "A bill to protect all persons in the United States in their civil rights and to furnish means for their vindication." Congressmen other than the floor managers interpreted the bill in a manner corresponding to the first part of this title.

Representative John Bingham, Republican of Ohio (about whom a great deal more will be said later), viewed the measure as impacting the entire nation. It was not proposed

simply for the protection of freedmen in their rights for the time being in the late insurrectionary States. That is a great mistake. It applies to every

31. *Id.* at 600.

32. *Id.* at 1760. That a reasonableness standard would apply in implementing the statute is also evident in some remarks of Senator Henderson of Missouri. In responding to assertions that by conferring citizenship on certain Indians, the states would lose power to adopt regulations governing their activities, Henderson stated that the states would still have power to determine among other things whether the person was competent to make contracts, as in the case of minors and lunatics. *Id.* at 572. See also Representative Wilson's explanations to the same effect later in the text.

33. *Id.* at 1118.

34. *Id.*

State in the Union, to States which have never been in insurrection, and is to be enforced in every State of the Union, not only for the present but for all future time, or until it shall be repealed by some subsequent act of Congress. It does not expire by virtue of its own limitation; it is intended to be permanent.³⁵

In a lengthy speech urging the House to override the President's veto, Representative Lawrence asserted the bill would have a very broad impact. He claimed it would protect every citizen in the exercise of fundamental liberties. "It is scarcely less to the people of this country than Magna Charta was to the people of England."³⁶ The legislation required that "whatever of certain civil rights may be enjoyed by any shall be shared by all citizens in each State, and in the Territories."³⁷

Representative Broomall of Pennsylvania interpreted the proposed legislation broadly. He asserted that "[i]ts terms embrace the late rebels, and it gives them the rights, privileges, and immunities of citizens of the United States."³⁸ The bill would help "secure protection to the loyal men of the South," who were victims in their person and property of oppression and prosecution in the Southern states only because of their loyalty to the Union; "loyal men [who] . . . have had their property confiscated by the State courts, and are denied remedy in the courts of the reconstructed South" would deservedly be accorded federal protections.³⁹

Representative Raymond of New York construed the act as "securing an equality of rights to all citizens of the United States, and of all persons within their jurisdiction."⁴⁰ He favored the principles⁴¹ but voted against it because Congress lacked authority to enact it.⁴² Senator Davis of Kentucky (an opponent of the measure) contended the bill broke down the legal system in all of the states, "so far not only as the Negro, but as any man without regard to color is concerned."⁴³ Representative Thayer (a supporter) asserted that the "bill [extends] these fundamental immunities of citizenship to all classes of people in the United States."⁴⁴ Senator Hendricks of Indiana (an opponent) stated the bill provides "that the civil rights of all

35. *Id.* at 1292.

36. *Id.* at 1832.

37. *Id.*

38. *Id.* at 1263.

39. *Id.* at 1265.

40. *Id.* at 2502.

41. *Id.* at 1267.

42. *Id.*

43. *Id.* at 598.

44. *Id.* at 1153.

men, without regard to color, shall be equal.”⁴⁵ Congressman Kerr of Indiana (an opponent) believed that under the measure “Congress may, then, go into any State and break down any State constitutions or laws which discriminate in any way against any class of persons within or without the State.” It would be able to “determine for each state the civil *status* of every person, of any race or color, who should elect to settle therein.”⁴⁶

Representative Shellabarger of Ohio (a supporter) noted the bill was limited to protecting citizens from deprivations on account of race or color. He used the term race synonymously with nationality. Were the bill not passed, the states would be in a position to adopt discriminatory measures against, for example, Germans: then “this Government [would be] in this position of utter hopelessness.”⁴⁷ Representative Hill of Indiana (a supporter) sought unsuccessfully to amend the bill by excepting from its protection “those who have voluntarily borne arms against the Government of the United States or given aid and comfort to the enemies thereof.” Evidently, he thought the bill protected these individuals.⁴⁸ Senator Cowan of Pennsylvania (an opponent) contended the bill “confers . . . upon everybody native born in all the States, the right to make and enforce contracts, because there is no qualification in the bill, and the very object of the bill is to override the qualifications that are upon those rights in the States The power given to these people by this bill is unlimited as to persons, and it is equally unlimited as to contracts.”⁴⁹

Some speakers considered only the effect on emancipated persons and did not comment on the meaning of the statute for the rest of the population. On the other side of the question was Senator Howard of Michigan (a supporter) who insisted the bill was confined to eliminating discrimination on the basis of race or color.⁵⁰ Opponents Senator Guthrie of Kentucky and Representative Eldridge of Wisconsin both indicated that this was also their understanding.⁵¹ Senator Stewart of Nevada (a supporter) asserted the bill did no more than strike at the renewal of any attempt to return the freedmen to slavery or peonage. Senator Henderson of Missouri (a supporter) thought its sole object was to break down the system of oppression in the seceded states.⁵²

These narrow interpretations are difficult to reconcile with abolitionist doctrine that emphasized legal equality generally and not just

45. *Id.* at 601.

46. *Id.* at 1268.

47. *Id.* at 1293-94.

48. *Id.* at 1154.

49. *Id.* at 1782.

50. *Id.* at 504.

51. *Id.* at 601, 1155.

52. *Id.* at 1785, 3034.

with respect to race. The former abolitionists were very influential in Republican ranks. Their ideal was that "slaves and free Negroes . . . must receive legal protection in their fundamental rights along with all other human beings."⁵³ They had long comprehended the moral and practical problems of isolating their pleas for legal equality to one area. Because the result would be to limit the powers of government, this perspective was highly acceptable in the generally laissez-faire climate of the Republican Party. The explanations of the bill by both Trumbull and Wilson reflected these important philosophical concerns and appealed to the vast majority of their party who shared them.

Nor are the narrow interpretations of the Act confirmed in the language; its terms benefit persons other than black citizens. Referring to the citizenship provision in his veto message, President Johnson remarked that it also included and made citizens "the Chinese of the Pacific States, Indians subject to taxation, the people called Gypsies, as well as the entire race designated as blacks, people of color, negroes, mulattoes, and persons of African blood."⁵⁴ Trumbull did not deny this in his response, dismissing the point as insignificant to the major thrust of the law.⁵⁵ Johnson could have gone much further in describing the inclusiveness of the measure. Most whites were also "persons born in the United States" and, therefore, as "such citizens of every race and color" entitled to "the same right in every State and Territory . . . as is enjoyed by white citizens." This last phrase does not affect the composition of the benefitted group for it only relates to the safeguards provided them. In the case of whites, it would mean "as is enjoyed by [other] white citizens." Assuming white citizens then generally enjoyed the protected liberties, a state could not deny them without good cause to certain of those born in the United States, either individuals or groups.⁵⁶

53. J. TENBROEK, *EQUAL UNDER LAW* 118 (2nd printing 1969). See also H.J. GRAHAM, *EVERYMAN'S CONSTITUTION* 168-71 (1968).

54. *CONG. GLOBE*, 39th Cong., 1st Sess. 1679 (1866).

55. *Id.* at 1757.

56. In 1860, the total resident population of the United States was 31,513,000 of which 4,138,697 were foreign born. The figures for 1870 were 39,905,000 and 5,567,229, respectively. *THE STATISTICAL HISTORY OF THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT* 8, 117-18 (1976). Given the small percentage of foreign-born persons, implementation of the provisions of the Act would be little disturbed by the existence of this group.

The Civil Rights Act can also be read as not qualifying the enumerated rights (contracts, suit, etc.) with the phrase "as is enjoyed by white citizens." This language would then apply only to the portion relating to "proceedings for the security of person and property." However, my construction of the Act would not change under this

As originally drafted, the Senate bill contained only the qualification "the same right;" the words "as is enjoyed by white citizens" were added in the House Judiciary Committee on an amendment offered by Chairman Wilson. His reasoning was that "unless these qualifying words were incorporated in the bill, those rights might be extended to all citizens, whether male or female, majors or minors. So that the words are intended to operate as a limitation and not as an extension"⁵⁷ This meant that courts passing on claims of women and minors would have to consider state common or statutory law as to their entitlement to civil rights (which for women and minors would depend on the rights involved, or for minors, the age of maturity). Thus, the phrase "as is enjoyed by white citizens" was a standard by which to determine state compliance with the Act.

In the instance of native born whites, the words "shall have the same rights . . . as is enjoyed by white citizens" would likewise constitute a standard by which state legislation would be judged. Thus the Act would affect state economic regulation denying the protected citizens, black and/or white, the right to make contracts freely for various purposes, such as in relation to employment, business, or property. For a statute to survive attack, a court would have to find that the affected citizens were not treated unequally — in effect, that the law was justified — as would later be required during the *Lochner* period.

Returning again to its enactment, the Civil Rights Act easily passed in the Congress. Thirteen Senators spoke on its merits, most of whom did not find any; fourteen discussed it in the House, again mostly in opposition. The bill passed in the Senate on February 22 by a vote of 33-12 and on March 13 in the House, 111-38. Thereafter, on April 6, the Senate voted to override President Johnson's veto by a margin of 33-15, and the House did the same on April 9, by a vote of 122-41.

The Thirty-ninth Congress also passed the Freedmen's Bureau Bill, intended, among other things, to protect the rights of emancipated slaves. Trumbull introduced it on the same day he presented the Civil Rights Bill. President Johnson vetoed it and was sustained, but Congress subsequently passed a modified version which survived another veto. Each version protected against deprivation of the same rights enumerated in section 1 of the Civil Rights Act, again evi-

interpretation, although others may consider it as strengthening the view that the Act affected whites.

In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), the United States Supreme Court found that the Civil Rights Act of 1866 applied to the civil rights of whites as well as non-whites. The case concerned alleged discrimination against whites.

57. CONG. GLOBE, 39th Cong., 1st Sess. app. 157 (1866).

dencing Congress' high priority for property and economic freedoms.⁵⁸

THE FOURTEENTH AMENDMENT

Bingham's Early Version of Section 1

Prior to the House debates on the Civil Rights Bill, the select Joint Committee on Reconstruction voted to submit to Congress a resolution proposing a fourteenth amendment to the Constitution, which committee member Representative John Bingham of Ohio, its primary author, presented to the House on February 26, 1866. It was concurrently introduced in the Senate, but never considered by that body. The Ohio legislator would later become the principal author of the major provision in the final version of the fourteenth amendment; Justice Hugo Black dubbed him "the Madison of the first section of the Fourteenth Amendment."⁵⁹ This earlier version of what later became the second sentence in section 1, provided as follows:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

The first part was worded to incorporate article IV, section 2, while the second used terminology not elsewhere present although indicative of the due process language of the fifth amendment. According to the Ohio Representative, the amendment would enable Congress to apply fundamental rights contained in the Constitution to the states which were then not affected by them. "Every word of the proposed amendment is today in the Constitution, save the words conferring the express grant of power upon the Congress of the United States." The Framers had omitted inserting authority for Congress to enforce against the states "the great canons of the supreme law." The amendment would, he said, arm Congress "with the power to enforce the bill of rights as it stands in the Constitution today." It encompassed no more than what was protected under two provisions of the Constitution, the privileges and immunities clause of article IV and the due process clause of amendment V.⁶⁰

58. *Id.* at 318, 209-10. The second Freedmen's Bureau Act was carried over veto on July 16, 1866.

59. *Adamson v. California*, 332 U.S. 46, 74 (1947) (Black, J., dissenting).

60. CONG. GLOBE, 39th Cong., 1st Sess. 1088-89 (1866).

Gentlemen admit the force of the provisions in the bill of rights, that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States, and that no person shall be deprived of life, liberty, or property without due process of law⁶¹

On this and at various times, Bingham used the term “Bill of Rights” to include all liberties protected in the Constitution; this, as he said on occasion, was the “immortal bill of rights,” according it a natural rights connotation, as other abolitionists were inclined to do.⁶² At other times, to be sure, he confined the term to the first eight amendments.

An opponent of the Civil Rights Act, the Congressman believed a constitutional amendment was required before Congress could impose civil rights restraints on the states. The House, however, was not disposed toward the general structure of the proposed amendment, but refused to table it, and after some debate, on February 28 by a vote of 110-37, postponed consideration until the second week of April. Bingham voted with the majority. The measure was never taken up again and was replaced by the final version.

The problem with this earlier version was that instead of prohibiting state action infringing on liberties, the amendment placed the obligation entirely on Congress, granting it what was considered either excessive or ill-defined authority over the states, and enabling future Congresses to change policy. The final version of section 1 was drafted to meet this concern. Consistent with the form of other constitutional protections, it prohibited certain state actions, and its provisions could be overcome only by another amendment, not the will of another Congress. Consideration of the February proposal is important because the scope of its protections is quite similar to that of the final version, and it is therefore instructive as to the latter’s meaning.

From Bingham’s perspective, the amendment would have made the Civil Rights Act unnecessary. He rejected the statute in part because it removed some inherent state powers and centralized them in the federal government.⁶³ His proposed amendment would greatly advance freedom and yet maintain the federal-state balance. “[T]he care of the property, the liberty, and the life of the citizen . . . is in the States, and not in the Federal Government. I have sought to effect no change in that respect in the Constitution of the country.”⁶⁴ Under the amendment, state authorities would only have to answer nationally if “they enact laws refusing equal protection to life, lib-

61. *Id.* at 1089.

62. J. TENBROEK, *supra* note 53, at 128, 215.

63. CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866).

64. *Id.*

erty or property."⁶⁵

The Ohio legislator explained that the equal protection provision of the amendment applied the due process guarantee to the states. He equated these two concepts; each comprehended the other. There could be no liberty without equality and vice versa. On initial consideration this might seem to be an untenable position, for there is frequently thought to be irreconcilable tension between liberty and equality. Governments impose many laws and regulations that achieve the latter at the expense of the former. However, this is the statist version of equality, to be brought about by adoption of laws that make people alike in their condition and not the libertarian one advanced by Bingham, espoused by John Locke among others, which comes from the rejection or elimination of laws that treat people unequally. For him, equality before the law meant that all laws should apply equally, and that no person or persons would be favored or denied. When government limits liberties of certain individuals, it also denies them equality with others not so incapacitated.⁶⁶ Bingham was far from alone in this thinking. For a great many years prior to the Civil War, abolitionists had maintained that the due process clause of the fifth amendment required that the laws treat equally all persons similarly situated with respect to life, liberty, and property.⁶⁷ Legislation treating certain people in a different or special way without adequate cause — therefore unequally — was found to be violative of due process in a number of judicial decisions

65. *Id.* at 1090.

66. Though . . . all men by nature are equal, I cannot be supposed to understand all sorts of equality. Age or virtue may give men a just precedency. Excellency of parts and merit may place others above the common level. Birth may subject some, and alliance or benefits others, to pay an observance to those to whom nature, gratitude or other respects may have made it due; and yet all this consists with the equality which all men are in, in respect of jurisdiction or dominion one over another, which was the equality . . . being that equal right that every man hath, to his natural freedom, without being subjected to the will or authority of any other man.

J. LOCKE, *OF CIVIL GOVERNMENT*, ch. VI, § 54.

The same perspective is set forth in considerable depth in F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 85-102 (1960). According to Hayek, the "great aim of the struggle for liberty has been equality before the law." *Id.* at 85. "Equality before the law and material equality are therefore not only different but in conflict with each other; and we can achieve either the one or the other, but not both at the same time." *Id.* at 87.

67. See J. TENBROEK, *supra* note 53, at 51-56. The idea was common to a great many other Republicans of the period. See Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 17 (1954).

prior to the Civil War.⁶⁸ Subsequent to ratification of the fourteenth amendment, courts employed the due process, equal protection, or both clauses to nullify legislation arbitrarily denying liberties to individuals or groups. To sustain a statute under either clause, a state had to show that sufficient reason existed to account for the differential treatment.⁶⁹

Commentators have referred to some of Bingham's positions as "peculiar," but apparently they were not then so regarded. On the floor of the House, his colleagues frequently acknowledged him to be a competent constitutional lawyer. That Congressional leaders held him in high esteem is also evident from his appointment to the very influential Reconstruction Committee and the important role he exercised in it. He became chairman of the committee in the third session of the Fortieth Congress. A prominent and influential Congressman in 1866, the Ohio Representative has been described variously as radical, moderate, and conservative.⁷⁰ He had roots in the anti-slavery movement, but contrary to most of its Congressional activists, opposed the Civil Rights Bill as a whole as well as the portion of the bill that forbade discrimination in civil rights and immunities and that was eliminated prior to passage.

Bingham is a much admired figure, yet he does not lack for critics. Contemporary commentators have little trouble finding fault. His lengthy speeches are not always clear in meaning or thought. Moreover, his interpretations of some constitutional issues are at great variance with modern thinking, making him even more difficult to comprehend. Like many of his Republican colleagues, he advanced antislavery political theory and the constitutional interpretations that accompanied it.

Bingham articulated his views on the issues with which the three major guarantees of section 1 are concerned in two speeches presented before Congress — one in 1857,⁷¹ the other in 1859.⁷² His later addresses to the Thirty-ninth Congress reveal similarity in position. Bingham customarily viewed privileges and immunities and due process in natural rights terminology, each as insulating human freedom from government oppression. In his 1857 speech, he defended the power of Congress to control slavery in the Territories, while in 1859 he attacked Oregon's attempt at statehood because it barred

68. See R.L. MOTT, *DUE PROCESS OF LAW* 256-79 (1926).

69. See *id.* at 275-99. The similarity of the two clauses is discussed by Chief Justice Warren in *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

70. Kelly, *The Fourteenth Amendment Reconsidered*, 54 MICH. L. REV. 1049, 1052 (1956) (radical); M.L. BENEDICT, *A COMPROMISE OF PRINCIPLE* (1976) (conservative); B.B. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* (1914) (moderate).

71. CONG. GLOBE, 34th Cong., 3d Sess. app. 135 (1857).

72. CONG. GLOBE, 35th Cong., 2d Sess. 981 (1859).

freed negroes and mulattoes from settling there or holding real property and making contracts within it. Bingham expressed ideas that later would be instrumental in framing the critical clauses of section 1.

Like Trumbull and Wilson, Bingham construed article IV, section 2 as guaranteeing fundamental rights: these were, he contended, natural or inherent liberties of citizens of the United States that were intended to be secure from violation by the states. This position required an interpretation that essentially eliminated the section as the comity clause between the states as it has traditionally been regarded; yet it was a construction that Bingham regarded as intended, even self-evident. A strong believer in natural rights, he maintained a distinction between them and political rights, relating the former to safeguarding of life, liberty, and property. Natural rights were insulated from the majority, whereas political rights were its product. The following are excerpts from his two speeches relating to privileges and immunities.

I deny that any State may exclude a law abiding citizen of the United States from coming within its Territory, or abiding therein, or acquiring and enjoying property therein, or from the enjoyment therein of the "privileges and immunities" of a citizen of the United States. . . . [Pursuant to article IV, section 2, the] citizens of each State, all the citizens of each State, being citizens of the United States, shall be entitled to "all privileges and immunities of citizens in the several States." Not to the rights and immunities of the several States; not to those constitutional rights and immunities which result exclusively from State authority or State legislation; but to "all privileges and immunities" of citizens of the United States in the several States. There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident that it is "the privileges and immunities of the citizens of the United States in the several States" that it guarantees [sic].

. . . [C]itizens of the United States . . . are entitled to all of the privileges and immunities . . . amongst which are the rights of life and liberty and property, and their due protection in the enjoyment thereof by law . . .⁷³

All free persons, then, born and domiciled in any State of the Union, are citizens of the United States; and, although not equal in respect of political rights, are equal in respect of natural rights. Allow me, sir, to disarm prejudice and silence the demagogue cry of "negro suffrage," and "negro political equality," by saying, that no sane man ever seriously proposed political equality to all, for the reason that it is impossible. Political rights are conventional, not natural; limited, not universal; and are, in fact, exercised only by the majority of the qualified electors of any State, and by the minority only nominally.⁷⁴

His due process orientation was of the same character. According

73. *Id.* at 984.

74. *Id.* at 985.

to Bingham, the due process guarantee of the fifth amendment secures natural rights of all persons, requires equal treatment by the law, and comprehends the highest priority for ownership. Note his statement that no one shall be deprived of property “against his consent,” a stronger affirmation of property rights than contemplated in the fifth amendment, which contains no such qualification.

[N]atural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this constitution guarantied [sic] by the broad and comprehensive word “person,” as contradistinguished from the limited term citizen — as in the fifth article of amendments, guarding those sacred rights which are as universal and indestructible as the human race, that “no person shall be deprived of life, liberty, or property but by due process of law, nor shall private property be taken without just compensation.”⁷⁵

Who . . . will be bold enough to deny that all persons are equally entitled to the enjoyment of the rights of life and liberty and property; and that no one should be deprived of life or liberty, but as punishment for crime; nor of his property, against his consent and without due compensation?⁷⁶

It must be apparent that the absolute equality of all, and the equal protection of each, are principles of our Constitution, which ought to be observed and enforced in the organization and admission of new States. The Constitution provides, as we have seen, that *no person* shall be deprived of life, liberty, or property, without due process of law. It makes no distinction either on account of complexion or birth — it secures these rights to all persons within its exclusive jurisdiction. This is equality. It protects not only life and liberty, but also property, the product of labor. It contemplates that no man shall be wrongfully deprived of the fruit of his toil any more than of his life.⁷⁷

The due process guarantee was no less important to him in 1866. Delivered in oratorical style, the following passage from a speech urging adoption of his early version of section 1 reveals Bingham’s commitment to a natural rights perspective holding due process to embody the highest reaches of justice.

Your Constitution provides that no man, no matter what his color, no matter beneath what sky he may have been born, no matter in what disastrous conflict or by what tyrannical hand his liberty may have been cloven down, no matter how poor, no matter how friendless, no matter how ignorant, shall be deprived of life or liberty or property without due process of law — law in its highest sense, that law which is the perfection of human reason, and which is impartial, equal, exact justice; that justice which requires that every man shall have his right; that justice which is the highest duty of nations as it is the imperishable attribute of the God of nations.⁷⁸

Consistent with such beliefs, Bingham rejected any constitutional distinction between citizens and persons in safeguarding liberties. In the debates on the Civil Rights legislation, he opposed substituting the word “citizen” for “inhabitant” because it confined protections.⁷⁹

75. *Id.* at 983.

76. *Id.* at 985.

77. CONG. GLOBE, 34th Cong., 3d Sess. app. 140 (1857).

78. CONG. GLOBE, 39th Cong., 1st Sess. 1094 (1866).

79. *Id.* at 1292.

Two other events are worthy of comment in considering Bingham's beliefs. In his maiden speech to Congress in 1856, he charged that a law passed by the Kansas Territorial Legislature, making it a felony for any free person to assert that no one has the right to hold slaves in the Territory, abridged "the freedom of speech and of the press, and deprive[d] persons of liberty without due process of law."⁸⁰ He apparently considered due process as protective also of activity not ordinarily associated with preservation of life, liberty and property.

Bingham's concern for constitutionally guaranteeing property and other interests not related to race discrimination is evident in a change he sought in the draft of a proposed constitutional amendment adopted by the Reconstruction Committee which was authored by the famous Representative Thaddeus Stevens. This occurred after the postponement by the House in the consideration of Bingham's early version, as already described. Section 1 of Stevens' amendment provided: "No discrimination shall be made by any State, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude." Bingham moved to add the following provision to it: "nor shall any State deny to any person within its jurisdiction the equal protection of laws, nor take private property for public use without just compensation." This motion lost in the Committee 5-7, with three absent.⁸¹ Presumably Bingham desired to extend the protections of the draft amendment beyond race relations to other personal freedoms and additionally to safeguard property from any form of confiscation.

It is most doubtful that he intended to augment the section's racial protections. Stevens' section 1 was similar in language to the provision in the original Civil Rights Bill forbidding "discrimination in civil rights and immunities" which the House, and subsequently the Senate, deleted.⁸² Bingham had urged that action because "the term civil rights includes every right that pertains to the citizen under the Constitution, laws, and Government of this country."⁸³ One given to such an understanding would hardly have thought more protection was needed for such rights than was already provided in Stevens' section 1. Nor does it seem Bingham would have received the support he did for his proposal from Representative Rogers and Senator

80. CONG. GLOBE, 34th Cong., 1st Sess. app. 124 (1856).

81. B.B. KENDRICK, *supra* note 70, at 85.

82. CONG. GLOBE, 39th Cong., 1st Sess. 1366, 1413 (1866).

83. *Id.* at 1291.

Johnson, both Democrats and opponents of the Civil Rights Act, had they believed it was so directed.

The equal protection provision he proposed was in the same language that Bingham drafted for this clause in the final version of section 1. The preceding episode reveals that equal protection relates to more than just race discrimination; it constitutes a substantive limitation on other state actions. Stevens voted to support Bingham's motion indicating his preference for coverage beyond race relations. Subsequently, the committee deleted Stevens' section 1 and substituted for it what is now its second sentence which Bingham authored.

While he emphasized the abolition of slavery and racial discrimination, Bingham emerges essentially as a man of strong libertarian convictions, committed to preserving a wide array of individual freedoms from molestation by government. His ideas are important not only to understanding the authorship of section 1, but also in providing insight into the thinking of the political leaders who approved it. The election of 1860 brought the Republicans, the party of the anti-slavery movement, to national power. Prominent members of the party, whether radical, moderate, or conservative, had strong anti-slavery convictions and sought, after emancipation, to bring the former slaves into the mainstream of American society and economy. As evident from the debates on the Civil Rights Bill, their political and constitutional theories stressed equal protection of the laws, which meant that no person was to be advantaged or disadvantaged by the laws. According to William H. Seward, Lincoln's Secretary of State and a prominent Republican, the party stood above all for "one idea . . . the equality of all men before human tribunals and human laws."⁸⁴ The abolitionists advanced natural law concepts that libertarian thinkers had long projected in support of an economic system dedicated to private property and free enterprise. Thus, their ideas of equality supported the positions associated with Adam Smith and John Locke.⁸⁵ Frequently their proclamations in the

84. 4 W. SEWARD, WORKS 302 (G. Baker ed. 1884) quoted in Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 537 (1974). However, to acquire popular support, the Republican 1860 platform did advocate a high protective tariff and free homesteads.

85. Among the rights to which the abolitionists gave prime attention were those of property and contract. They urged that these liberties be extended to all people, for these were natural rights that would enable the dependent poor to become financially secure and thus, independent. Nelson, *supra* note 84, at 555-57.

On the economic views of the named men, see K.I. VAUGHN, JOHN LOCKE, ECONOMIST AND SOCIAL SCIENTIST (1980); A. SMITH, THE WEALTH OF NATIONS (1937).

Blackstone explained the common law as supportive of these ideas of limited government.

[Civil liberty] is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the

advocacy days prior to the Civil War sounded like they emanated from these sources.⁸⁶

Bingham's early version of section 1 would have enabled Congress

public. Hence we may collect that the law, which restrains a man from doing mischief to his fellow citizens, though it diminishes the natural, increases the civil liberty of mankind: but every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny. Nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, and laws destructive of liberty . . . [T]hat constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.

1 W. BLACKSTONE, COMMENTARIES *121-22.

86. J. TENBROEK, *supra* note 53, sets forth these examples:

The call for the Macedon anti-slavery convention of June 8-10, 1847 provided

1. The true foundation of Civil government is the equal, natural, and inalienable rights of *all men* — and the moral obligation resting on the entire community to secure the free exercise of these rights, including life, liberty, and the pursuit of happiness, to each individual, in his person and his property, and in their management.

. . . .

3. The sole and indispensable business of civil government is to secure and preserve the natural and equal rights of all men, unimpaired, to prevent and redress, violations of original rights. And the benefits of government are not purchased by the giving up of any portion of our natural rights for protection of the rest.

. . . .

5. All monopolies, class legislations, and exclusive privileges are unequal, unjust, morally wrong, and subversive of the ends of civil government.

6. The primary and essential rights of humanity are, the right to occupy a portion of the earth's surface

. . . .

9. The right of self-ownership includes, of necessity, the right of each individual to the direction and to the products of his own skill and industry, and the disposal of those products, by barter or sale, in any portion of the earth where a purchaser can be found. These original and natural rights, civil government may neither infringe or impair and all commercial restrictions therefore (except the wise and needful prohibition of immoral and criminal traffic, which no man has a natural right to engage in) are unjust and oppressive.

10. A tariff for the protection of one particular branch of industry, so far as it reaches its end, is an unjust tax upon one portion of the community for the benefit of another. . . .

Id. at 138 n.2, 142 n.7.

At the Honeoye Liberty Mass Meeting, held December 29, 1846 through January 1, 1847, a declaration of sentiments was unanimously adopted containing similar assertions and also included the following:

That "the rightful power of all legislation is to declare and enforce our natural rights and duties, and take none of them from us." That "the idea is quite unfounded, that, on entering society, we give up any natural right. . . ."

Id. at 142 n.7.

to impose these principles on the states. In the debates on the proposed amendment, ten Congressmen, divided equally between supporters and opponents, voiced substantive comments. No one seriously quarreled with Bingham's definitions of privileges and immunities, due process, and equal protection. Opponents feared Congress would utilize these concepts excessively against the states, something which Bingham vigorously denied would occur since the Amendment would only authorize Congress to enforce "the Bill of Rights."

When asked by Representative Hale of New York whether the amendment was aimed solely at protection of American citizens of African descent in rebellious states, Bingham denied this, and said it applied to all the states. It would also safeguard the thousands of Union supporters in the rebellious states from confiscation and banishment.⁸⁷ Subsequent discussion disclosed the extent to which the amendment would govern the states. The Ohio Representative asserted that the amendment conferred upon Congress a general power to secure for all persons equal protection from the states with respect to life, liberty, and property. It would enable Congress to strike down the Oregon constitutional provisions Bingham had condemned in his 1859 speech. However, Hale's New York did not require Congressional intervention. Bingham was uncertain about its impact in Indiana.⁸⁸

As to real estate, every one knows that its acquisition and transmission under every interpretation ever given to the word property, as used in the Constitution of the country, are dependent exclusively upon the local law of the States, save under a direct grant of the United States. But suppose any person has acquired property not contrary to the laws of the State, but in accordance with its law, are they not to be equally protected in the enjoyment of it, or are they to be denied all protection? That is the question, and the whole question, so far as that part of the case is concerned.⁸⁹

Two exchanges between Hale and Representative Stevens, who supported the measure, further clarified the intended scope for Congressional authority under the amendment. Hale charged that under the equal protection provision, Congress would be able to override a state's civil and criminal legislation, establishing its own laws instead. Stevens replied that the authority was far less broad.

Does the gentleman mean to say that, under this provision, Congress could interfere in any case where the legislation of a State was equal, impartial to all? Or is it not simply to provide that, where any State makes a distinction in the same law between different classes of individuals, Congress shall have power to correct such discrimination and inequality?⁹⁰

87. CONG. GLOBE, 39th Cong., 1st Sess. 1065 (1866).

88. *Id.*

89. *Id.* at 1089.

90. *Id.* at 1063.

In response to Hale's assertion that Congress would be empowered to overrule the states with respect to the property rights of women, Stevens explained, "[w]hen a distinction is made between two married people or two *femmes sole*, then it is unequal legislation; but where all of the same class are dealt with in the same way then there is no pretense of inequality."⁹¹ Stevens' explanations would require the application of reasonableness distinctions the judiciary later utilized under substantive due process. While their responses and examples indicated wide coverage for the equal protection provision, both Bingham and Stevens maintained that state legislation that did not abridge fundamental liberties would be unaffected.

Coverage under this amendment appears broader than under the Civil Rights Act, in which protections are enumerated. The statute would be enforced by the judiciary, while the reach of the amendment would depend on the will of Congress. A state law imposing restraints on certain persons or groups and not on all others, would have to be justified to Congress as nondiscriminatory, warranted by differences in situation or condition. Had the amendment been adopted, Congress would be in a position to strike down the law litigated in the *Lochner* case, and for essentially the same reasoning employed by the Supreme Court. In that decision, the Court was not persuaded that there was sufficient basis to except bakeries and confectionaries from the prevailing rule of freedom of employment contract. New York had passed a law solely affecting certain persons, and it did not show adequate reason for this differential treatment. As we shall see in the following portion of this paper, the final version of section 1 was sufficiently similar to the earlier one to allow for the same outcome under it in a *Lochner*-type controversy.

The Final Version

On April 28, 1866, the select Joint Committee on Reconstruction voted 12-3 (only Democrats opposing) to report another proposed version of the fourteenth amendment, of which section 1 was authored by John Bingham. Section 1 consisted of what is now the second sentence of the amendment; a prior sentence on citizenship would be added subsequently. Section 5 did not differ from the one finally approved. Representative Thaddeus Stevens presented it to the House on May 8 and Senator Jacob Howard to the Senate on May 23. Both were members of the Joint Committee. To better

91. *Id.* at 1064. (See also *id.* for additional comments of Rep. Hale.)

comprehend the meaning of section 1, I believe it best to discuss the Senate debate prior to that of the House, and the subsequent commentary will proceed on this basis.

Howard explained the privileges and immunities clause in part by referring to Justice Washington's opinion in *Corfield v. Coryell*. Privileges and immunities "cannot be fully defined in their entire extent and precise nature," observed the Senator, commenting that Washington's interpretation does give "some intimation of what probably will be the opinion of the judiciary."⁹² Howard also embraced within his definition the "personal rights guarantied [sic] and secured by the first eight amendments of the Constitution." As examples, he identified many of the rights so safeguarded, omitting those specifically included in Washington's enumeration.⁹³ The clause in question had been drafted to protect "privileges and immunities of citizens of the United States" to whom the Republican leaders thought article IV, section 2 applied, even though not so stated therein. This resolved the "ellipsis in the language" — the wording about which Bingham expressed concern in his 1859 speech.⁹⁴

In a statement corresponding to what Bingham said in presenting his earlier version, Howard claimed all of these restraints then bound the federal government, but not the states.

[T]hese immunities, privileges, rights, thus guarantied [sic] by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. . . . [Moreover,] there is no power given in the Constitution to enforce and to carry out any of these guarantees. They are not powers granted by the Constitution to Congress, and of course do not come within the [necessary and proper] clause of the Constitution . . . but they stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year. The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.⁹⁵

Congress would have power under section 5 to enforce these and other guarantees set forth in the amendment. While not mentioning it by name, presumably sections 1 and 5, taken together, authorized the passage of legislation such as the Civil Rights Act. Howard did not offer separate meanings for the other two clauses, but lumped them together in a short explanation.

The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person,

92. *Id.* at 2765.

93. *Id.*

94. See *supra* text accompanying note 73.

95. CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866).

whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. Is it not time, Mr. President, that we extend to the black man, I had almost called it the poor privilege of the equal protection of law? Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States, both bound to obey the same laws, to sustain the burdens of the same Government, and both equally responsible to justice and to God for the deeds done in the body?⁹⁶

Accordingly, these clauses outlaw discriminatory racial, class, and caste legislation. Here Howard speaks of protecting legal equality, both racial and otherwise, as the Civil Rights Act did. The extent of this commitment is not defined, but judging from the origins and the Senator's explanation, it is substantive and substantial. Not being limited by the specifics contained in the Act, its impact on the states would be greater. Howard distinguished the privileges and immunities clause from the others in two respects. First the others applied to persons rather than just citizens. Second, the privileges and immunities clause secured fundamental liberties from denial or diminution by the states whereas the others forbade unequal application of them by the states. The Senator's failure to distinguish between the due process and equal protection clauses suggests that he, like Bingham, viewed the two as basically alike in their antidiscriminatory purposes.

The three clauses thus provided sweeping protection for fundamental liberties. Except for eliminating direct Congressional involvement, the final version is similar conceptually to Bingham's earlier one. The privileges and immunities clause reads as Bingham interpreted his February version of it (and of article IV, section 2). Since he used equal protection and due process interchangeably, the addition of due process language and change in equal protection wording clarified and secured meaning and provided added safeguards. In a speech to Congress in 1871, Bingham asserted that the final version was "more comprehensive than as it was first proposed. . . . It embraces all and more than did the February proposition."⁹⁷

Bingham's speeches reveal that he, like others of his

96. *Id.* at 2766.

97. CONG. GLOBE, 42d Cong., 1st Sess. app. 81, 83-85 (1871).

contemporaries, employed each of the three concepts to condemn oppressive state legislation. All were catch-phrases of the antislavery movements. Absent from the amendment is any reference to civil rights, attributable probably to the fact the term was thought to include political rights. As previously explained, the same concern led to the deletion of this term in the Civil Rights Act.

At the prompting of other Senators, Howard subsequently offered specific changes to the amendment, which were adopted. One of these was the addition of the definition of citizenship, which became the first sentence of section 1. In the ensuing debate, only six Senators, three from each party, commented substantively on what had then become the second sentence of section 1. The Republicans approved, while the Democrats opposed, the latter concentrating their criticism on the privileges and immunities clause. The sparcity of the discussion may be attributable in part to the greater passions and concerns which other sections aroused among the Senators.

Senator Poland of Vermont supported and amplified Howard's explanation. He also maintained the privileges and immunities clause of the amendment "secures nothing beyond what was intended" in article IV, section 2. Poland went on to state that many of the states had repudiated or disregarded this important clause and it was now eminently proper and necessary that Congress be invested with the power to enforce it. Furthermore, with slavery abolished, there could be no valid or reasonable objection to the due process or equal protection clauses. "[Both clauses are] the very spirit and inspiration of our system of government, the absolute foundation upon which it was established. [They are] essentially declared in the Declaration of Independence and in all the provisions of the Constitution." Because there was some uncertainty as to the power of Congress to enact the Civil Rights Act, this amendment would remove all such doubts.⁹⁸

Senator Howe of Wisconsin supported section 1 as a means to combat the wrongs which the rebellious states committed and might continue to commit. Those states sought to deny "to a large portion of the population the plainest and most necessary rights of citizenship." These included the right to hold land that had been paid for, the right to sue for wages that were withheld or other wrongs, and the right to give testimony. No state should be able to deny its citizens their privileges and immunities or equal protection of the laws.⁹⁹ Senator Henderson of Missouri chose to discuss only that part of section 1 relating to citizenship. The other clauses, he asserted, merely secured the rights that attached to citizenship in all free countries. He implied the amendment would overcome the Black

98. CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866).

99. *Id.* app. 219.

Codes that had made the Negro a "degraded outcast" deprived of the "commonest rights" of property and legal processes.¹⁰⁰

Senator Davis saw no need for a new privileges and immunities clause, for article IV "comprehends the same principle in better and broader language." He offered no explanation for this conclusion. Due process should be left to the states where it was already assured in their constitutions. Equal protection was also a matter for the states.¹⁰¹ Senators Hendricks of Indiana and Johnson of Maryland spoke about the ambiguity of the privileges clause. The former complained that he had not heard any Senator or statesman accurately define the rights and immunities of citizenship.¹⁰² The latter, a member of the Reconstruction Committee, disapproved only this clause, because he did not understand what its effect would be.¹⁰³ His motion to delete it was rejected. This limited debate may not be very revealing as to meaning but does have an orientation supportive of the floor managers' explanations.

When the vote came on June 8 on the joint resolution, it was approved: yeas-33, nays-11, more than the required two-thirds.

Because of the narrow meaning currently given the term "privileges and immunities" as it appears in article IV, it may appear surprising that only a few Democrats challenged Howard's extensive definition. However, the debates relating to the fourteenth amendment reveal (as heretofore noted), that probably most of the Republicans regarded privileges and immunities as encompassing all fundamental liberties secured in the Constitution, which necessarily would include those set forth in amendments I through VIII. Antislavery doctrine advanced this position.¹⁰⁴ Were it otherwise, the clause might secure only a portion of those liberties identified in the eight amendments, and this would constitute a far lesser commitment to freedom — and a seemingly incoherent one. Moreover, Justice Washington had indicated that his list of liberties was not final, and that unnamed others were also embodied within those specified. Howard's broad definition, accordingly, remained consistent with such thinking.

Washington's interpretation differs from the one that has come to be accepted by the U.S. Supreme Court. Under the existing under-

100. *Id.* at 3031, 3034-35.

101. *Id.* at 240.

102. *Id.* at 3039.

103. *Id.* at 3041.

104. J. TENBROEK, *supra* note 53, at 122-31.

standing, the privileges and immunities clause of article IV forbids any state from discriminating in many matters against citizens of other states in favor of its own. This clause does not stand as a guardian for fundamental rights, safeguarding citizens against the laws of their own or other states, as Washington would have it. Because Republicans of the Thirty-ninth Congress generally accepted Washington's meaning, their speeches are sometimes difficult to comprehend for those steeped in contemporary Supreme Court doctrine.

Howard's interpretation of privileges and immunities was not uncommon among lawyers of that period. As indicated, it was in keeping with Justice Washington's position. It appears similar to that expressed by Justice Bradley for himself and Justice Swayne in his dissent in the *Slaughter-House Cases*.¹⁰⁵ Bradley believed prior to ratification of the fourteenth amendment, the privileges and immunities of citizens of the United States consisted of all the people's liberties including those secured in the Bill of Rights and elsewhere in the Constitution, even if they were not necessarily safeguarded from limitation by the states. While he did not specifically refer to the Bill of Rights, Justice Field, in his minority opinion representing the views of all four dissenters, approved Washington's interpretation: the privileges and immunities designated by Washington are those "*which of right belong to the citizens of all free governments.*"¹⁰⁶

Debate in the House on section 1 was likewise not very extensive. In describing the contents of this section, Representative Stevens read the privileges and immunities and equal protection clauses but paraphrased the due process clause as prohibiting the states from "unlawfully depriving [citizens] of life, liberty, and property." The provisions of what is now the second sentence of section 1, he maintained, were

all asserted in some form or other, in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all.¹⁰⁷

Whatever law applies to a white man shall likewise apply to the black man precisely in the same way and to the same degree. He did not otherwise define the section, except to assert that it would maintain the principles of the Civil Rights Act in the event the latter was repealed by another Congress. After this short explanation, Stevens went on to section 2, which he considered the most important one.

Howard and Bingham, as previously described, also viewed the

105. 83 U.S. 36, 111, 116-17 (1872) (Bradley, J., dissenting).

106. *Id.* at 97 (Field, J., dissenting) (emphasis in original).

107. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

Constitution as being defective because it did not permit the Congress or judiciary to apply its fundamental guarantees to the states. Bingham, among others, claimed the Civil War might have been averted if the national government could have imposed these restraints on the slaveholding states.

Probably the most powerful member of Congress, Stevens was more radical than Bingham on reconstruction policy. Thus, he sought to guarantee constitutionally negro suffrage, but could not obtain enough votes for passage. Bingham did not help him in this quest. However, both took some consistent positions on amending the Constitution. Stevens supported Bingham's main efforts: first on the latter's earlier version of the fourteenth amendment and then on the Ohioan's addition to section 1 of the draft amendment he authored. Additionally, he voted to delete this section 1 in favor of the one drafted by Bingham, which now constitutes the second sentence. The two had similar ideas in another area which also may be revealing of their perspective on section 1. During the drafting of the fourteenth amendment, Stevens sponsored bills that would support the economic interests of certain railroads against hostile state legislatures. Bingham voted for these measures. Commentators have speculated upon the effect of such business problems upon the drafting of the amendment.¹⁰⁸ It is difficult to believe these Congressmen were not aware the broad language would be invoked in support of commercial interests.

In a speech near the close of the House debate on the proposed amendment, Representative Bingham explained that section 1 protected by national law from abridgement or denial by a state, "the privileges and immunities of all of the citizens of the Republic and the inborn rights of every person within its jurisdiction . . ."¹⁰⁹ In light of the Congressman's known perspectives, "inborn" most likely meant natural rights. He used the same term in his 1857 speech previously mentioned when he condemned states that "trample upon the inborn rights of humanity" and lauded those which "defend the inborn rights of each against the combined power of all."¹¹⁰

In the sentence quoted above from his closing speech, Bingham summed up the significance and importance of section 1. For him, privileges and immunities encompassed the fundamental liberties, including those contained in the first eight amendments. Both the due

108. H.J. GRAHAM, *supra* note 53, at 465-66.

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

110. CONG. GLOBE, 34th Cong., 3d Sess. 136 (1857).

process and equal protection clauses further secured these and other natural rights — for all persons, regardless of citizenship. “That great want of the citizen and stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this Amendment.”¹¹¹

The balance of the House debate was not very enlightening on how the representatives construed what is now the second sentence of section 1. Much of the debate concerned other sections, with a number of legislators making no reference to section 1. In all, less than twenty Representatives dealt with section 1. Most of the Republicans who participated mentioned its relationship to the Civil Rights Act — that the amendment supplied necessary Congressional authority to enact it, or constitutionalized its protections against diminution or extinction by subsequent Congresses.

Some spoke about the personal protections secured by the amendments other than those in the racial area. Representative Thayer said it “simply brings into the Constitution what is found in the bill of rights of every State.”¹¹² The equality aspects were stressed by Representatives Raymond¹¹³ and Farnsworth,¹¹⁴ Representative Miller said the due process and equal protection clauses were within the spirit of the Declaration of Independence,¹¹⁵ Representative Eckley believed the amendment afforded “[s]ecurity of life, liberty and property to all citizens of all the states.”¹¹⁶

Of the Democrats, only Representative Rogers of New Jersey (a member of the Reconstruction Committee) spoke extensively. He warned that the privileges and immunities clause would revolutionize the entire constitutional system by eliminating the states’ powers. “[A]ll the rights we have under the laws of the country are embraced under the definition of privileges and immunities.” He asserted that the amendment embodied “that outrageous and miserable civil rights bill.”¹¹⁷

By the time this debate took place, the Congress had been exposed to civil rights discussions for many months. During this period, they had been quite discerning in their voting, having substantially altered Trumbull’s original bill and postponed Bingham’s earlier version. Despite their power and prestige, the Republican civil rights activists could only succeed within certain limits. The legislators acted on the broad outlines while leaving the details to their commit-

111. CONG. GLOBE, 39th Cong., 1st Sess. 2543 (1866).

112. *Id.* at 2465.

113. *Id.* at 2502.

114. *Id.* at 2539.

115. *Id.* at 2510.

116. *Id.* at 2535.

117. *Id.* at 2538.

tees and members thereof. This record suggests the Congressmen had considerable understanding. The fact that certain matters were not discussed during the debate would seem to reveal no more than that they were either not of serious concern or noncontroversial.

On May 10, the House by a vote of 128-37 voted to adopt the joint resolution proposing the fourteenth amendment.

THE DUE PROCESS CONCEPT AND CLAUSE

During the debates on the Civil Rights Bill and the two proposed Constitutional amendments, the term "privileges and immunities" was frequently mentioned and defined. Less attention was directed at the term "due process," which has so much more influenced the course of the nation's laws. When mentioned, it was always in the context of limiting governmental authority. As reported, this was the perspective of Representative Bingham. He equated due process with equal protection of the laws and fundamental and natural rights. No representative disputed Bingham's explanation that the equal protection provision of his first version, which was clearly substantive in character, did little more than apply the due process clause to the states. Representative Higby specifically agreed, asserting the language of the two guarantees "is very little different."¹¹⁸

The prior discussion of the Civil Rights Act disclosed Representative Wilson's convictions as to due process. He believed the Act merely enforced the protections of the fifth amendment due process clause against the states.¹¹⁹ Representative Thayer argued that this clause gave, by implication at least, sufficient power to Congress to pass the Civil Rights Act.¹²⁰ For Representative Baker of Illinois, the proposed due process clause was "a wholesome and needed check upon the great abuse of liberty which several of the States have practiced, and which they manifest too much purpose to continue."¹²¹ Senator Poland and Representative Miller identified the due process and equal protection clauses with the spirit of the Declaration of Independence.¹²² Representative Williams of New Jersey

118. *Id.* at 1054.

Bingham was asked by Representative Rogers "what do you mean by 'due process of law?'" He replied that "the courts have settled that long ago, and the gentleman can go read their decisions." In view of the definition Bingham had given the concept, it is hard to consider his answer to the question as a very serious or reasoned one.

119. *See supra* text accompanying note 18.

120. CONG. GLOBE, 39th Cong., 1st Sess. 1152 (1866).

121. *Id.* app. 256.

122. *Id.* at 2961, 2510.

opined that were suffrage regarded as a property right, its deprivation would violate the due process clause.¹²³ Thus, due process of law meant for these Congressmen a substantive guarantee of life, liberty, and property. Representative Stevens, as previously reported, appears to have so construed the clause in introducing the amendment in the House.

Most Republican Congressmen, particularly those who had been active or associated with the antislavery movement, held similar views. Due process was a term often used before, during, and after the Civil War. Both sides of the slavery controversy employed it to further their cause. Proslavery forces contended slaves were property and therefore owners were protected against loss without due process. In contrast, beginning in the mid-1830's, antislavery activists thought of the due process guarantee as "constitutionalizing" their natural rights beliefs in the sanctity of life, liberty, and property.¹²⁴ They repudiated any notion that a person could be someone else's property; people possessed property in their own selves and the due process clause obligated the national government to secure it in the territories.

The due process concept was a major verbal weapon for the abolitionists. Graham observes that due process

was snatched up, bandied about, "corrupted and corroded," if you please, for more than thirty years prior to 1866. For every black letter usage in court, there were perhaps hundreds of thousands in the press, red schoolhouse, and on the stump. Zealots, reformers, and politicians — not jurists — blazed the paths of substantive due process."¹²⁵

Thus, the political parties committed to eradicating slavery used the term to advance this position. In 1843 the Liberty Party platform declared that the due process clause of the fifth amendment legally secured the inalienable rights referred to in the Declaration of Independence.¹²⁶ The 1848 and 1852 platforms of the Free Soil Party contended the clause both served as a restraint on the federal

123. *Id.* at 1063.

124. J. TENBROEK, *supra* note 53, at 119-22; Kelly, *supra* note 70, at 1053-55; H.J. GRAHAM, *supra* note 53, at 242-65. Concerning the early abolitionist arguments that would later be advanced under due process and other concepts, see A.L. HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 329-32 (1978).

125. H.J. GRAHAM, *supra* note 53, at 250.

"Over the next thirty years [from 1834] due process as a substantive conception became part of the constitutional stock in trade of abolitionism." J. TENBROEK, *supra* note 53, at 121. "In comparison with the concept of equal protection of the law, the due process clause was of secondary importance to the abolitionists. It did, however, reach a full development, and by virtue of its emphasis in the party platforms, a widespread usage and popular understanding." *Id.* at 119-20.

126. *Id.* at 139. The Liberty Party was formed in 1840 and dedicated to antislavery. In 1844, its presidential candidate received 60,000 votes. It continued strong in local elections in 1846 but united in 1848 with the antislavery Whigs and Democrats to form the Free Soil Party. THE COLUMBIA ENCYCLOPEDIA 1212 (1963).

government as well as an obligation that it enforce the inalienable rights set forth in the Declaration.¹²⁷ More significantly, according to the 1856 and 1860 platforms of the Republican Party, the clause denied Congress the power to allow slavery to exist in any territory in the Union. "[I]t becomes our duty to maintain [the due process provision] by legislation against all attempts to violate it."¹²⁸ Some of those involved in the drafting or consideration of the Republican platforms would probably later, as members of Congress or in other political roles, be responsible for framing or adopting the fourteenth amendment. In the 1856 political campaign, "due process of law" was a leading catch phrase of Republican orators.¹²⁹

Due process advocacy was not confined to the antislavery movement. At the time the fourteenth amendment was being framed, insurance and other corporations submitted large numbers of petitions to Congress permeated with due process of law reasoning, urging federal relief from state legislation depriving them of property and economic freedoms.¹³⁰ Commentators have noted the commonality of interests between corporate and antislavery groups: each thought it would benefit from the imposition of due process, just compensation, and privileges and immunities restraints on the states. Both accordingly, lobbied for these positions.¹³¹ The abolition of slavery eliminated the argument over ownership of the person, and all sides could thereafter promote personal freedom under the same reasoning.

This layman's general perception of due process was reflected to a considerable degree in the courts. While the contours of due process are never precise, it was a definable legal concept in 1866, and to this extent the Framers of the amendment spoke with clarity, obviating the need to inquire into their intentions. By then, it was accepted that due process related to required processes and procedures in civil law. In this respect, it was a substantive restraint on legislatures, forbidding them from passing these kinds of oppressive laws. There was also considerable precedent that due process of law went much further and protected ownership. In 1857, Chief Justice Taney invoked substantive due process as one basis for his decision in the

127. J. TENBROEK, *supra* note 53, at 140-41 n.n.3 & 4. This party came into existence in 1847-48 and polled 300,000 votes. Its 1852 candidate for President received over 150,000 votes. It was absorbed into the new Republican Party in 1854. THE COLUMBIA ENCYCLOPEDIA 767 (1963).

128. J. TENBROEK, *supra* note 53, at 141 n.n.5 & 6.

129. H.J. GRAHAM, *supra* note 53, at 80.

130. *Id.* at 83-88.

131. *Id.* at 81.

Dred Scott case. Taney held that Congress had no power to prohibit slavery in specified areas because the “powers over person and property . . . are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them.”¹³² Taney explained this “express” limitation as follows:

And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence [sic] against the laws, could hardly be dignified with the name of due process of law.¹³³

On this point, the Chief Justice was supported by the two Justices who concurred in his opinion. This was not the first time that Taney accepted substantive due process. In speaking for the Court in *Bloomer v. McQuewan*¹³⁴ in 1852, he had asserted that a special act depriving licensees of their right to use property protected by patent “certainly could not be regarded as due process of law.”¹³⁵ However, the case was resolved on other grounds.

Substantive due process was a very viable concept among Justices of the U.S. Supreme Court at the time the fourteenth amendment was framed and ratified. In a federal circuit court case in 1865, United States Supreme Court Justice Grier held that a Pennsylvania statute repealing a railroad corporation charter violated the due course of law provision of the state constitution.¹³⁶ The first High Court ruling on due process after framing of the amendment was *Hepburn v. Griswold*,¹³⁷ issued February 7, 1870, by a court then consisting of seven members, all appointed prior to Congress’ action. For the majority of four, Chief Justice Chase held (among other matters) that holders of contracts for payment in dollars entered into prior to the effective date of the Legal Tender Act of 1862, were deprived by that Act of their property in violation of the fifth amendment due process guarantee. Justice Grier was then no longer a member of the Court, but had been when the case was decided in conference on November 27, 1869, at which time he concurred with the majority. When the contract in *Hepburn* was executed, the only form of money that could be lawfully tendered in payment of private debts was gold or silver coin. To obtain funds for the war effort, the Act authorized the issuance of paper notes, not redeemable in gold or silver coin, and provided that with certain exceptions these notes should “be lawful money and a legal tender in payment of all debts,

132. *Dred Scott v. Sandford*, 60 U.S. 393, 450 (1857).

133. *Id.*

134. 55 U.S. 539 (1853).

135. *Id.* at 553.

136. *Baltimore v. Pittsburgh & C.R.R.*, 2 F. Cas. 570 (C.C.W.D. Pa. 1865) (No. 827).

137. 75 U.S. 603 (1870).

public and private, within the United States." While the litigation was pending, the value of dollars in coin exceeded that in notes.

The majority concluded the due process clause protects holders of contracts to the same extent that it does owners of real property. According to Chase, the clause (as well as other provisions of the fifth amendment) operates "directly in limitation and restraint of the legislative powers conferred by the Constitution."¹³⁸ Justice Miller, for the minority of three, did not deny that the clause was a substantive limitation on the legislature. He objected that the effect on holders was incidental to the purpose of the Congress to further the war effort. President Grant subsequently appointed two Justices who, on May 1, 1871 in *Knox v. Lee*¹³⁹ joined with the three dissenters to reverse *Hepburn*. Writing for the majority in *Knox*, Justice Strong applied the same analysis to the due process issue as Miller had, and Chase followed his prior interpretation.

One of the dissenting Justices in *Hepburn* was Swayne, and he and newly appointed Justice Bradley voted with the majority in *Knox*. Neither should be considered antagonistic to substantive due process. On the contrary, both contended in their dissents in the *Slaughter-House Cases*, decided the following year (and to be discussed subsequently), that the due process clause of the fourteenth amendment secured property and economic interests. On the issue of protecting vested property interests, these Justices would have agreed with the four who made up the majority in *Hepburn*. In *Knox*, Bradley filed a concurring opinion, arguing that Congress had full power to enact the disputed legislation. He did not discuss due process directly. Presumably, Swayne, who did not file a separate opinion in either case, agreed.

Decided in 1872, the *Slaughter-House Cases* were the next major decision involving due process. In 1869, the Louisiana legislature granted a 25-year exclusive privilege to a private corporation it had created to operate a regulated livestock and slaughterhouse business within a specified area of about 1150 square miles, comprising New Orleans and two other parishes. The privilege required that all cattle brought into this area for commercial purposes be slaughtered by the corporation or at its facilities. By a vote of 5-4, the U.S. Supreme Court upheld the monopoly as not in violation of the fourteenth amendment or any other section of the Constitution. The opinion centered on the privileges and immunities clause. With respect to the

138. *Id.* at 624.

139. 79 U.S. 457 (1871).

due process clause, Miller said for the majority that “under no construction of that provision that we have ever seen” can the restraint imposed on the butchers be held to be a deprivation of property within the meaning of that provision.¹⁴⁰

The four dissenters protested that the objective of the fourteenth amendment was to give the Court precisely the power to strike down measures such as the Louisiana statute which encroached upon the ability of citizens to acquire property and pursue business. In his dissent for the four-person minority, Field relied on the meaning of the privileges and immunities clause and did not discuss due process.¹⁴¹ However, Justice Bradley, in his separate dissenting opinion concurred in by Justice Swayne, did comment on it, stating that “a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law.”¹⁴²

It is possible that Field and the other dissenter, Chief Justice Chase, would have found the due process clause violated had this been the critical issue in the case. Field, who agreed with Chase’s opinions in *Hepburn* and *Knox*, became in time the Court’s strongest champion of substantive due process.¹⁴³ A leading abolitionist, Chase, long prior to his appointment to the Court, had advanced the due process concept to support antislavery theory and goals.¹⁴⁴ Justice Clifford concurred in Miller’s opinion in the *Slaughter-House Cases* but he also agreed with Chase in the two legal tender cases.

Nor should Justice Miller’s opinion in the *Slaughter-House Cases* label him as an opponent of substantive due process. A literal reading of Miller’s language suggests no more than that due process did not encompass the activities in question. It did not mean that vested property rights were outside its scope. That Miller was inclined to include such rights is revealed by his decision in a case that was submitted in briefs at the time that the *Slaughter-House Cases* were argued, but remained undecided until the following year.¹⁴⁵ In this case, Iowa’s state-wide prohibition law, which had been enacted in 1851, came under attack as a violation of due process. Miller wrote that a statute prohibiting the sale of property would raise “very

140. 83 U.S. at 80. “To reach the conclusion of Justice Miller and the majority, one must disregard not only all antislavery and all anti-race discrimination theory from 1834 on, but one must ignore virtually every word said in the debates of 1865-66.” H.J. GRAHAM, *supra* note 53, at 319.

141. 83 U.S. at 83.

142. 83 U.S. at 122.

143. B. SIEGAN, *supra* note 1, at 53-54.

144. J. TENBROEK, *supra* note 53, at 61-63; H.J. GRAHAM, *supra* note 53, at 255, 301 n.18.

145. *Bartemeyer v. Iowa*, 85 U.S. 129 (1873).

grave questions" under the fourteenth amendment due process clause. However, Miller decided that the case did not present this issue.

It is not difficult to conclude that during the period when the amendment was framed and ratified and for some time thereafter, a majority of the Supreme Court would have held that due process protected substantively the ownership of property.

At the state level, due process clauses were also applied to strike down legislative interferences with ownership. A leading pre-Civil War decision on due process at the state level is *Wynehamer v. People*,¹⁴⁶ an 1856 New York case in which a state penal statute forbidding the sale of intoxicating liquors owned at the time of enactment (except for medicinal and religious purposes) and requiring the destruction of such as were intended for sale, was declared to violate the due process clause of the state constitution. New York's highest court held that the clause protected the prerogatives of ownership; that is, said one of the Justices, while some regulation is possible, "where [property] rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away."¹⁴⁷

The most influential commentator in the period following the ratification of the amendment, Thomas M. Cooley, also asserted that due process secured property rights. In the first edition of his famous book on constitutional limitations, published in 1868,¹⁴⁸ he concluded that government can violate due process by the limitations it imposes

and not any considerations of mere form. . . . When the government, through its established agencies, interferes with the title to one's property, or with his independent enjoyment of it, and its act is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional defence [sic] which have become established in our system of law, and not by any rules that pertain to forms of procedure merely. . . . Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.¹⁴⁹

146. 13 N.Y. 378 (1856). This decision was not followed in other states, probably for the most part due to the sensitivity of the liquor issue. For a survey of pre-fourteenth amendment cases involving due process or law of the land provisions, see B. SIEGAN, *supra* note 1, at 24-46; R.L. MOTT, *supra* note 68, at 256-77, 275-99.

147. 13 N.Y. at 393.

148. T.M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS* (Repub. ed. 1972) (1st ed. Boston 1868).

149. *Id.* at 356.

Cooley concedes that private rights to property may be interfered with by any branch of government.

The chief restriction is that vested rights must not be disturbed; but in its application as a shield of protection, the term "vested rights" is not used in any narrow or technical sense, as importing a power of legal control merely, but rather as implying a vested interest which it is equitable the government should recognize, and of which the individual cannot be deprived without injustice.¹⁵⁰

The Justice goes on to discuss those property interests protected by due process (or its equivalent, law of the land) clauses. Thus, according to this authoritative commentator, due process at the time the fourteenth amendment came into being provided substantive safeguards for property interests; he rejected the view that it had no more than procedural significance in civil matters.

THE FOURTEENTH AMENDMENT AND *Lochner*

United States Supreme Court Justice Stephen Field explained in 1872 that section 1 of the fourteenth amendment was intended to give practical effect to the "declaration of 1776 of inalienable rights." Writing for himself and the other three dissenters in the *Slaughter-House Cases*, he asserted that it "secures the like protection to all citizens . . . against any abridgement of their common rights [by the States]."¹⁵¹ The foregoing study of section 1 supports this conclusion. This section was drafted to accord substantial protection for liberty at the state level. Each clause of its second sentence was directed toward this end, and, collectively, they constitute a formidable barrier against state excesses and oppressions.

Although this general commitment is quite plain, it does not reveal what activity is safeguarded and to what extent. This inquiry may not be readily resolved for many areas but it can be satisfied for the liberties about which this article is concerned, those relating to property and economics. In the civil area these were liberties of highest concern to those responsible for the framing of section 1 of the fourteenth amendment, as is evident from the views expressed by them as well as the law and commentaries that are most important to understanding it. The Civil Rights Act of 1866, Justice Washington's definition of privileges and immunities, and the commentaries of Blackstone and Kent (the most quoted and respected legal authorities), all emphasize the importance of property ownership in a free society, and the liberties required to make it meaningful, such as the right of contract. There should be little doubt that people supportive of the doctrines expounded or advanced in the said materials would strive to secure the economic freedoms in the fourteenth amendment.

150. *Id.* at 357-58.

151. 83 U.S. at 105.

This background can be summarized briefly as follows:

1. Section 1 of the amendment established the principles of the Civil Rights Act in the Constitution so that they could not be repealed by a subsequent Congress. The Act protected against discriminatory treatment the rights of most United States citizens "to make and enforce contracts . . . [and] to inherit, purchase, lease, sell, hold and convey real and personal property."

2. According to Justice Washington, the privileges and immunities belonging to citizens of all free governments include "the enjoyment of life and liberty, with the right to acquire and possess property of every kind," and with respect to citizens of one state the "right . . . to pass through, or to reside in, any other state for purposes of trade, agriculture, professional pursuits, [and] to take, hold and dispose of property, either real or personal." Washington did not specifically refer to it, but the freedom of contract would be comprehended under the property rights he did mention. Contracts are a form of property in that they are an asset or acquisition (Blackstone's term) that can be purchased, held, and sold. They are requisite likewise for the acquisition, use, and transfer of private property.¹⁵² Both Senator Trumbull and Representative Wilson explained that all of the rights set forth in the Civil Rights Act were included in Washington's definition.

3. The debates disclose that Sir William Blackstone and Chancellor James Kent were highly authoritative for the Congress on the powers and purposes of government. The former declared that "the principal aim of society is to protect individuals in the enjoyment of those [three] absolute rights," which were to personal security, personal liberty, and private property. For Blackstone, the right of property meant the "free use, enjoyment, and disposal [by the owner] of all his acquisitions, without any control or diminution, save only by the laws of the land." The legislature could acquire property but only by giving the owner "full indemnification and equivalent for the injury thereby sustained."¹⁵³ Kent wrote that the right to acquire and enjoy property is "natural, inherent, and unalienable."¹⁵⁴

152. There should be little doubt that Bingham and his colleagues would have accepted John Marshall's position that the right of contract was a natural right. *Ogden v. Saunders*, 25 U.S. 213, 346-47 (Marshall, C.J., dissenting).

153. 1 W. BLACKSTONE, *supra* note 85, at *120, 134-35.

154. 2 J. KENT, *COMMENTARIES ON AMERICAN LAW* 1 (Repub. ed. 1971) (1st ed. New York 1827).

There have been modern theorists, who have considered . . . [the] inequalities of property, as the cause of injustice, and the unhappy result of government and

The legitimacy of the *Lochner* review should be considered in light of this background. Because it incorporates the principles of the Act, resolution of this issue should not differ under section 1 of the fourteenth amendment from what it would be under the statute. *Lochner* involved the question whether the state, under the circumstances involved, could regulate the terms of certain employment contracts. The Civil Rights Act secured the “right . . . to make and enforce contracts,” which would therefore comprehend the *Lochner* situation. Moreover, the Thirty-ninth Congress drafted the Act to protect, among other things, the right of emancipated Blacks to contract freely for the purchase and sale of goods and services. The legislators sought to eliminate state laws that regulated the terms of employment for the Blacks because these laws discriminated against them. Clearly the statute comprehended employment contracts.

The defendant in *Lochner* was an employer who complained that the New York statute deprived him and other bakery employers of the right to contract with employees for more than ten hours of work per day, or a total of sixty per week. Were the statute confined to black employers, there is little question it would invite inquiry under the Act. The state would have the burden to justify different treatment for the black employers. Being a legal equality statute, the state would have the same obligation under it were a group of white citizens similarly restricted.

Such an interpretation would correspond with both the political and economic perspectives dominant in the Thirty-ninth Congress. Pursuant to the explanations given by Bingham and Stevens, a similar burden would be borne by the state under the original version of section 1 that was presented to Congress in February.¹⁵⁵ Because the final version provides no less protection against the states, it would likewise safeguard the bakery employers.

The constitutional outcome should not differ even if it is assumed that the Civil Rights Act was confined solely to racial discrimination, as some contend it was. The liberties enumerated in the statute were of most concern to the Thirty-ninth Congress or they would not

artificial institutions. But human society would be in a most unnatural and miserable condition, if it were instituted or reorganized on the basis of such speculations. The sense of property is graciously implanted in the human breast, for the purpose of rousing us from sloth, and stimulating us to action; and so long as the right of acquisition is exercised in conformity to the social relations, and the moral obligations which spring from them, it ought to be sacredly protected. The natural and active sense of property pervades the foundations of social improvement. It leads to the cultivation of the earth, the institution of government, the acquisition of the comforts of life, the growth of the useful arts, the spirit of commerce, the productions of taste, the erections of charity, and the display of the benevolent affections.

Id. at 256-57.

155. See *supra* text accompanying notes 87-91.

have been named in both the Act and the Freedmen's Bureau Bill. It would be most unlikely that Congress would have secured them under the statutes but not under the Constitution. It would be very odd indeed if the Congress did not intend to safeguard liberty of contract under section 1.

Lochner was an interpretation of the due process clause. The charge that *Lochner* was a lawless construction of that clause is in part grounded on the supposition that due process in the 1860's related only to procedure and not to substance. However, there is no indication in the relevant debates that Bingham and his fellow Republicans so confined it. Among other things, they equated due process with equal application of the laws. The equal protection provision of Bingham's initial version of section 1 was premised on this understanding. For them, due process meant essentially protection against government oppression, which could take many forms.

The courts did not then accord this interpretation to the due process guarantee. During the period in question, most U.S. Supreme Court justices regarded due process as a safeguard for vested property or other material interests but did not extend this protection further into the economic area to include liberty of contract. In time, and for good reason, the Court eliminated this distinction.

The paramount idea of due process, that government cannot deprive people of their fundamental rights, has been a part of Anglo-Saxon law since King John accepted the Magna Charta in 1215. Chapter 39 provides essentially that no freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested unless by the lawful judgment of his peers and by the law of the land. Due process of law became in time synonymous with law of the land. Thus state constitutions usually contained either law of the land or due process clauses. Over the years, English and American courts have expanded the meaning of due process to embody contemporary concerns for the preservation of liberty, at times going no further than protecting process and procedures.

Understandably, due process did not remain limited to securing vested interests. Deciding the issue on a case-to-case basis, as is typical of American jurisprudence, the Supreme Court enlarged the protections of the due process clauses to include, by 1897, the liberty to contract for the production, distribution, and sale of goods and

services. In *Allgeyer v. Louisiana*,¹⁵⁶ Justice Peckham explained the unanimous ruling:

The liberty mentioned in [the due process clause of the fourteenth amendment] means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.¹⁵⁷

Due process does not bar all governmental restraints in the area it impacts; it forbids unjustified restraints. This is consistent with long held English-American conceptions about the limits of governmental powers. Thus, Blackstone defined civil liberty as “no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public.”¹⁵⁸ So too, Justice Washington asserted that the fundamental liberties he designated belonged of right to citizens of all free governments, but were “[s]ubject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.”¹⁵⁹ Congressman Bingham accepted this idea with the likely exception that a very high burden of proof be borne by the government in justifying a restraint.

CONCLUSION

While it involved only the due process provision, the inquiry conducted by the United States Supreme Court in *Lochner* was consistent with the Framers’ understanding of each of the three clauses in the second sentence of section 1. Because both “privileges and immunities of citizens of the United States” and “equal protection of the laws” were provisions not previously construed by the courts, the Framers’ meaning of them should be controlling.

There is greater difficulty in interpreting the due process clause inasmuch as it had judicial meaning when the amendment was framed. By the date of *Lochner*, however, the definition which in the 1860’s went substantively no further than to include vested property rights, had, in the normal course of adjudication, comprehended contracts of employment. This development is not antagonistic to the basic rationale of due process nor an unrealistic extension in meaning. Constitutional adjudication does not preclude sensible movement

156. 165 U.S. 578 (1897).

157. *Id.* at 589.

158. 1 W. BLACKSTONE, *supra* note 85, at *121.

159. *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230). *See also supra* text accompanying note 11.

in interpretation. Thus, when *Lochner* was decided, the constitutional outcome should have been the same, whether the interpretation relied on the judicial or the Framers' meaning of due process.

