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The Concept of Equal Protection of the Laws—A Historical Inquiry†

EARL A. MALTZ*

Standard accounts of the intent of the Framers of the fourteenth amendment argue that the equal protection clause was intended to prevent discrimination against certain groups. This Article contends that this argument is based upon an incorrect reading of the historical evidence. The Article suggests that the primary function of the equal protection clause was to guarantee a particular right — the right to “protection of the laws” — to all persons rather than to outlaw discrimination generally against a specific class or classes.

INTRODUCTION

Although mainstream theories of the intent of the drafters of the equal protection clause differ widely, all share one distinctive characteristic. Reading the clause as guaranteeing the protection of equal laws, each theory sees the concept of equal protection as having been aimed at the elimination of particularly obnoxious classifications. Theorists generally differ only in their descriptions of the nature of the classifications which were intended to be prohibited.

This Article contends that the focus on classification rests on a misreading of the intent of the drafters. Instead, it argues that the main thrust of the equal protection clause was to guarantee to all persons equality in a discrete right — the right to protection of the laws. The Article begins by outlining the difficulties in classification-based theories of the drafter's intent. It then identifies the historical antecedent of the right to protection and links those antecedents to

† Some of the conclusions of this article are inconsistent with positions I have taken in earlier work. I can only hope that the changes reflect greater knowledge and insight.

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the discussions of the fourteenth amendment in the Thirty-ninth Congress. The Article concludes with a discussion of the implications of the theory for intent-based approaches to constitutional law.

THE DIFFICULTIES WITH CONVENTIONAL THEORIES

While varying substantially in detail, mainstream theories of the intent of the drafters of the equal protection clause generally fall into two classes. In the first class are “race-focused” theories. The other group includes what might be called open-ended theories.

Race-focused Theories

The basic premise of the race-focused theories is quite simple: the Thirty-ninth Congress intended to prohibit only those state actions which discriminate on the basis of race. Race-focused theorists differ on the precise extent of this prohibition; while Justice Rehnquist, for example, would read the fourteenth amendment to prohibit *all* discrimination on the basis of race,¹ Raoul Berger sees the drafters as having intended to prohibit only certain types of racial discrimination.² Regardless of the differing views on the extent of prohibition, the basic premise remains the same — the drafters intended to reach only classifications which were based on race or national origin.

To support their position, race-focused theorists rely primarily on contextual arguments. They argue that the main concern of Congress was protecting the civil rights of newly-freed slaves in southern states, and that this concern is reflected not only in the discussion of the fourteenth amendment itself, but also in other legislation and discussions during the first session of the Thirty-ninth Congress. Thus, given the fact that, on its face, the meaning of “equal protection of the laws” is unclear, race-focused theorists contend that the most plausible conclusion is that Congress intended to prohibit only racial discrimination.

Even in purely contextual terms, race-focused theories suffer from substantial difficulties. Admittedly, much of the discussion of the proposed equal protection clause focused on the infamous black codes;³ however, the debates contain a number of references to the mistreatment of abolitionists and white unionists.⁴ Given these references, race-focused theories seem unduly limited.

Even more damning are the textual arguments against the race-

1. See *Fullilove v. Klutznick*, 448 U.S. 448, 522-27 (1980) (Rehnquist, J., joining dissenting opinion of Stewart, J.)

2. See R. BERGER, *GOVERNMENT BY JUDICIARY* 18-19 (1977).

3. For a description of the black codes, which sharply reduced the rights of the freed slaves, see T. WILSON, *THE BLACK CODES OF THE SOUTH* (1965).

4. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 158, 1065 (1865) (remarks of Rep. Bingham).

focused theories. The drafters of the fourteenth amendment were capable of addressing racial discrimination directly and specifically when they chose to do so. For example, both the Freedman's Bureau Bill and Civil Rights Bill of 1866 explicitly prohibit discrimination on the basis of race.⁵ Moreover, the current language of section 1⁶ was adopted as a substitute for a simple prohibition against racial discrimination in civil rights.⁷ Thus, the only plausible conclusion is that the drafters of the fourteenth amendment apparently had some other goal in mind.

Open-ended Theories

Open-ended theories of the drafters' intent provide the major alternative to race-focused analysis. Open-ended theorists argue that, rather than simply prohibiting discrimination against some particular group, the equal protection clause was intended to embody the general concept that unfair discrimination against any class was unconstitutional.⁸ Their arguments are based upon the language of the equal protection clause and/or the drafters' perceived reliance on natural law concepts of equality. Open-ended theorists differ on precisely what concept of fairness is embodied in the equal protection clause; among the more popular theories are that the clause prohibits discrimination against "discrete and insular minorities"⁹ and that the clause prohibits classifications which stigmatize the disadvantaged group.¹⁰ The basic theme of open-ended theories, however, is always the same: the drafters' intention was to constitutionalize an open-ended theory of fair classification whose details would be filled in over time.

While facially plausible, such theories suffer from insuperable contextual difficulties. The major problem is the impact which an open-ended fourteenth amendment would have on the allocation of authority between the state and national governments. Of course, the entire point of section 1 was to impose some new constraints on state

5. For the text of the relevant portion of the Civil Rights Bill of 1866, see CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866). For the text of the relevant portion of the Freedman's Bureau Bill, see CONG. GLOBE, 39th Cong., 1st Sess. 3118 (1866).

6. U.S. CONST. amend. XIV, § 1.

7. See B. KENDRICK, JOURNAL OF THE JOINT COMMITTEE ON RECONSTRUCTION 106 (Negro Press ed. 1969) [hereinafter cited as J. JOINT COMMITTEE].

8. See, e.g., J. BAER, EQUALITY UNDER THE CONSTITUTION 73-104 (1983); Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93, 126-37 (1983).

9. See, e.g., J. ELY, DEMOCRACY AND DISTRUST 135-79 (1980).

10. See J. BAER, *supra* note 8, at 73-103.

authority. But while under a race-focused approach, the new constraints would be rigidly circumscribed, open-ended theories raise the possibility that some branch of the national government has the authority to use an amorphous, changing principle to apply ever-increasing restraints on state autonomy. Thus, if the drafters of the equal protection clause in fact intended that it be open-ended, they must have contemplated a veritable revolution in American federalism.

The political ideology of the members of the Thirty-ninth Congress makes it extremely unlikely that they advocated such a reallocation of authority. Admittedly, the Civil War had sounded the death knell for the most extreme theories of state sovereignty; moreover, the exigencies of the Civil War had inspired unprecedented assumptions of power by the central government. But all Congressmen — even the most radical Republicans — remained committed to the concept of federalism.¹¹ Further, moderate Republicans, who effectively controlled the first session of the Thirty-ninth Congress,¹² were committed to the concept of a reconstructed nation where state governments retained effective control over most matters. This conviction emerged dramatically in the Senate debate over the appropriateness of decisive federal action to combat the spread of cholera.

A bill was introduced which would have formed the Secretaries of War, Navy, and Treasury into a commission with powers to impose stringent quarantine measures at ports of entry, to establish sanitary cordons in interior areas, and to use the military to enforce the commissioner's decrees.¹³ If ever there were occasions for centralized coordinated intervention, the battle against cholera was one. As both supporters and opponents ruefully noted, cholera was a respecter of neither state lines nor states' rights.¹⁴ Further, a rigid quarantine in the port of New York, for example, would be useless if Philadelphia were lax in its health measures.¹⁵ Nonetheless, the bill was defeated by a coalition of Democrats and moderate and conservative Republicans. The essence of their objections was captured by John Grimes, the influential Senate Moderate from Iowa who stated:

[T]he time is gone. . .to legislate in the manner which [the cholera] bill proposes. During the war. . .we drew to ourselves. . .as the Federal government powers which had been considered doubtful by all and denied by many. . . . That time. . .has creased and ought to cease. Let us go back to

11. See H. GRAHAM, *EVERYMAN'S CONSTITUTION* 312 (1968).

12. For fuller explanations of the complex political situation in the early Reconstruction Era, see M. BENEDICT, *A COMPROMISE OF PRINCIPLE* (1974); C. MCKITTRICK, *ANDREW JOHNSON AND RECONSTRUCTION* (1960).

13. See generally H. HYMAN, *A MORE PERFECT UNION* 393-96 (1973).

14. See *CONG. GLOBE*, 39th Cong., 1st Sess. 2484 (1866) (remarks of Sen. Edmunds); *id.* at 2485 (remarks of Sen. Morrill).

15. See *id.* at 2445, 2585.

the original condition of things and allow the States to take care of themselves. . . . Yes, sir, take care of their own cholera. My state will take care of its cholera.¹⁶

The same commitment to federalism and the concept of state autonomy was evident in the attitude of the Moderates toward civil rights measures. These concerns emerged most dramatically in the debates of an early proposal to arm Congress with authority to "secure to all persons. . . equal protection in the rights of life, liberty and property." The proposal was postponed (never to reemerge) after more conservative Moderates argued that it would unduly concentrate authority in the hands of the federal government.¹⁷

Given this commitment to federalism, it is unlikely that the drafters intended the type of revolutionary changes envisioned by open-ended theorists. Further, were such changes intended, the fourteenth amendment would have been an unlikely vehicle. The amendment was not simply, or even primarily, intended to be a guarantee of individual rights; instead, it was designed to be the cornerstone of a comprehensive Reconstruction program around which all Republicans would unite in the elections of 1866.¹⁸ As such, its form reflected a delicate series of political compromises designed to attract not only Radicals, but also the more conservative of the Moderates. Inclusion of an open-ended provision, with its drastic implications for federalism, would have alienated important segments of the Republican Party. The fourteenth amendment was intended to be a unifying force, thus deliberate inclusion of such a controversial provision seems unlikely.

One possible explanation for the language of section 1 is that it was a concession to the Radicals in order to gain their support for the remainder of the proposal. This theory is implausible for a variety of reasons. First, the Radicals plainly considered other sections critical. For example, the archradical Thaddeus Stevens stated that section 2 was, "the most important in the [proposed amendment]."¹⁹ Further, resisting Moderate efforts to remove section 3 as reported by the Joint Committee on Reconstruction, he snarled, "give us section three or give us nothing."²⁰

16. *Id.* at 2446.

17. *See infra* notes 66-79 and accompanying text.

18. *See, e.g.,* M. BENEDICT, *supra* note 12, at 169-87; J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 91-116 (1956); C. MCKITRICK, *supra* note 12, at 326-64; Maltz, *The Fourteenth Amendment as Political Compromise: Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933 (1984).

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

20. *Id.* at 2544.

Second, and even more decisive, is the fact that the current wording of section 1 is clearly of Moderate origin. In the Joint Committee on Reconstruction, the language was adopted in place of wording which would have prohibited “discrimination . . . as to the civil rights of persons because of race, color, or previous condition of servitude.”²¹ The substitution was supported in the Committee by all of the Democrats and almost all of the moderate Republicans voting²² — the very men who were least likely to countenance drastic alterations in the balance of power between the state and national governments. By contrast, the majority of the opposing votes came from the more radical elements of the Joint Committee.²³

Summary

In short, neither race-focused theories nor open-ended theories of the equal protection clause provide persuasive explanations of the drafters’ intent. Race-focused theories are inconsistent with the language of the equal protection clause; by contrast, while seemingly consistent with that language, open-ended theories are implausible in view of the context in which the fourteenth amendment was adopted. The remainder of this Article describes an alternative theory of the drafters’ intent which, I believe, avoids both of these problems.

EQUALITY AND PROTECTION IN NINETEENTH-CENTURY THOUGHT

The Concept of Equality

The rhetoric of equality figured prominently in the Congressional debates over section 1 of the fourteenth amendment. This rhetoric, however, did not simply emerge suddenly in the post-war era. Instead, it had its origins in the antebellum campaign of the abolitionists, and was later adopted in the pre-war era by the nascent Republican Party. Thus, in order to understand the usages of the term “equality” in the post-war debates, one must first examine the

21. J. JOINT COMMITTEE, *supra* note 7, at 106 n.135.

22. The three Democrats were Senator Reverdy Johnson and Representatives Andrew Rogers and Henry Grider. The moderate Republicans favoring the change were Senator George Williams and Representatives John Bingham, Roscoe Conkling, and Henry Blow. The only Moderate defector was Senator John Grimes.

The change was also supported by three Radicals — Representatives Thaddeus Stevens, Elihu Washburne, and George Boutwell. Their support is best understood as an attempt to placate the Moderates and gain support for the Radical-sponsored section 3. See Maltz, *supra* note 18, at 963-64.

23. The three Committee members who opposed the change were Senators John Grimes and Jacob Howard and Representative Justin Morrill. Howard was a thoroughgoing Radical. See J. JAMES, *supra* note 18, at 45. Morrill’s politics were more complex; but although he sometimes sided with Moderates, he was more often in the Radical camp during the first session of the Thirty-ninth Congress. See M. BENEDICT, *supra* note 12, at 351.

arguments put forward during the half century immediately preceding the Civil War.²⁴

The theory of racial equality was, of course, central to the abolitionists' claim that slavery should be abolished immediately. This theory was put in its simplest form in the instructions to Theodore Weld which accompanied his commission as an agent of the American Anti-Slavery Society in 1833:

People of Color are to be emancipated and recognized as citizens, and their rights secured as such, equal in all respects to others, according to the cardinal principle of the American Declaration of Independence. Of course, we have nothing to do with any equal laws which the states may make, to punish vagrancy, idleness, and crime, either in whites or blacks.²⁵

Taken at face value, statements such as this implied that all legal distinctions based on color should be abolished, a theory of "total racial equality." Indeed, a minority of abolitionists (and later Republicans) pressed this position.²⁶ Those making such arguments, however, were immediately confronted with a powerful countervailing social force—the widespread negrophobia which gripped early nineteenth-century America.²⁷ This phenomenon worked against advocates of total racial equality in two ways. First, the distrust of blacks shaped the political opinions of many who were in the forefront of the antislavery movement.²⁸ Second, even if a particular politician believed personally in the concept of total racial equality, he might likely be loathe to press that position for fear of incurring adverse political consequences.²⁹

These factors led most antislavery activists to couch their position in different terms. Rather than total racial equality, a "limited absolute equality" was more commonly advocated. The argument was

24. For more detailed discussions of these theories, see H. GRAHAM, *supra* note 11, at 152-242; J. TENBROEK, *EQUAL UNDER LAW* 33-142 (enlarged ed. 1965).

25. 1 *LETTERS OF THEODORE DWIGHT WELD, ANGELINA GRIMKE WELD, AND SARAH GRIMKE* 126 (G. Bainer & D. Dumond eds. 1934).

26. See Brief for Plaintiff, *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 201-04 (1849), reprinted in CHARLES SUMNER, *HIS COMPLETE WORKS* 51-100 (1849); C. OLCOTT, *TWO LECTURES ON THE SUBJECT OF SLAVERY AND ABOLITION* (1838); S.P. Chase, *The Address and Reply on the Presentation of a Testimonial to S.P. Chase by the Colored People of Cincinnati* (1845).

27. See, e.g., E. FONER, *FREE SOIL, FREE LABOR, FREE MEN* 261-300 (1970); L. LITWACK, *NORTH OF SLAVERY* 15-23 (1961); V. J. VOGLI, *FREE BUT NOT EQUAL* 1-9 (1967).

28. See, e.g., L. LITWACK, *supra* note 27, at 269-70; Speech of Hon. Lyman Trumbull on the Politics of the Day, in Springfield, Ill. (June 19, 1857); *CONG. GLOBE*, 36th Cong., 1st Sess. 1683 (1860) (remarks of Sen. Harlan).

29. See, e.g., E. FONER, *supra* note 27, at 261-62; L. LITWACK, *supra* note 27, at 269-70.

based on the proposition that all men were equally entitled to certain natural rights—life, liberty, and property. The antislavery forces argued that slavery was inconsistent with natural law because the institution denied these rights to a certain class of men—the black slaves.³⁰ The first edition of the *Anti-Slavery Record* provides a classic example of this position:

[W]hat do abolitionists mean when they cite the Declaration of Independence for the proposition “that all men are created equal?” That men are physically equal? That they are equal in wealth and learning? That criminals shall not be deprived of their liberty? No. They mean, according to the plain dictates of common sense, that, in coming into this world, and going through it, all men shall have an equal and fair chance to exercise all their powers of body and mind for their own happiness. Of course, they mean that no man shall encroach upon another. That one man shall have as good a right to acquire wealth as another. That one parent shall have as good a right to the services of his own children as another. That every wife shall be in subjection to her own husband, and to no one else; and that no man shall be deprived of his liberty or an alleged crime “without due process of law.” Slavery violates natural equality in all these respects; and in the last respect, it is not only contrary to our Declaration of Independence, but to the Constitution of the United States.³¹

Tactically, the use of the model of limited absolute equality yielded considerable advantages to the antislavery movement. Perhaps most importantly, the basic concept of limited absolute equality was deeply imbedded in the American political/legal culture. The theory was enshrined not only in the Declaration of Independence, but in many state constitutions as well. The Pennsylvania Constitution of 1790 contained a typical provision:

[A]ll men are born equally, free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending property and reputation, and of pursuing their own happiness.³²

Thus, one sees two concepts of equality were expressed by abolitionists and Republicans in the antebellum era. The total racial equality theory argued that race was simply an inappropriate basis for governmental classification. The second, the more popular and politically palatable conception of limited absolute equality suggested that all men had certain “natural rights,” derived from either general natural law, the Declaration of Independence, and/or the Constitution, and that government could no more deprive blacks of these rights than it could deprive any other class of men of these

30. See, e.g., E. FONER, *supra* note 27, at 291-92; R. NYE, *FETTERED FREEDOM* 229-30 (1963).

31. 1 *ANTISLAVERY RECORD* 8 (1835). See also CONG. GLOBE, 36th Cong., 1st Sess. 1685 (1860) (remarks of Sen. Wilson); Fisher, *Of the Distinction Between Natural and Political Rights*, 86 *NEW ENGLANDER* 1 (1864).

32. PA. CONST. art. IX, § 1, *reprinted in* 8 W. SWINDLER, *SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS* 292 (1979); see also, e.g. OR. CONST. art. 1, § 1, *reprinted in* 8 W. SWINDLER, *supra*, at 2050; VA. CONST. art. 1 § 1, *reprinted in* 10 W. SWINDLER, *supra*, at 68.

rights. The key question is which concept of equality the drafters of the fourteenth amendment intended to embody in their proposal.

In answering this question, the precise wording of the amendment is important. Section 1 does not mandate equality of rights generally or even equality before the law. It merely requires that states provide "equal protection of the laws." As set forth below, the concept of equal protection had a generally accepted special meaning in the mid-nineteenth century, related to, but analytically separate from, the notion of equal rights generally.

The Origins of the Right to Protection

Like the idea of limited absolute equality, the concept of a right to protection is deeply rooted in Anglo-American jurisprudence.³³ The basic underpinning of the concept is the social contract theory which dominated nineteenth-century political thought. Under this theory, the right to protection by the sovereign authority is the *quid pro quo* which inhabitants received for giving up some of the rights which they possessed in the state of nature. In the shorthand of the era, allegiance is the obligation of the citizen and protection the obligation of the sovereign.³⁴

The allegiance/protection equation made early appearances in even earlier British legal materials. In 1608, Lord Coke made the reciprocal obligations of allegiance and protection an explicit point in his opinion in *Calvin's Case*.³⁵ Blackstone later made much the same point, arguing that

[T]he original contract of society [is] that the whole should protect all its parts, and that every part should pay obedience to the will of the whole; or, in other words, that the community should guard the rights of each individual member, and that (in return for the protection) each individual should submit to the laws of the community.³⁶

and that

[T]he principal aim of society is to protect individuals in the enjoyment of . . . rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance

33. For other discussions focusing on the content of the concept of protection, see Avins, *The Equal "Protection" of the Laws; The Original Understanding*, 12 N.Y.L.F. 385 (1966); Willing, *Protection by Law Enforcement: The Emerging Constitutional Right*, 35 RUTGERS L. REV. 1 (1982).

34. See, e.g., KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870 passim* (1978); Speech of Harrison Gray Otis Yates, *Rights of Colored Men to Suffrage, Citizenship, and Trial by Jury* 47 (1838).

35. 7 COKE 1 (1608).

36. 1 W. BLACKSTONE, *COMMENTARIES* *47.

and intercourse, which is gained by the institution of friendly and social communities.³⁷

The same concepts were equally influential on the American scene. Theorists as diverse as John Calhoun and Francis Lieber plainly subscribed to the allegiance/protection equation.³⁸

Kent's Commentaries also featured the right of protection prominently noting that “[t]he personal security of every citizen is protected from lawless violence by the arm of the government and the . . . penal code”;³⁹ . . . that “[e]very person is entitled to be protected in the enjoyment of his property”; and “[t]his duty of protecting every man’s property by means of just laws, promptly, uniformly, and impartially administered, is one of the strongest and most interesting of obligations on the part of government. . . .”⁴⁰ Similarly, many early state constitutions included specific provisions guaranteeing the right to protection,⁴¹ with Ohio being the first to use the term “equal protection” in 1850.⁴² Finally, in discussions of the privileges and immunities clause of article IV of the federal Constitution, [the comity clause] cases such as *Corfield v. Coryell*⁴³ and *Campbell v. Morris*⁴⁴ identified a right to government protection of person and property analytically distinct from such interests as the rights to pursue lawful occupations and the right to acquire and hold real and personal property.⁴⁵

Given the prominence of the right to protection in nineteenth-century thought, the key question is what interests were embraced by that right. This question in turn can be broken into two components. The first is the issue of what persons could effectively assert a right to protection of the law. From the contract-based origin of the right, one might assume that only citizens could claim this protection.

37. 2 W. BLACKSTONE, COMMENTARIES *124.

38. See 2 F. LIEBER, MISCELLANEOUS WRITINGS 177-78 (1880); remarks of John C. Calhoun, April 2, 1836, reprinted in 13 PAPERS OF JOHN C. CALHOUN 128 (Wilson ed. 1980).

It should be noted that despite his position on the concept of the reciprocal obligations of allegiance and protection, Calhoun did not base his theory on the concept of natural rights. See generally J. CALHOUN, A DISQUISITION ON GOVERNMENT (Poli. Sci. Classics ed. 1947).

39. 2 J. KENT, COMMENTARIES *15.

40. 2 J. KENT, COMMENTARIES *331, 333-34.

41. R.I. CONST. art. 1, § 2, reprinted in 8 W. SWINDLER, *supra* note 32, at 387; VA. CONST. art. 1, § 3, reprinted in 10 W. SWINDLER, *supra* note 32, at 68.

42. OHIO CONST. art. 1, § 2, reprinted in 7 W. SWINDLER, *supra* note 32, at 558.

43. 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230).

44. 3 H. & McH. 535, 554 (Md. 1797).

45. See also 2 W. BLACKSTONE, COMMENTARIES app. 77-79 (Tucker ed. 1803) (although slaves should be freed, they should not be allowed to hold real property; their limited rights, however, should be under “protection of the laws”); Letter from William Heighton to George Stearns (Feb. 27, 1865), in *The Equality of Men Before the Law Claimed & Defended in Speeches by William D. Kelley, Wendell Phillips and Frederick Douglas* (Boston 1865).

Such an assumption would, however, be incorrect. Relying on a concept of limited-implied allegiance, nineteenth-century authorities were unanimous in concluding that lawfully resident aliens also had a right to the protection of the sovereign authority. Only outlaws and slaves were denied this right.⁴⁶

The other central issue concerns the interests that were covered under the rubric of the right to protection of the law. Obviously, the right to protection must embrace the ability to be protected from personal aggression by other persons within the sovereign's territory, as well as to hold property within that territory free from such aggression. The right comes most clearly into play when the government is called upon to resist a hostile invasion; with respect to citizens, mid-nineteenth-century thought also clearly posited a right to protection of one's government even while within the territorial jurisdiction of some other government.⁴⁷

Another strand of the nineteenth-century concept of the right to protection derives from the somewhat ambiguous position of government itself. On one hand, government exists largely to protect life, liberty, and property. But on the other, the government is potentially one of the greatest threats to these interests. Personal liberty is directly threatened by the power to imprison, and the right to take property by the powers of taxation and eminent domain.⁴⁸

Kent dealt with this problem by describing a right to protection *from* government as well as *by* government. In the context of life and liberty, he viewed the former right as being embodied in the procedural protections of the Bill of Rights as well as the prohibition against cruel and unusual punishment. In the context of property interests, the citizens' right to protection was viewed as including a right to be free from "unequal and undue assessments" and to obtain compensation for property seized for public use.⁴⁹

In the landmark decision of *Ex Parte Milligan*,⁵⁰ decided contemporaneously with the drafting of section 1, the majority opinion relied eloquently on this concept. Finding that a military tribunal had no jurisdiction to try and convict a civilian in a loyal state, Justice

46. See, e.g., *Clark v. Morey*, 10 Johns 68 (N.Y. 1813); *Russell v. Skipwith*, 6 Binn. 241 (Pa. 1814); J. KENT, COMMENTARIES *62-63; 2 W. BLACKSTONE, COMMENTARIES app. 98 (Tucker ed. 1803).

47. See CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866) (remarks of Rep. Bingham); 10 Op. Att'y Gen. 382, 404 (1862).

48. See generally J. CALHOUN, *supra* note 38.

49. J. KENT, COMMENTARIES *331-332, 339.

50. 71 U.S. (4 Wall.) 2 (1866). See also 10 Op. Att'y Gen. 382, 393-94 (1862).

Davis argued:

[I]t is the birthright of every American citizen when charged with crime to be tried and punished according to law. The power of punishment is alone the means through which the laws have provided for the purpose and if they are ineffectual, there is an immunity from punishment. . . By the protection of the law human rights are secured; withdraw that protection and they are at the mercy of wicked rulers, or the clamor of an excited people.⁵¹

In short, by the mid-nineteenth century, American jurisprudence and political thought clearly recognized the existence of an individual right to protection. Further, this right was multifaceted, encompassing not only a right to be protected *by* government but also *from* government. The next subsection will examine the use of that concept in the pre-Reconstruction debates over black rights.

The Right to Protection and the Rights of Blacks

Not surprisingly, abolitionists seized on the right to protection as a central feature of their argument against slavery. Protection of the laws was viewed as the antithesis of slavery itself. Thus, the grant of equal protection to blacks would automatically bring an end to the institution. From the abolitionist perspective, the necessary protection for blacks had three components. First, the law should formally provide that the life, liberty, and property of blacks would be protected. Second, blacks should have access to the courts to gain redress for violation of these protective laws. Third, the government should provide actual physical protection for blacks and their fundamental rights. Henry Stanton's 1837 argument against the maintenance of slavery in the District of Columbia is particularly evocative:

Having robbed the slave of himself, and thus made him a thing, Congress is consistent in denying to him all of the protection of the law as a man. His labor is coerced by laws of Congress; no bargain is made, no wage is given. His provender and covering are at the will of the owner. His domestic and social rights are as entirely disregarded in the eye of the law as if the Deity had never instituted the enduring relations of husband and wife, parent and child, brother and sister. There is not the shadow of legal protection or the family state among the slaves of the district. . .neither is there any real protection for the lives and limbs of the slaves. . . . No slave can be a party before a judicial tribunal. . .in any species of action against any person, no matter how atrocious may have been the injury received. He is not known to the law as a person: much less, a person having civil rights. The master may murder by system, with complete immunity, if he perpetrates his deeds only in the presence of colored persons. . . . Congress should immediately restore to every slave, the ownership of his own body, mind, and soul, transfer from things without rights to men with rights. . .[t]he slaves should be legally protected in life and limb, in his earnings, his family and social relations, and his conscience. To give impartial legal protection in [the] District to all of its inhabitants would annihilate slavery. Give the slave then, equal legal protection with his master, and at its first approach

51. 71 U.S. at 118-19.

slavery and the slavery trade flee in panic as the darkness before the full-orbed sun.⁵²

Although the comity clause was generally featured more prominently, the right to protection was also at times used by antebellum Republicans to criticize restrictions on free blacks. In this respect the 1858 debate over the admission of Oregon was typical. The proposed state constitution of Oregon outlawed slavery but also prohibited the immigration of free blacks into the state. In addition, the constitution barred all blacks from access to the courts. Most of the race-related criticism of the proposed constitution focused on the claim that the immigration restriction violated the comity clause. Some Republicans, however, also argued that even if the immigration restriction was acceptable, the ban in court access would be objectionable on the independent ground that it effectively denied the protection of law to blacks who might legitimately be in Oregon on temporary business.⁵³

But the abolitionists did not seek protection only for blacks; they also sought it for themselves. The doctrine of abolitionism was extremely unpopular, not only in the slave states, but in many free states as well. Thus, abolitionists were often subject to mob violence and sought protection for their own rights of life, liberty, and property. Often, such protection was denied by unsympathetic government agencies, who at times even encouraged mob action.⁵⁴

Abolitionist literature is replete with complaints of this lack of government protection. Typical was the plea of L.P. Lovejoy, one of the martyrs of the abolitionist movement who was a victim of mob violence in Alton, Illinois in 1837. Shortly before his death, he voiced this argument to a delegation of the people of Alton:

I . . . have not desired, or asked any compromise. I have asked for nothing but to be protected in my rights as a citizen—rights which God has given men, which are guaranteed to me by the Constitution of my country. Have I, sir, been guilty of any infraction of the laws? Whose good name have I injured? When and where have I published anything injurious to the reputation of Alton? . . . What, sir, I ask has been my offense? Put your finger upon it—define it—and I can stand ready to answer for it. If I have committed any crime, you can easily convict me. You have public sentiment in your favor. You have your juries, and you have your attorney. . . and I have

52. Remarks by Henry Stanton before the Massachusetts House of Representatives (Feb. 23 & 24, 1837), reprinted in E. BORMANN, *FORERUNNERS OF BLACK POWER: THE RHETORIC OF ABOLITION* 63-64 (1971). See also C. OLCOTT, *supra* note 26, at 44; *Philanthropist*, Jan. 27, 1837, at 3, col. 2.

53. See CONG. GLOBE, 35th Cong., 1st Sess. 1967 (1858) (remarks of Sen. Wilson).

54. See R. NYE, *supra* note 30, at 174-218.

*no doubt you can convict me. But if I have been guilty of no violation of law, why am I hunted up and down continually like a partridge upon the mountains? Why am I threatened with the tar barrel? Why am I waylaid every day, and from night to night, and my life in jeopardy every hour? . . . I plant myself, sir, down on my unquestionable rights, and the question to be decided is, whether I shall be protected in the exercise and enjoyment of those rights. . . whether my property shall be protected, whether I shall be suffered to go home to my family at night without being assailed, and threatened with tar and feathers, and assassination; whether my afflicted wife, whose life has been in jeopardy, from continued alarm and excitement, shall night after night be driven from a sick bed into the garret to save her life from the brickbats and violence of the mobs. . . .*⁵⁵

In short, references of the right to protection of the law and equal protection were prominent in the arguments of antebellum antislavery activists. The structure of these arguments, however, also reflected the limits of the nineteenth-century conception of equal protection as a vehicle for ensuring racial equality. For this right was largely parasitic outside a very narrow compass; the government's obligation to provide protection was triggered only by the existence of some other legal interest. Such interests might be established extrinsically either by natural or positive law. But the key point is that the right to protection (or equality of protection) was not itself commonly viewed as implying a generalized right to equal treatment.

This point emerged clearly in *Roberts v. City of Boston*.⁵⁶ *Roberts* was an 1849 challenge to the maintenance of segregated schools in Boston. Arguing for the plaintiff, Charles Sumner relied in part on the provision of the Massachusetts Constitution which provided that “[A]ll men are born free and equal and have certain natural, essential, and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties.” This provision, Sumner contended, established the proposition that whites and blacks were “equal before the law” and, since in his view segregated schools were by their nature unequal, the maintenance of separate schools violated the state constitution.⁵⁷

Chief Justice Shaw, although accepting the argument that the state constitutional provision established equality before the law, rejected the claim that the maintenance of segregated schools was unconstitutional. Shaw concluded:

The great principle. . . is that by the constitution and laws of Massachusetts all persons. . . are equal before the law. This, as a broad general principle. . . is perfectly sound; . . . But when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the

55. J.C. LOVEJOY & O. LOVEJOY, MEMOIR OF THE REV. ELIJAH LOVEJOY: WHO WAS MURDERED IN THE DEFENSE OF LIBERTY OF THE PRESS AT ALTON, ILLINOIS, NOV. 7, 1837, at 279-80 (1838). See also *The Liberator*, May 31, 1844, at 2, col. 1; *The Emancipator*, July 22, 1834, at 2, col. 2.

56. 59 Mass. (5 Cush.) 198 (1849).

57. Brief, *supra* note 26, at 55-66, 70-81.

same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, *are equally entitled to the paternal consideration and protection of the law, for their maintenance and security.* What those rights are, to which individuals, in the infinite variety of circumstances by which they are surrounded in society, are entitled, must depend on laws adapted to their respective relations and conditions.⁵⁸

The standard analysis of the *Roberts* case describes Sumner as a hero whose argument presaged the conceptions of racial equality later embodied in the fourteenth amendment and Shaw as a villain whose retrograde views on the nature of equality were to haunt American jurisprudence for one hundred years.⁵⁹ But in structure Shaw's opinion simply reflects the dichotomy between the concepts of equality of rights and equality of protection respectively, which appears in antebellum arguments. All men—black or white—are equally entitled to protection of the laws to enforce their legal rights; but unless a particular interest can be classified as a natural right, the legislature may withhold that interest from any class at will. Since public education is not a natural right, the legislature would not violate the principle of limited absolute equality even if blacks were totally excluded.

In short, antebellum concepts of limited absolute equality and protection of the laws suggest that the equal protection clause was intended to have a somewhat limited scope. The next subsection will examine the views of the principle proponent of the equal protection language in the Thirty-ninth Congress.

THE VIEWS OF JOHN BINGHAM

Any serious attempt to understand the intended meaning of the equal protection clause must closely examine the theories of John A. Bingham, an Ohio Republican, who served in the House of Representatives from 1855 to 1863 and 1865 to 1876. Bingham initially proposed a constitutional amendment to secure "equal protection." Further, he continually pressed for such an amendment in the face of initial defeat in the Joint Committee on Reconstruction and on the House floor. Thus, to the extent that one can attribute authorship of legislation to any one person, the credit for section 1 of the fourteenth amendment belongs to Bingham.

58. 59 Mass. (5 Cush.) at 206 (emphasis added).

59. See J. BAER, *supra* note 8, at 77; H. HYMAN & W. WIECEK, *EQUAL JUSTICE UNDER LAW* 95-96 (1982); L. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 108-17 (1957).

The Pre-Reconstruction Era

Bingham's interest in the concepts embodied in section 1 began to emerge well before the Reconstruction era. One can trace the evolution of his thinking in this area to a number of speeches which he gave in the House between 1856 and 1862. These speeches contain references to all of the major elements of section 1. For example, in 1858 Bingham argued that the privileges and immunities language of the comity clause placed natural rights — the rights to life, liberty, and property — beyond the control of the state governments.⁶⁰ And in 1856 he attributed a substantive content to the due process clause of the fifth amendment; attacking a Kansas territorial statute which made it illegal to utter any "sentiment calculated to induce slaves to escape from the service of their masters," he argued that the statute was unconstitutional because it "abridges the freedom of speech and of the press, and deprives persons of liberty without due process of law, or any process but that of brute force."⁶¹

For purposes of understanding the equal protection clause, two aspects of Bingham's early speeches are particularly important. First, the concept of equality was a consistent theme of Bingham's early speeches. These speeches, however, reveal that he adhered to the concept of limited absolute equality rather than total racial equality. This point was revealed clearly in 1859 when he stated:

Nobody proposes or dreams of political equality any more than of physical or mental equality. It is as impossible for men to establish equality in these respects as it is for "the Ethiopian to change his skin." Who would say that all men are equal in stature, in weight, and in physical strength; or that all are equal in natural mental force, or in intellectual requirements? Who, on the other hand, 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 crimes; nor of his property against his consent and without due compensation. . . [E]quality of all to the right to live; to the right to know; to argue and to utter, according to conscience; to work and enjoy the product of their toil, is the rock on which the Constitution rests—its sure foundation and defense. . . . The charm of that Constitution lies in the great democratic idea which is embodied, that all men, before the laws, are equal in respect of those rights which God gives and no man or State may rightfully take away except as a forfeiture for crimes.⁶²

The second key point is that Bingham plainly viewed the right to protection as a separate right. In 1857 he stated that, "it must be apparent that the outward equality of all *and the equal protection of each*, are principles of any Constitution, which ought to be observed and enforced."⁶³ In 1859, he defined the privileges and immunities of

60. See, e.g., CONG. GLOBE, 35th Cong., 2d Sess. 985-86 (1859); CONG. GLOBE, 34th Cong., 3d Sess. app. 140 (1857).

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

62. CONG. GLOBE, 35th Cong., 1st Sess. 985 (1859).

63. CONG. GLOBE, 34th Cong., 1st Sess. app. 140 (1857).

citizens of the United States as including both "the rights of life, liberty and property, and their due protection in the enjoyment thereof by law."⁶⁴

Thus, the basic elements which eventually emerged in section 1 were clearly evident in Bingham's thought prior to the Reconstruction era. His development of these concepts, however, did not reach full fruition until the first session of the Thirty-ninth Congress, which grappled with the problem of Reconstruction in late 1865 and early 1866.

Bingham in the First Session of the Thirty-ninth Congress

In assessing the development of the fourteenth amendment, one must take into account important political changes in Bingham's position between 1862 and 1865. Prior to the Civil War, Bingham was known as a Radical. During the Reconstruction Era, however, he was one of the leading Moderates in Congress.⁶⁵ It is against this background that his proposals must be considered.

Bingham's first equal protection proposal was submitted to the first session of the Thirty-ninth Congress on December 6, 1865. The proposal would have amended the Constitution to empower Congress to pass "all necessary and proper laws to secure to all persons in every state equal protection in their rights of life, liberty, and property."⁶⁶ Bingham gave a detailed explanation of the purpose of this proposed amendment in a speech delivered on the House floor on January 9, 1866. The speech was a response to a Democratic discussion of a message from President Andrew Johnson in which Johnson had declared himself in favor of "equal and exact justice to all men." After accusing the Democrats of being in favor of equal and exact justice only for white men, Bingham continued:

The spirit, the intent, the purpose of our Constitution is to secure equal and exact justice to all men. That has not been done. It has failed to be done in the past. It has failed in respect of white men as well as black men. . .time was within the memory of every man now within the hearing of my voice, when it was entirely unsafe for a citizen of Massachusetts or Ohio who was known to be the friend of the human race, the avowed advocate of the foundation principle of our Constitution — the absolute equality of all men before the law—to be found anywhere in the streets of Charleston or in the streets of Richmond.

To be sure, it was not because the Constitution of the United States

64. CONG. GLOBE, 34th Cong., 1st Sess. 984 (1859).

65. See, e.g., D. DONALD, *THE POLITICS OF RECONSTRUCTION* 62 (1965); J. JOINT COMMITTEE, *supra* note 7, at 183-85.

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

sanctioned any infringement of his rights in that behalf, but because in defiance of the Constitution its very guarantees were disregarded. . . .

When you come to weigh these words "equal and exact justice to all men," go read, if you please, the words of the Constitution itself: "the citizens of each State of the Union (being ipso facto citizens of the United States) shall be entitled to all the privileges and immunities of citizens (supplying the ellipsis 'of the United States') in the several States." [This guarantee] was utterly disregarded in the past by South Carolina when she drove with indignity and contempt and scorn from her limits the honored representative of Massachusetts, who went hither upon the peaceful mission of asserting in the tribunal of South Carolina the rights of American citizens.

I propose. . . that hereafter there shall not be any disregard of the essential guarantee of your Constitution in any State of the Union. . . [b]y simply adding an amendment to the Constitution. . . giving to Congress the power to pass all laws necessary and proper to secure to all persons. . . their equal personal rights; and if the tribunals of South Carolina will not respect the rights of the citizens of Massachusetts under the Constitution. . . I desire to see the Federal Judiciary clothed with the power to take cognizance of the question and assert those rights by solemn judgment, inflicting upon the offenders such penalties as will compel a decent respect for this guarantee to all the citizens of every State. . . . [T]he divinest feature of your Constitution is the recognition of the absolute equality before the law of all persons, whether citizens or strangers. . . subject only to the exception made by reason of slavery, now happily abolished. The President, therefore, might well say, as he does say in his message, that "The American system rests on the assertion of the equal right of every man to life, liberty, and the pursuit of happiness; to freedom of conscience, to the culture and exercise of all his faculties."

I propose, then, sir, by amending the Constitution, to provide for the efficient enforcement, by law, of these "equal rights of every man," and upon the assertion of which. . . the American system rests.⁶⁷

This speech plainly reflects the concept of limited absolute equality. First, it totally destroys any contention that Bingham viewed the concept of equal protection only in terms of discrimination on the basis of race. Bingham did refer to the denial of "equal justice" to the freed slaves; the only allusion to specific unconstitutional state behavior, however, was his clear reference to the celebrated Samuel Hoar affair. Hoar—a white man—had been sent to South Carolina by the governor of Massachusetts to test the constitutionality of the infamous Negro Seamen Acts.⁶⁸ On his arrival in Charleston, the state legislature passed a resolution demanding his expulsion. A mob assembled for this purpose. After consultation with a number of leading citizens of the city, Hoar left South Carolina without attempting to accomplish his mission.⁶⁹ Given that Bingham explicitly

67. CONG. GLOBE, 39th Cong., 1st Sess. 157-58 (1866).

68. For an account of the struggle over the Negro Seamen Acts, see 5 C. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836-1864, at 378-82, 392-93 (1974).

69. See 1 G. HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS 24-27 (1872). The Hoar affair was a subject of frequent congressional discussion in the quarter-century immediately preceding the Reconstruction era. See, e.g., CONG. GLOBE, 33rd Cong., 1st Sess. app. 1012-1013, 1556 (1854); CONG. GLOBE, 31st Cong., 1st Sess. app. 1661-1662 (1850).

stated that his amendment would empower the federal government to protect men such as Hoar, the proposal could hardly be viewed as aimed only at racial discrimination.

A second key point is that throughout his January 9th speech, Bingham evinced a belief that his proposed amendment would not empower Congress to impose any new obligations upon the states. Instead, he argued that the proposal would simply allow Congress to enforce preexisting Constitutional constraints on the states — in particular, those constraints imposed by the comity clause. Further, he plainly implied that the notion of “equal and exact justice” which he had in mind, did not encompass the right of blacks to be free from all racial discrimination; instead, he suggested that blacks in common with other citizens simply had an absolute right to judicial enforcement of their rights to “life, liberty, and the pursuit of happiness; to freedom of conscience, to the culture and exercise of all [their] faculties.” His proposed Constitutional amendment would simply state that if the states did not provide such judicial enforcement, the federal government could step in to supply the necessary protection.

Soon after this speech, the proposed amendment was considered by the Joint Committee on Reconstruction—of which Bingham was a key member. After considerable maneuvering over the precise language to be used,⁷⁰ the Joint Committee reported a proposed Constitutional amendment which was quite similar to Bingham’s original proposal of December 6th:

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.⁷¹

The debate over this proposal focused mainly on its equal protection component. In his defense of the Committee’s proposal on February 26, 27, and 28, Bingham reiterated the themes of his January 9th speech. First, in response to the suggestion that the proposed amendment was aimed specifically at racial discrimination,⁷² Bingham stated that:

[I]t is proposed as well to protect the . . . loyal white citizens of the United States whose property, by State legislation, has been wrested from them under confiscation, and protect them also against banishment.⁷³

70. See J. JOINT COMMITTEE, *supra* note 7, at 49-51, 56-58, 60-62.

71. *Id.* at 62.

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

73. *Id.*

In dealing with the scope of the rights which Congress would have authority to protect, he referred continually to the comity clause, the due process clause of the fifth amendment, and the Bill of Rights generally. On this point, Bingham first noted that *Barron v. City of Baltimore*⁷⁴ and *City of Livingston v. Moore*⁷⁵ clearly established that the Bill of Rights was not formally binding on the states, and thus that Congress had no authority to protect the rights of citizens guaranteed by that document. He further contended, however, that state officers were at least morally bound to respect the Bill of Rights and other provisions of the federal Constitution by their oaths of office, as well as the supremacy clause, and continued:

The adoption of the proposed amendment will take from the States no rights that belong to the States. They elect their Legislatures; they enact their laws for the punishment of crimes against life, liberty, or property; but in the event of the adoption of this amendment, if they conspire together to enact laws refusing equal protection to life, liberty, or property, the Congress is thereby vested with power to hold them to answer before the bar of the national courts for the violation of their oaths and of the rights of their fellow-men. . . . Is the Bill of Rights to stand in our Constitution. . . a mere dead letter? It is absolutely essential to the safety of the people that it should be enforced. . . .

Is it not essential to the unity of the people that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States? Is it not essential to the unity of the Government and the unity of the people that all persons, whether citizens or strangers, within this land shall have equal protection in every State in this Union in the rights of life and liberty and property.⁷⁶

Even more clearly than the January 9th speech, this passage indicates that in Bingham's view, the proposed amendment would not have added any new substantive constraints on state action. Instead, the proposal would simply have armed Congress with authority to protect existing constitutional rights, as well as state-created interests in property. The same point had been made in an earlier Bingham response to a charge that the proposed amendment would enable Congress to usurp state authority over property:

Although this word property has been in your Bill of Rights from the year 1789 until this hour, who ever heard it intimated that anybody could have property protected in any State until he owned or acquired property there according to its local law or according to the law of some other State which he may have carried hither? I undertake to say no one.

As to real estate, everyone 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 State, 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

74. 32 U.S. (7 Pet.) 243 (1833).

75. *Id.* at 469.

76. CONG. GLOBE, 39th Cong., 1st Sess. 1089-90 (1866).

the whole question, so far as that part of the case is concerned.⁷⁷

But if the proposed amendment would not have granted Congress authority to establish new substantive rights, what new powers would it have created in the federal government? One possibility has already been suggested; Congress could provide punishment for those state officials who refused to protect the rights of any class of citizens. Second, Congress could provide direct legal and physical protection for the rights of life, liberty, and property. This power is implied not only by the references to the Hoar affair, but also in the following passage from Bingham's defense of the proposed amendment:

I commend especially to [an opponent of the amendment] the paper issued by [a former Secretary of State] touching the protection of the rights of Martin Kosta, a citizen of the United States, whose rights were invaded abroad, within the jurisdiction of the empire of Austria. Commodore Ingraham gave notice that he would fire upon their town and their shipping unless they respected the rights of a declared citizen of the American Republic. You had the power to enforce your demand. But you were powerless in time of peace in the presence of the laws of South Carolina, Alabama, and Mississippi as States admitted and restored to the Union to enforce the rights of citizens of the United States within their limits.⁷⁸

In summary, then, Bingham did not view the proposed constitutional amendment as being race-focused or, indeed, aimed at the general problem of class-based discrimination at all. Instead, he saw the proposal as simply arming the federal government with authority to guarantee that all persons—both white and black—would be protected in rights guaranteed to them by the Constitution, as well as whatever rights were guaranteed to them by state law. Others, however, feared that the proposal had broader implications. This fear was largely responsible for the decision to postpone consideration on the proposal. After this decision, the Bingham proposal seemed moribund.

Bingham, however, was not prepared to give up the idea of a constitutional amendment which would incorporate the principles of equal protection. In the debate over the Civil Rights Bill, he argued that his amendment was necessary to empower Congress to pass the Bill.⁷⁹ Among mainstream Republicans, however, he was in a distinct minority on this point. Notwithstanding Bingham's objections, the Civil Rights Bill was passed over the veto of President Johnson.

At this stage, the Joint Committee turned to the preparation of an

77. *Id.* at 1090.

78. *Id.* at 1090.

79. *Id.* at 1291-92.

omnibus constitutional amendment which would embody the major elements of the Republican reconstruction program. Initially, the Committee focused on a proposal presented by Robert Owen, which provided in part that “[N]o 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.”⁸⁰ Bingham, however, continually pressed for the addition of a provision including equal protection language.⁸¹ Initially, after a protracted struggle, he was defeated in his efforts to add such a provision to the proposed constitutional amendment. But eventually, Bingham persuaded the Joint Committee to replace the “[N]o discrimination. . .because of race, color, or previous condition of servitude” with the following language:

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 Five. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.⁸²

When the proposed fourteenth amendment was reported to the House floor, debate focused primarily not on section 1, but rather on section 3. Nonetheless, Bingham did discuss the proposed section 1 in a fairly extensive speech on May 10th:

The necessity for the first section [is that] [t]here was a want hitherto. . .in the. . .United States by express authority of the Constitution to do that by Congressional enactment which hitherto they have not had the power to do and had never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State. . . .

. . .[T]his amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any free man the equal protection of the laws or to abridge the privileges or immunities of any citizens of the Republic. . . .

The second section [of the proposed fourteenth amendment] excludes the conclusion that by the first section, suffrage is subjected to congressional law; save, indeed, with this exception, that as the right in the people of each State to a Republican government and to choose their Representatives in Congress is of the guarantees of the Constitution, by this amendment might be given directly for a case supposed by Madison, where treason might change a State government from a Republican to a despotic government and thereby deny suffrage to the people. . .I beg leave. . .to say, that many instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guaranteed privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. . . .

[T]he words of the Constitution that “the citizens of each state shall be entitled to all privileges and immunities in the several States include,

80. See J. JOINT COMMITTEE, *supra* note 7, at 83.

81. See *id.* at 85-87, 98-99.

82. See *id.* at 106, 117.

among other privileges, the right to bear true allegiance to the Constitution and laws of the United States, and to be protected in life, liberty and property. . . . But, sir [the loyal citizenry] looked in vain for any grant of power in the Constitution by which to give protection to the citizens of the United States resident in South Carolina against the infamous provision of the ordinance which required them to abjure the allegiance which they owed their country. It was an opprobrium to the Republic that for fidelity to the United States they could not by national law be protected against the degrading punishment inflicted on slaves and felons by State law. The great want of the citizen and stranger, protection by the national law from unconstitutional State enactments, is supplied by the first section of [the proposed fourteenth] amendment. That is the extent that it hath, no more. . . .⁸³

Once again, the essence of Bingham's position on section 1 is clear. He plainly viewed it as a unified whole. Further, the function of section 1 was neither to prohibit racial discrimination nor to add any new constitutional constraints on the States. Instead, the focus of this provision was simply to arm Congress with authority to protect the citizenry against encroachments on those rights already established by the comity clause and the due process clause of the fifth amendment.

The structure of the discussion of the right of suffrage is particularly significant. In general, the Constitution leaves the regulation of suffrage to the states. Therefore, section 1 does not grant Congress general authority to effect such state regulations. By contrast, the right to a republican form of government is established by an extrinsic constitutional provision; thus, Bingham concluded that Congress could enforce this right under the equal protection clause.

The May 10th speech thus fits comfortably into the pattern which Bingham's analysis followed throughout the first session of the Thirty-ninth Congress. The same themes recur in his congressional pronouncements after the fourteenth amendment had been ratified. Indeed, the clearest summary of Bingham's view of the concept of equal protection was presented in the debate over the Ku Klux Klan Act of 1871.

[The equal protection clause] means that no State shall deny to any person within its jurisdiction the equal protection of the Constitution of the United States. . . and, of course, that no State should deny to any such person any of the rights which are guaranteed to *all* men, nor should any State deny to any such person any right secured to him either by the laws and treaties of the United States or of such States.⁸⁴

The remarkable aspect of this description is that Bingham does not refer to classifications at all. Instead, he states that the equal

83. CONG. GLOBE, 39th Cong., 1st Sess. 2542-43 (1866).

84. CONG. GLOBE, 42nd Cong., 1st Sess. app. 83 (1871) (emphasis added).

protection clause guarantees: (1) *any* person (2) equal protection of (3) rights established either by the Constitution, the laws of the United States, or the laws of the particular state where the person happens to be located. Put another way, by its own force the equal protection clause does not prohibit discrimination in the granting of substantive rights; instead, the clause merely requires that the states make available on equal terms the mechanism necessary to enforce the rights created either by other provisions of the Constitution or by state law. Presumably, those mechanisms include state agencies which prevent infringement on rights—the police—as well as the bodies which rectify or punish violations of rights—the courts. Where the states fail in their obligation to make these mechanisms available, section 5 gives Congress the authority to intervene in order to ensure “equal protection of the laws.”

To summarize, then, Bingham’s pronouncements consistently reflect the view that the equal protection clause was not intended to add any additional prohibitions on discrimination against particular classes. Instead, the clause simply required that all persons be provided the mechanisms for enforcement of rights established by other aspects of the law. But while he was the single most important figure in the development of section 1, Bingham was not the only actor on the political stage. The next section will thus examine other evidence on the intended meaning of the equal protection clause.

OTHER MAJOR DISCUSSIONS OF SECTION ONE IN THE FIRST SESSION OF THE THIRTY-NINTH CONGRESS

While Bingham was primarily responsible for the language of section 1, he was not the only member of Congress to comment on the proposed equal protection clause. Although the debates focused primarily on other sections of the proposed constitutional amendment, the record of the first session of the Thirty-ninth Congress contains a number of comments on the concept of “equal protection of the laws.” Unfortunately, most are of such a general nature as to be of little use in ascertaining the congressional understanding of the provision. Nonetheless, the discussions which reflect the thinking of the Joint Committee as a whole must be given serious consideration. These include the Report of the Joint Committee on Reconstruction and the speeches introducing the proposed amendment in the House and Senate, respectively.

The Report of the Joint Committee on Reconstruction

Although issued too late to influence the congressional debate over the fourteenth amendment, the Report of the Joint Committee on

Reconstruction⁸⁵ is a key source for the understanding of the equal protection clause. As the explanation of the body responsible for section 1 (and the fourteenth amendment as a whole), pronouncements from the report weigh heavily in arguments over the intended meaning of section 1. Unfortunately, the report primarily concerned itself with arguing the status of the defeated southern states and the paramount authority of Congress on Reconstruction issues.⁸⁶ The only direct references to section 1 simply refer to the necessity of "providing such constitutional. . . guarantees as will tend to secure the civil rights of all citizens of the republic"⁸⁷ and of making "changes [in] the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic. . . ."⁸⁸ No more precise definition is given of the rights protected. On two points, however, the Joint Committee Report provides significant reinforcement for Bingham's analysis of the concept of equal protection.

First, the Report clearly implies that while the welfare of the freed slaves was an important concern of the Committee, section 1 was intended to protect the rights of whites as well. As already noted, the Report speaks of the necessity to secure the civil rights of "all men." Moreover, the need for this amendment was due to the fact that "[in the South] the general feeling and disposition among all classes are yet totally adverse to the toleration of any class of people friendly to the Union, *be they white or black.*"⁸⁹

On the subject of voting rights, the Report is more emphatic, stating clearly that the amendment was deliberately crafted to allow the states to retain all authority which they possessed under the original Constitution. The discussion of voting came in the context of the analysis of section 2, which altered the basis of representation. Although noting the unfairness of race-based suffrage requirements, the Committee clearly stated the intent to leave state control over suffrage untouched.⁹⁰

85. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION (Negro University Press ed. 1969).

86. See, e.g., *id.* at VII-XVIII.

87. *Id.* at XVIII.

88. *Id.* at XXI.

89. *Id.* at XVII (emphasis added).

90. Doubts were entertained whether Congress had power . . . to prescribe the qualifications of voters in a State, or could act directly on the subject. It was doubtful in the opinion of your committee, whether the States would consent to surrender a power they had always exercised, and to which they were attached. As the best if not the only method of surmounting the difficulty, and as eminently just and proper in itself, your committee came to the conclusion that

In short, the Report of the Joint Committee on Reconstruction sheds some light on the intended meaning of the equal protection clause. The evidence, however sparse, is however, entirely consistent with the basic conclusion that the clause was seen as guaranteeing a narrow spectrum of rights to all races. By contrast, the evidence is totally inconsistent with race-focused theories of the concept of equal protection.

The Presentations to the House and Senate

Although Bingham played the primary role in drafting section 1, the task of presenting and explaining the proposal in the full House and Senate was carried out by other members of the Committee. As senior House member on the Joint Committee, Thaddeus Stevens presented the Committee plan on the House floor. Normally the analogous duties in the Senate would have been performed by William Pitt Fessenden, the chairman of the Joint Committee. Fessenden, however, was temporarily disabled by illness; and this responsibility fell to Jacob Howard.

Stevens' Presentation

Stevens' discussion of section 1 was somewhat truncated. After arguing that each of the three clauses were contained "in some form or other" in either the Declaration of Independence or the Constitution as it existed, Stevens continued:

But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect [sic] and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall apply *equally* upon all. Whatever law punishes a white man for a crime shall punish the black man in precisely the same way and precisely the same degree. Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of address is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same.⁹¹

Steven's explanation of section 1 is largely undifferentiated. Thus, it is somewhat difficult to make firm judgments on the precise relationship of his statement to specific clauses. Nonetheless, some conclusions can be drawn regarding Stevens' understanding of the scope of the proposal.

First, his assertion that the amendment requires that laws operate

political power should be possessed in all the States exactly in proportion as the right of suffrage should be granted, without distinction of color or race. This it was thought would leave the whole question with the people of each State, holding out to all the advantage of increased political power as an inducement to allow all to participate in its exercise.

Id. at XIII.

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

equally is an assertion of the principle of limited absolute equality rather than total racial equality. It is tied to Stevens' statement that the amendment gives Congress the power to enforce provisions of the Constitution which had previously bound only the federal government — an echo of the assertions made by Bingham and Howard with respect to the comity clause.⁹² Since the principles of the comity clause are embodied in the privileges and immunities clause, which in turn embraces the concept of limited absolute equality, Stevens' endorsement of the principle of equality should be taken to refer to the privileges and immunities clause.

Conversely, Stevens apparently had a quite limited conception of the equal protection clause. His explanation seems to have separated that clause from both the general right to equality and the right to immunity from unequal punishment. That is, it connected equal protection only with the right to go to testify and to sue for redress of grievances. This interpretation obviously fits comfortably with the right to protection.

The discussion of racial discrimination in punishment was more ambiguous. First, as already noted, this prohibition did not seem to be connected with the equal protection clause. In other contexts, some members of the Thirty-ninth Congress had indicated that this prohibition was implicit in the privileges and immunities clause;⁹³ a contemporaneous treatise on state constitutional law suggested that the concept of due process included analogous limitations of State power.⁹⁴

Even if associated with the equal protection clause, the discussion of racial discrimination in punishment cannot be taken as authority for the proposition that the clause posited a general right to be free from racial discrimination. Kent, it must be remembered, posited a right to be protected from certain types of government actions, including unjust punishment.⁹⁵ If (as the debates over the Civil Rights Bill suggest) the thirteenth amendment was intended to establish the proposition that race was an arbitrary ground on which to base punishment,⁹⁶ then prohibition of racial discrimination in punishment

92. *See id.* at 157-58 (remarks of Rep. Bingham); *id.* at 2765-66 (remarks of Sen. Howard).

93. *See id.* at 1117 (remarks of Rep. Wilson); *id.* at 501 (remarks of Sen. Cowan).

94. *See* T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 351-53 & n.2, 390-91 (Da Capo ed. 1868).

95. *See supra* note 49 and accompanying text.

96. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1115-19 (1866) (remarks of Rep.

might be seen as being within this right to protection. But this right was limited to criminal proceedings, taxation, and eminent domain proceedings; it did not apply generally to, for example, a right to government gratuities. Thus, even if the discussion of punishment is related to the equal protection clause, the discussion does not suggest that the clause was intended to prohibit racial discrimination generally.

Howard's Presentation

Howard's discussion of section 1 in the Senate was far more extensive. Much of his attention was directed toward the "curious question" of "what are the privileges and immunities of citizens of the United States." On this point he focused primarily on *Corfield v. Coryell*⁹⁷ and the Bill of Rights. He then continued:

The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law 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 the law? Ought not the time to be now passed when one measure of justice is to be meted out to the member of another caste, both castes being like 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?⁹⁸

It spoke broadly of abolishing "all class legislation" and condemned the practice of having "one measure of justice. . .meted out to a member of one caste while another and a different measure is meted out to the member of another caste." Howard's statements can be interpreted as at least prohibiting all forms of racial discrimination, and perhaps other types of unfair discrimination as well.

Alternative interpretations are also plausible, however. For instance, the only specific example of class legislation cited by Howard was "the hanging of a black man for a crime for which the white man is not to be hanged." If class legislation is intended to refer only to criminal laws, then, the analysis is entirely consistent with a limited vision of the scope of equal protection. Similarly, the reference to different measures of justice might be viewed as a discussion of remedies, rather than a matter of equality of rights. Other portions

Wilson) (by implication); *id.* at 1123-24 (remarks of Rep. Cook).

97. 4 F. Cas. 371, (Wash. C.C. 1825) (No. 3230).

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

of Howard's presentation lend considerable support to this interpretation. For example in discussing section 5 he stated:

I look upon the first section, taken in connection with the fifth, as very important. It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction. It established equality before the law, and it gives to the humblest, the poorest, the most despised of the race the *same rights and the same protection* before the law as it gives to the most powerful, the most wealthy, or the most haughty. . . . Without this principle of *equal justice to all men and equal protection under the shield of the law*, there is no republican government, and none that is really worth maintaining.⁹⁹

Plainly, Howard saw the concept of "equal protection" as analytically separate from that of "equal rights." This analysis is most plausibly understood in terms of the limited concept of protection developed by Blackstone and Kent.

Further, Howard's discussion of the effect of section 1 on the right to vote clearly indicates that his understanding of the conception of "equal rights" to be constitutionalized was that of limited absolute equality rather than total racial equality. He argued:

The first section of the proposed amendment does not give to either of these classes the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a despotism.¹⁰⁰

Taken together with the sharp distinction drawn between equal rights and equal protection, this passage suggests that Howard's understanding of section 1 was much like that of Bingham. The basic constitutional minimum of rights was to be established by the privileges and immunities clause; the equal protection clause was primarily intended to insure access to the means of enforcing those rights. But if a right were not embodied in the privileges and immunities clause, if it were merely a "creature of law," then section 1 would leave it entirely within state control.

Contrary Evidence

While the Report of the Joint Committee on Reconstruction and the statements of Stevens and Howard were the official Republican explanations of section 1, many other Republicans spoke on the issue

99. *Id.* at 2766 (emphasis added).

100. *Id.*

of the meaning of the equal protection clause during the Reconstruction era. Not surprisingly, these statements showed a diversity of interpretation. Some provide support for a limited conception of the phrase "equal protection of the laws";¹⁰¹ others are so vague and general as to be of little use in establishing congressional intent.¹⁰² But some may be taken to reflect a broad understanding of the concept of equal protection.

During the debates over section 1 during the first session of the Thirty-ninth Congress, the Radical Senator Timothy Howe of Wisconsin discussed the application of the equal protection clause to Florida's school system. Under Florida's system, both whites and blacks were taxed to support a school system for whites, but only blacks were taxed to support a black school system. The black system was woefully inadequate. This situation, Howe argued, would be prohibited by the equal protection clause.¹⁰³

One of the difficulties in interpreting Howe's speech lies in its ambiguity; it is unclear whether he intended to condemn the inequality in taxation or the inequality in the two school systems. If taxation were the problem, then Howe's position is readily assimilable to Kent's conception of protection from the government. If the core of his complaint was the state of the black school system, on the other hand, the implications of his statement are much broader.

Such broad implications are more clearly evident in a group of statements made in later Congresses. Typical is a statement by Senator Oliver Morton of Indiana during debate in 1872:

I desire to inquire what is meant by "the equal protection of the laws" which a State shall not deprive any person of? To what does the word "protection" refer? Does it mean that the State shall not deprive a man of the equal protection of the law for his person? Will any one contend that it shall have a construction so narrow as that? Will it be contended that it means that a State shall not deprive a person of the equal protection of the law for his property; that it shall be confined to that? I submit that when it declares that no State shall deprive any person of the equal protection of the laws, it means substantially that no person shall be deprived by a State of the equal benefit for the laws; that the word "protection," as there used, means not simply the protection of the person from violence, the protection of his property from destruction, but it is substantially in the sense of the equal benefit of the law; that it is intended to promote equality in the States, and it refers to the laws of the States.¹⁰⁴

One finds similar sentiments expressed from time to time by men

101. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. app. 69 (1871) (remarks of Rep. Shellabarger); *id.* at 608 (remarks of Sen. Pool); Cincinnati Commercial, Sept. 24, 1866, at 2, col. 2 (remarks of Gov. Morton); *id.*, Sept. 9, 1866, at 2, col. 2 (remarks of William Dickson).

102. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2539 (1866) (remarks of Rep. Farnsworth); *id.* at 2465 (remarks of Rep. Thayer).

103. *Id.*, app. 219.

104. CONG. GLOBE, 42d Cong., 2d Sess. 846-47 (1872). See also 3 CONG. REC. 1793 (1875) (statement of Rep. Boutwell).

such as Representative William Lawrence of Ohio¹⁰⁵ and of Representative George Boutwell of Massachusetts.¹⁰⁶

The weight of this evidence is reduced by a number of factors. First, as post-hoc statements, they are less persuasive than contemporaneous statements. Second, typically these statements were made in the context of attempts to establish the constitutional authority of Congress to pass particular laws. Thus, they are “law office history,” intended to persuade rather than enlighten. Finally, while men such as Howe and Lawrence were present during the debates over the fourteenth amendment, and Boutwell was a member of the Joint Committee, there is no evidence that any of the advocates of broad construction were particularly influential in the drafting of section 1. Thus, their views are not necessarily dispositive.

If other contextual factors pointed to a broad congressional intent, these statements would provide sufficient support to infer such an intent. However, these other factors, in fact support a contrary inference. The next section focuses on factors which mitigate against an inference of broad intent.

OTHER CONTEXTUAL FACTORS

Evolution of Language

Further support for the theory that the concept of “equal protection of the laws” was not intended to establish any new substantive rights against class-based discrimination is provided by the evolution of the language of the clause during the first session of the Thirty-ninth Congress. The essence of the argument made against Bingham’s Congressional power proposal was the breadth of the language “life, liberty, and property.” Robert Hale of New York delivered the main attack on the Bingham proposal:

[t]he language [of the proposal] in its grammatical legal construction. . . is a grant of the fullest and most ample power to Congress to make all laws “necessary and proper” to secure to all persons in the States protection on the rights of life, liberty and property: with the same proviso that such protection shall be equal. It is not a mere provision that when the State undertakes to give protection which is unequal, Congress may equalize it; it is a grant of power in general terms—a grant of the right to legislate for the protection of life, liberty, and property, simply qualified with the condition that it shall be equal legislation. . . [W]e all know it is true that probably every State in this Union failed to give equal protection to all persons within its borders in the rights of life, liberty and property. . . Take the

105. CONG. GLOBE, 43rd Cong., 1st Sess. 412 (1874).

106. *Id.* at 1793.

case of the rights of married women; did anyone ever assume that Congress was to be invested with the power to legislate on that subject, and to say that married women in regard to their rights or property should stand on the same footing with men and unmarried women?¹⁰⁷

Thaddeus Stevens attacked the example arguing that “[w]hen a distinction is made between two married women and 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.”¹⁰⁸ Hale, however, would not accept this explanation:

The language of the section under consideration gives to *all persons* equal protection. Now, if that means you shall extend to one married woman the same protection you extend to another, and not the same you extend to unmarried women or men, then by parity of reasoning it will be sufficient if you extend to one negro the same rights you would do to another, but not those you extend to a white man I think, if [Representative Stevens] claims that the resolution only intends that all of a certain class shall have equal protection, such class legislation may certainly as easily satisfy the requirements of this resolution in the case of the negro as in the case of the married woman. The line of distinction is, I take it, quite as broadly marked between negroes and white men as between married and unmarried women.¹⁰⁹

In summary, Hale’s argument was that the Bingham proposal was flawed in that it would create a revolution in federalism by granting the federal government plenary authority over vast areas previously reserved to the states — the protection of life, liberty, and property. The difficulty with the addition of the concept of equality, Hale asserted, is not that it was a bad idea *per se*, but rather that it would not have imposed a significant limitation on the federal government’s ability to legislate generally on the subject of life, liberty, and property under the Bingham amendment. These arguments were largely responsible for the refusal of the House of Representatives to adopt the initial Bingham proposal.¹¹⁰

107. CONG. GLOBE, 39th Cong., 1st Sess. 1063-64 (1866).

108. *Id.* at 1264.

109. *Id.*

110. *See also, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1083-87 (1866) (remarks of Rep. Davis); *id.* at 1095 (remarks of Rep. Conkling) (by implication).

Advocates of a broad construction of the equal protection clause often cite the objections of the Radical Giles Hotchkiss, who pointed to the fact that the initial Bingham proposal did not directly constrain the States, but only granted power to Congress. *Id.* at 1095. In evaluating the impact of Hotchkiss’ objections, however, two other factors must also be considered. First, no alteration was necessary to secure the support of most Radicals; in general, they were perfectly willing to accept the Bingham proposal. *See id.* at 1057-62 (remarks of Rep. Kelly); *id.* at 1054-57 (remarks of Rep. Higby). Even more importantly, Hotchkiss also objected to the potentially broad implications of the Bingham language. He stated:

I understand the amendment as now proposed by its terms to authorize Congress to establish uniform laws throughout the United States upon the subject [of] the protection of life, liberty and property. I am unwilling that Congress shall have any such power. . . . It is not indulging in imagination to any great stretch to suppose that we may have a Congress here that would establish such rules in my State as I would be unwilling to be governed by.

The key question thus becomes what factors moved the House to reach a different result when pressed to vote on section 1. One suggestion, is that despite the changes in the final draft of section 1, the final version of that section would have been subjected to the same criticism as Bingham's proposal, and that, therefore, the Framers should be presumed to have intended the results feared by Hale. TenBroek argues that:

[n]ot all changes in legislative proposals are aimed at conciliating or removing objections. Some are made to strengthen a proposal in order to better achieve an objective, the sponsors having determined to proceed despite the consequences predicted by critics, or perhaps even for the very purpose of bringing those consequences about.¹¹¹

Whatever the merit of such arguments in the abstract, the circumstances surrounding the changes in the language decisively refute this contention with respect to section 1. As already noted, Bingham himself consistently denied any intention to achieve the result suggested by Hale; for example, Bingham explicitly stated that the states would retain the right to prescribe preconditions for ownership of property. Moreover, when the current section 1 was proposed as a substitute for an amendment which would have simply prohibited racial discrimination with respect to "civil rights" — a clearly limited proposal which would not have been subject to Hale's objections — the substitute attracted the votes of virtually all of the more conservative members of the Joint Committee on Reconstruction, while more radical elements of the Joint Committee formed the majority of the opposition.

The voting pattern of Roscoe Conkling of New York on this issue is illustrative. Conkling was clearly a part of the Republican mainstream; indeed, he was quite radical on some issues.¹¹² On issues of race relations and the extension of the power of the federal government generally, however, he was on the extreme conservative edge of the Republican mainstream. On statutory issues, he voted to limit both the District of Columbia Suffrage Bill¹¹³ and the Civil Rights

Id. at 1095.

It was only "the very privileges which [Bingham] is contending for" — i.e., those guaranteed by the comity clause — that Hotchkiss wished to have secured by a new amendment. Thus on this point the opposition to the original Bingham proposal was of a single mind.

111. J. TENBROEK, *supra* note 24, at 217.

112. *See, e.g.*, J. JOINT COMMITTEE, *supra* note 7, at 106 (addition of disenfranchisement provision to proposed amendment); *id.* at 105 (addition of disqualification provision).

113. CONG. GLOBE, 39th Cong., 1st Sess. 311 (1866); *id.* at 310.

Bill.¹¹⁴ On constitutional issues considered by the Joint Committee, his conservative pattern was even more pronounced. Conkling was one of the only two Republicans to vote against reporting Bingham's initial proposal,¹¹⁵ and also voted against adding the current section 1 as an addition to the prohibition on racial discrimination in civil rights.¹¹⁶ Yet when the Bingham language was proposed as a *substitute* for the "civil rights" language, Conkling voted in favor of the substitution.¹¹⁷ He was joined not only by other Moderates such as Senator George Williams of Oregon and Representative Henry Blow of Missouri, but also by all three Democrats on the Joint Committee — in short, with only one exception, all of the men who would be most likely to vote in favor of restricting the proposal. Thus, the most plausible interpretation is that section 1 as adopted was less intrusive on the established system of federalism than a simple prohibition on racial discrimination in civil rights, and as such, it was not viewed as subject to the criticisms which Hale had leveled at the initial Bingham proposal.

This conclusion is reinforced by the course of the floor debates on the Joint Committee proposal. During the course of those debates, a number of Republicans criticized various aspects of the proposed constitutional amendment and suggested changes in the committee draft. Yet none of the Republicans who had voiced federalism-based concerns regarding Bingham's initial proposal—Conkling,¹¹⁸ Hale,¹¹⁹ Representatives Davis¹²⁰ and Hotchkiss,¹²¹ and Senator Stewart¹²² — voiced similar objections to section 1 as ultimately proposed by the Joint Committee.¹²³ Indeed, Stewart was one of those who

114. *Id.* at 1296.

115. J. JOINT COMMITTEE, *supra* note 7, at 57, 61-62.

116. *Id.* at 98.

117. *Id.* at 106-07.

118. See CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866) (by implication).

119. See *id.* at 1064-66.

120. See *id.* at 1083-87.

121. See *id.* at 1095.

122. See *id.* at 1082-83.

123. Nearly a decade later, Hale did suggest that the language ultimately adopted had the same flaws as the original Bingham proposals. Answering contentions that the proposed Civil Rights Act of 1875 was beyond Congressional authority, Hale contended that:

I will remember . . . that . . . standing alone in my party, [I opposed] the fourteenth amendment upon the ground that it *did* change the constitutional powers of legislation of Congress [and that section five] was to a certain extent a revolution of our form of government in giving Congress a control of matters which had hitherto been confined exclusively to state control.

3 CONG. REC. 979-80 (1875) (emphasis in original).

The difficulty with this statement is that it is historically inaccurate. While he was against the original Bingham proposal, Hale voted in favor of the fourteenth amendment in its final form. Moreover, there is no record of his having voiced reservations regarding section one. Thus his 1875 comments can be dismissed as simple law office history.

pressed for adding a definition of citizenship to the protections of section 1.¹²⁴

One possible explanation for this change of position is that change from the "positive" form ("Congress shall have power to make all laws necessary and proper") to the "negative" form, including a direct prohibition on state action together with the simple statement that "Congress shall have power to enforce" the prohibition. In an era where Congress rather than the Supreme Court was viewed as the primary enforcer of constitutional rights, the latter formulation can be viewed as having a less drastic effect on the existing balance of power between the states and national government.¹²⁵

Despite Bingham's denial that he intended the shift from the positive to negative form to have any such import,¹²⁶ the change in language no doubt pleased the more conservative Moderates. At the very least the negative form recognized the states' primacy in establishing and maintaining individual rights, with Congress given authority to intervene only when the states were remiss in fulfilling their obligations.¹²⁷ This change, however, cannot fully explain the actions of the Moderates, for in the Joint Committee Moderates and Democrats had preferred the Bingham language to another "negative" provision — the original Owen proposal.¹²⁸

124. See CONG. GLOBE, 39th Cong., 1st Sess. 2560 (1866).

In discussing the proposed amendment, Stewart did note the "increasing danger of consolidated and despotic government so long as the national government strives to protect negro and white loyalists in the South." *Id.* at 2964. This statement did not seem to refer to dangers inherent in section 1 in particular, but rather to the general difficulties associated with delays in reconstructing the defeated southern States.

125. James Garfield, who had been a member of the Thirty-ninth Congress, made this argument in 1871. Comparing the initial Bingham formulation with that which was eventually adopted, he contended:

The one exerts its force directly upon the States, laying restriction and limitations upon their power and enabling Congress to enforce these limitations. The other, the rejected proposition, would have brought the power of Congress to bear directly upon the citizens, and contained a clear grant of power to Congress to legislate directly for the protection of life, liberty, and property within the States. The [enacted form] limited but did not oust the jurisdiction of the State over the subject. The [rejected form] gave Congress plenary power to cover the whole subject with its jurisdiction and, as it seems to me, to the exclusion of the State authority.

CONG. GLOBE, 42d Cong., 1st Sess. app. 150-51 (1871).

126. *Id.* at app. 83-84. See also J. TENBROEK, *supra* note 24, at 221 (contending that the Garfield argument is linguistically untenable).

127. See Ohio Exec. Document, Part 1, No. 282 (1867), *quoted in* C. FAIRMAN, DOES THE FOURTEENTH AMENDMENT INCORPORATE THE BILL OF RIGHTS 5, 96 (1949); M. BENEDICT, *supra* note 12, at 170.

128. See J. JOINT COMMITTEE, *supra* note 7, at 106-07.

On its face, this voting pattern was somewhat anomalous. As already noted, Moderates had strongly criticized the potentially sweeping implications of Bingham's earlier equal protection proposal.¹²⁹ By contrast, although its reach was uncertain in some respects, the Owen proposal was clearly limited to matters involving racial discrimination. Thus, one might have thought that the Moderates would have preferred this formulation to the Bingham language.

The key to the Moderate action lies in another important change in the equal protection language — the change from “equal protection in the rights of life, liberty, or property” to simply “equal protection of the laws.” As noted above, the main objection to the original Bingham proposal was that it granted Congress plenary authority over all matters of life, liberty, and property and the requirement that legislation provide “equal protection” was not a substantial limitation on this power. But if (as Bingham suggested in 1871) the term “laws” encompassed only those rights protected by the Constitution and those already guaranteed to individuals by state law, then the objections of men such as Hale, Davis, and Conkling would be satisfied. Congress could only supply to an individual protection in rights already guaranteed to him either by the Constitution or state law. Congress could not define these substantive rights, and thus the power of the states would remain largely intact.

This circumstantial evidence provides important corroboration for Bingham's expressed analysis of the equal protection clause. Further support is provided by the terms in which the opponents of the fourteenth amendment expressed their objections.

The Democratic Position

Attempting to discover the intent of the drafters of any piece of legislation from the statements of opponents is at best a perilous enterprise. Typically, in attempting to defeat proposed legislation, opponents will bring forth a parade of horrors, greatly exaggerating the effect of the proposals.¹³⁰ Thus, if one depends on opposition

129. See *supra* notes 107-110 and accompanying text.

130. To illustrate this point, one need only examine the debates over Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17 (1980). During the course of those debates, one of the proposal's prominent opponents stated that:

Title VII . . . would rob every American having as many as 25 employees in any business or industrial enterprise affecting interstate commerce of those precious rights which the founders of our country came here to enjoy. The bill would give the Federal Government the power to go into any business or industry in the United States having as many as 25 employees and affecting interstate commerce and tell the operator of that business whom he had to hire. It would give the Federal Government the power to go into any such business or any such industry and determine whom the employer had to promote. It would give the Federal Government the power to go into any such business or industry and tell the operator of that business whom he should lay off and whom he

statements, he or she might conclude that a given bill was intended to have a much broader impact than was actually contemplated.

One encounters similar problems in dealing with the legislative history of section 1 of the fourteenth amendment. Men such as Andrew Rogers of New Jersey and George S. Shanklin of Kentucky were attempting to defeat the fourteenth amendment. Thus, it was in their best interest to portray section 1 as destructive of the basic fabric of American federalism.¹³¹ But as actual indicia of the intent of the drafters of section 1, their statements in opposition are unreliable. Thus, those who depend on opposition statements to support a broad reading of section 1¹³² make a fundamental error.

One can, however, draw negative inferences from the failure of opposition spokesmen to attack a particular provision. The fourteenth amendment was exhaustively debated both in Congress and in the election campaign of 1866. During these debates, Democrats attacked the proposed amendment from every conceivable angle, often showing themselves willing to engage in the grossest exaggeration of its likely effects. Thus, a failure to attack a particular provision is evidence that the provision was widely understood not to effect a significant change in the federal system and was therefore generally uncontroversial.

Of course, section 1 as a whole was subjected to its share of attack during the debates and the subsequent campaign. Many of these attacks were couched in the most general terms, not identifying any

should retain in times of financial adversity.

. . . [T]he bill would go further than that. It would give the Federal Government the power to go into such business and industry, and even direct the operator of such business or industry as to how he should fix the rates of compensation as between employees.

The bill is broad enough in its provisions . . . to authorize the Federal Government to undertake to tell the operator of a business or industry what the workload of his employees should be. . . .

Under . . . the bill the Federal Government would have the power to say to a business or an industry how many employees it should have.

110 CONG. REC. 13077 (1964) (remarks of Sen. Ervin).

Relying only on this passage, one might well conclude that Title VII was intended to give the Federal Government broad authority to regulate all aspects of business and industry. But, in fact, this is a gross exaggeration; Title VII was plainly only intended to allow the government to act in relatively limited circumstances.

131. See CONG. GLOBE, 39th Cong., 1st Sess. 2538 (1866) (statement of Rep. Rogers); *id.* at 2500 (statement of Rep. Shanklin).

132. See, e.g., H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 78 (1908); J. TENBROEK, *supra* note 24, at 218-19; C. FAIRMAN, *supra* note 127, at 5, 49-50.

particular clause as objectionable.¹³³ The focus of the more specific attacks is, however, quite instructive. The overwhelming majority of these attacks focused on the privileges and immunities clause¹³⁴ and the citizenship clause added by the Senate.¹³⁵ The due process clause was also derided in a number of published discussions of the amendment.¹³⁶ By contrast, critics typically ignored the equal protection clause; Democrats did not specifically criticize this provision during the Congressional debates, and attacks on the concept of equal protection during the ensuing political campaign were also quite rare.¹³⁷

Indeed, there were significant indications that the opposition was amenable to the theory of guaranteeing “equal protection of the laws.” For example, Reverdy Johnson, one of the less conservative Democrats and the most brilliant opposition theoretician, although opposing the privileges and immunities clause,¹³⁸ voted in favor of the equal protection clause in the Joint Committee.¹³⁹ Similarly, on the Senate floor, Edgar Cowan — a nominal Republican who consistently supported the Democrats on Reconstruction issues — suggested that he was in favor of legally establishing the right of all people to “the protection of the laws while [the person] is within and under the jurisdiction of the courts.”¹⁴⁰ Perhaps the most striking example of the attitude of the Democrats toward the concept of equal protection is the minority report of the Joint Committee. The minority report never directly addresses section 1. In another context, however, it states that:

Each citizen. . . of every State owes the same allegiance to the general

133. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2530 (1866) (remarks of Rep. Randall); *id.* at 2500 (remarks of Rep. Shanklin); Charleston Courier, Nov. 1, 1866, at 2.

134. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 3041 (1866) (remarks of Sen. Johnson); *id.* at 2538 (remarks of Rep. Rogers); *id.* at 2397-98 (remarks of Rep. Phelps); Speech of George Pendleton, reported in Cincinnati Commercial, July 23, 1866, at 2, col. 2; Letter from Ex-Provisional Gov. W.L. Sharkey of Minn. to B.G. Humphreys, Gov. of Minn., reported in N.Y. Times, Oct. 7, 1866, at 3, col. 1; PA. LEG. REC. app. at iii (1867), quoted in C. FAIRMAN, *supra* note 127, at 1114.

135. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2939 (1866) (remarks of Sen. Hendricks); *id.* at 2890-97 (remarks of Sen. Cowan); Speech of Clement L. Vallandigham, reported in Cincinnati Commercial, Oct. 6, 1866, at 2; Raleigh Sentinel, June 20, 1866, at 2; WIS. SEN. J. 96 *et. seq.* (1867) quoted in C. FAIRMAN, *supra* note 127, at 108-09.

136. See Letter from O.H. Browning, Sec. of the Interior, to his constituents in Illinois, published in N.Y. Times, Oct. 24, 1866, at 1, col. 4; Letter from George Weston, published in Nat. Intelligencer, July 10, 1866, at 2; E. McPherson, Fourteenth Amendment Scrapbook 24 (unpublished manuscript on file in Library of Congress).

137. The pages of the Cincinnati Commercial contain many examples of the speeches (discussions) on the fourteenth amendment during the relevant period, as does E. McPherson, *supra* note 136.

138. CONG. GLOBE, 39th Cong., 1st Sess. 3041 (1866).

139. J. JOINT COMMITTEE, *supra* note 7, at 85.

140. CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866). See also *id.* at 2919 (remarks of Sen. Davis).

government and is entitled to the same protection. The obligation of this allegiance. . . is made paramount and perpetual, and. . . it is equally the paramount duty of the general government to allow to the citizens of each State, and to the State, the rights secured to both and the protection necessary to their full enjoyment.¹⁴¹

This statement stands as an unequivocal commitment to the basic concept of equal protection. By its terms, the statement applies only to the right of protection from the federal government. But one must remember that the major objection to section 1 was based on the theory that Congress, through its enforcement power, would use the fourteenth amendment as a device to intervene in state affairs. Thus, coming from the political group most concerned with preserving state autonomy, an endorsement of the basic concepts that the federal government already had the duty to provide the "same protection" to all citizens stands as important evidence that the equal protection clause was generally viewed as being of very little scope, simply embodying a discrete right already belonging to all citizens, either by virtue of natural law or by some provision of the unamended Constitution. Democrats may well have believed that the right should be enforced at the state rather than the federal level, but the existence of the right itself was uncontroversial.

Summary

The equal protection clause was apparently not intended primarily as a safeguard against unfair classifications. Instead, it appears the drafters were simply attempting to constitutionalize a principle which would require statutes to provide the mechanism to protect citizens in the exercise of extrinsically established legal rights. In the fourteenth amendment context, the main provision establishing such rights was the privileges and immunities clause. The question of the intended scope of that clause thus becomes critical to any understanding of the equal protection clause.

A full discussion of the privileges and immunities clause is beyond the scope of this Article. One crucial issue, however, must be resolved — did the drafters intend that the privileges and immunities clause protect only a fixed set of rights, or was the precise scope of that clause intended to change over time?

141. H. REP. NO. 30, pt. 2, 39th Cong., 1st Sess. 2 (1866). *See also id.* at 5.

THE PRIVILEGES AND IMMUNITIES CLAUSE

Mainstream Republicans did not speak with one voice regarding the intended meaning of the proposed privileges and immunities clause. One finds references to the Civil Rights Act of 1866;¹⁴² the Bill of Rights;¹⁴³ and antebellum case law such as *Corfield v. Coryell*.¹⁴⁴ Moreover, there seems to have been an understanding that the precise boundaries of the concept of privileges and immunities were somewhat unclear.¹⁴⁵

Seizing on this uncertainty, Democrats argued that the concept was not only unclear, but could change over time. One of the most common attacks on section 1 was based on the argument that despite vigorous denials by the Republicans, the clause could and would be used to force black suffrage on the states.¹⁴⁶ There is considerable evidence, however, that the understanding and intention of the Republican drafters was that the meaning of privileges and immunities would remain fixed.

First, the same political and ideological factors which mitigate against an open-ended interpretation of the equal protection clause are present in the case of the privileges and immunities clause.¹⁴⁷ Second, while the Republicans may not have been entirely certain about what rights were protected by the privileges and immunities clause, they were consistent and firm in arguing that state control over suffrage would not be affected by section 1.¹⁴⁸ Such an argument can only be made with confidence if the parameters of the proposed clause were assumed to be fixed.

Finally, and most significantly, John Bingham consistently expressed intentions which were inconsistent with the concept of an

142. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2465 (1866) (remarks of Rep. Thayer); *id.* at 475 (remarks of Sen. Trumbull).

143. See, e.g., CONG. GLOBE, 42nd Cong., 1st Sess. 84 (1871) (remarks of Rep. Bingham); CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (remarks of Sen. Howard); *id.* at 1089-90 (remarks of Rep. Bingham); see generally H. HYMAN & W. WIECEK, *supra* note 59, at 404-05 (and additional sources cited therein).

144. 4 F. Cas. 371 (C.C. Wash. 1825) (No. 3230); see also CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (remarks of Sen. Howard); *id.* at 475 (remarks of Sen. Trumbull).

145. See CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (remarks of Sen. Howard); *id.* at 41-42 (remarks of Sen. Sherman). See also *id.* at 3041 (remarks of Sen. Johnson).

146. See, e.g., *id.* at 2538 (remarks of Rep. Rogers); Cincinnati Commercial, July 23, 1866, at 2, col. 2 (speech of George H. Pendleton); *id.* Oct. 6, at 2, (speech of Clement Vallandigham); TEX. HOUSE J. 578 (1866), quoted in C. FAIRMAN, *supra* note 127, at 89-90; N.H. HOUSE J. 176, quoted in C. FAIRMAN, *supra* note 127, at 176. See also CONG. GLOBE, 39th Cong., 1st Sess. 3041 (1866) (remarks of Sen. Johnson) (opposing privileges and immunities clause because "I do not understand what will be the effect of that").

147. See *supra* notes 8-23 and accompanying text.

148. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (remarks of Sen. Howard); *id.* at 2543 (remarks of Rep. Bingham).

open-ended privileges and immunities clause. Beginning on January 9, 1866, and continuing through the debates, Bingham emphasized that his objective was to provide a mechanism to assure the enforcement of guarantees which in his view were already in the Constitution — particularly those inherent in the comity clause.¹⁴⁹ Rather than simply achieving this purpose, an open-ended clause would have radically altered the federal/state balance of power — an intention which Bingham vigorously and repeatedly denied.¹⁵⁰

The clearest statement of Bingham's position on this point actually came in 1871. The occasion was the House Judiciary Committee response to the memorial of Victoria C. Woodhull, which requested the passage of a statute requiring states to allow women to vote. Woodhull claimed that Congress had the authority to pass such a statute based on its power to enforce both the privileges and immunities and equal protection clauses.¹⁵¹

One of the interesting features of the report of the House Judiciary Committee is the light which it shed on the relationship between the various clauses of section 1. Both the majority and minority reports treated the question of whether the right to vote was covered by the privileges and immunities clause as dispositive. Even the minority report, which favored the passage of a woman's suffrage law, did not argue that Congress could proceed under the equal protection clause independently of the privileges and immunities clause. This pattern of argument further reinforces the impression that the only new requirement imposed by the equal protection clause was that the states provide protection for rights guaranteed elsewhere.

Bingham's majority report is also quite significant for the light which it shed on his understanding of the concept of privileges and immunities. Writing for the majority, he states:

The clause of the fourteenth amendment, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," does not, in the opinion of the committee, refer to privileges and immunities of citizens of the United States other than those [guaranteed by the comity clause]. The fourteenth amendment, it is believed, did not add to the privileges and immunities beforementioned but was deemed necessary for their enforcement as an express limitation upon the power of the States. It had been judicially determined that the first eight articles of amendment of the Constitution was not limitations on the power of the States, and it was apprehended that the same might be held as the provision of the second section, for the article.¹⁵²

149. See, e.g., *id.* at 1064; *id.* at 157-58.

150. See, e.g., *id.* at 1088-94.

151. See SEN. MISC. DOC. NO. 16, 41st Cong., 3d Sess. 1 (1871).

152. H. REP. NO. 22, 41st Cong., 1st Sess. 1 (1871).

The message could not be clearer. The privileges and immunities clause was not intended to work any revolution in federalism, and thus could not have been intended to be open-ended. Of course, one might make the standard objection that the Judiciary Committee report was simply an advocacy piece prepared five years after the fact. Two factors, however, limit the force of that objection in this context. First, the report was prepared by John Bingham, the author of section 1. Second, it is entirely consistent with the statements which Bingham made throughout 1866. Thus, the report of the House Judiciary Committee on the Woodhull Memorial stands as evidence that the privileges and immunities clause was not intended to be open-ended.

CONCLUSION

No theory of the intent of the drafters of the fourteenth amendment is likely to be consistent with all of the evidence on the subject. The evidence itself is not entirely consistent; moreover, a substantial portion of it is simply ambiguous. Nonetheless, any such theory should be consistent with most or all of the following:

1. The contemporaneous understanding of the concepts of "equality" and "protection".
2. The statements of John Bingham, the drafter of section 1.
3. The statements of most of those who could be characterized as speaking for the body of the Republican Party on this issue.
4. The course of development of section 1.
5. The political and ideological climate of the early Reconstruction era.

Classification-based theories of the equal protection clause fail to meet these criteria. By contrast, a theory which focuses primarily on a discrete right to protection and sees classification as being important only in view of specific limited areas fits most of the important evidence. Thus, the latter theory is the most plausible.