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# THE ORIGINAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT IN ILLINOIS, OHIO, AND PENNSYLVANIA

by

JAMES E. BOND\*

The fourteenth amendment is a second American Constitution, the “new birth of freedom” for which Lincoln had prayed at Gettysburg. It nationalized the protection of civil liberty and thereby revolutionized the structure of American government. In the three great clauses of its first section it guarantees the privileges and immunities of citizenship, the equal protection of the laws, and due process of law.<sup>1</sup> These guarantees are the bedrock upon which the American regime of individual liberty rests.

Stated as principles, these guarantees presumably embodied a particular view of man and his relationship to government. The nature of that view is of more than antiquarian interest because it should inform contemporary interpretation of those guarantees.<sup>2</sup> Indeed, litigants frequently invoke, and courts frequently cite, the original understanding.<sup>3</sup> These invocations and citations do not, however, reflect any consensus about the original understanding.<sup>4</sup>

In search of the original understanding lawyers and judges have mined many sources<sup>5</sup> but have left untapped one major vein: the state ratification de-

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<sup>1</sup> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and 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.

U.S. CONST. amend. XIV, § 1.

<sup>2</sup>The Supreme Court itself has recognized the relevance of the state debates. In *Brown v. Board*, 345 U.S. 972 (1954), it ordered counsel to answer the following question:

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

See generally Kaczorowski, *Searching for the Intent of the Framers of the Fourteenth Amendment*, 5 CONN. L. REV. 368 (1972-73).

<sup>3</sup>Whether the Court does in fact — or should in theory — rely on the original understanding are much disputed questions. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1-14 (1978). Resolution of that dispute is beyond the scope of this article. The relevance of the analysis contained in this article nevertheless depends on how the dispute is resolved. One who rejects reliance on the original understanding would dismiss the evidence amassed here as interestingly irrelevant.

<sup>4</sup>See, e.g., the Court's sharp disagreement in *Adamson v. California*, 332 U.S. 46 (1947), over whether the framers intended to incorporate the Bill of Rights in the 14th amendment. The disagreement within the Court mirrors an equally sharp dispute among scholars. See *infra* notes 5 and 6.

<sup>5</sup>For an analysis of the social, political, and economic conditions that induced Congress to consider the amendment, see J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1965); J. TENBROEK, *EQUAL UNDER THE LAW* (originally published in 1961 under the title *THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT*); Graham, *The Early Anti-Slavery Backgrounds of the Fourteenth Amendment*, 1950 WIS. L. REV. 479, 610.

bates.<sup>6</sup> These debates may illuminate the original understanding with unusual clarity because ratification of the 14th amendment was the major election issue in 1866. Congress had hammered out the amendment as a solution to the many dilemmas of reconstruction. The Republican or, as it was more commonly called at that time, Union Party adopted the 14th amendment as its campaign platform.<sup>7</sup> The Democratic Party rejected the 14th amendment and chose instead to support President Johnson's more lenient reconstruction policy.<sup>8</sup>

This sharp and bitter clash insured a thorough analysis of the amendment. The Republicans praised the amendment because it would insure peaceful reunion.<sup>9</sup> The Democratic Party denounced the amendment because it would in-

For dissection of the legislative debates that persuaded Congress to promulgate the amendment, see R. BERGER, *GOVERNMENT BY JUDICIARY* 37-68, 134-245 (1977); W. CROSKEY, II *POLITICS AND THE CONSTITUTION* 1083-1118 (1953); B. KENDRICK, *JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* (1914); Avins, *Social Equality and the Fourteenth Amendment: The Original Understanding*, 4 *HOUS. L. REV.* 640 (1967); Van Alstyne, *The Fourteenth Amendment, The "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 *SUP. CT. REV.* 33; Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 *MICH. L. REV.* 1049 (1956); Bickel, *The Original Understanding and the Segregation Decision*, 69 *HARV. L. REV.* 1 (1955); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 *STAN. L. REV.* 5 (1949).

<sup>6</sup>Professor Fairman did survey the state debates in his influential article. Fairman, *supra* n.5, at 81-132. Justice Harlan surveyed "state materials relating to the ratification process" even more briefly in *Oregon v. Mitchell*, 400 U.S. 112, 195-200 (1970) (Harlan, J., concurring in part and dissenting in part). See also H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908).

<sup>7</sup>Republican papers in these three states commonly ran the text of the 14th amendment above the masthead on the second page under the heading "Union Platform."

<sup>8</sup>The following is representative of the position which the Democratic Party took:

Grand Democratic Mass Convention of the Eastern and Central Counties of Pennsylvania.

A Grand Mass Convention of the friends of JOHNSON, CLYMER [the Democratic candidate for governor] and the CONSTITUTION, will be held at READING, on Wednesday, the 18th of July, 1866.

All who are in favor of the immediate restoration of the Union in all its original purity.

All who believe that The Constitution of the United States is the Supreme Law of the Land.

All men everywhere who are opposed to committing the destinies of 80 MILLIONS OF WHITE MEN to 800,000 NEGRO VOTERS; all who are opposed to Negro Legislators, Negro Judges and Negro Jurors in Pennsylvania, and especially those BRAVE MEN who perilled Life and Limb to defend and uphold the Government of their Fathers, and not to create a new nation in which the NEGRO is to be our social and political equal, are invited to attend.

The Crisis of our Country's Destiny is upon us. The patriotic Andrew Johnson tells you that the traitors Thaddeus Stevens and Charles Sumner, are trying to destroy our system of Government, the Government that Washington and Jefferson gave us, the best Government the world ever saw, and to establish in its place a Consolidated Despotism, controlled by New England fanaticism.

"CONSOLIDATION IS AS DANGEROUS AS SECESSION." — Andrew Johnson

The most distinguished Democratic and Conservative Statesmen of the country will be present and address the Convention.

The President and the Union Members of the Cabinet have been invited.

Excursion Tickets will be issued on all the Railroads.

By order of the Democratic State Central Committee.

J.D. DAVIS, Chairman  
Democratic Standing Committee of Berks Co.  
WM. ROSENTHAL, President  
Democratic City Club of Reading

Johnstown Democrat, June 20, 1866, at 2, col. 1.

<sup>9</sup>Ohio Governor Cox opened the campaign in that state with this promise:

The adoption of the Constitutional Amendment will witness the immediate opening of the doors of the Capitol to the Southern delegates, and as the last subject of dispute in reference to the rights of

sure continued conflict and disunion.<sup>10</sup> In local party caucuses and conventions the faithful adopted resolutions extolling or condemning the amendment. Every candidate for state or national office declared himself for or against it. On the stump, these candidates were obliged to explain themselves; and their explanations and the editorial commentary they provoked provide insight into the original understanding.

This article reviews the state ratification debates in Pennsylvania, Ohio, and Illinois. Then as now these states were major electoral battlegrounds. In all three states the two parties fielded strong candidates and ran well-organized campaigns. Many of the nationally recognized proponents of the 14th amendment hailed from these states.<sup>11</sup> Those among them who faced re-election were marked men. President Johnson himself made his famous "swing around the circle," defending "My Policy" in major cities in all three states.<sup>12</sup> The President was only the most prominent of the many well-known outsiders who criss-crossed these states in a desperate attempt to influence the decision.<sup>13</sup> Throughout the summer and fall of 1866 this debate riveted the public's attention on the single issue of ratification.<sup>14</sup>

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States or of persons shall be thus removed, the last possibility of renewed disturbance or of revolutionary tumult will also have vanished, and our federal system will resume its progress, calmly and smoothly as the heavenly planets spin through their orbits in space. The case of Tennessee . . . is the pledge and proof of the truth of this assertion.

Speech of Governor Cox, August 21, 1866, CAMPAIGN SPEECHES OF 1866 17 (Cincinnati Commercial ed. 1866). See also *Id.* at 13 (speech of Columbus Delano at Coshocton, August 28, 1866); at 19 (speech of Senator Sherman at Cincinnati, September 28, 1866); at 39 (speech of Robert Schenck on August 18, 1866).

The Union press frequently described the amendment as "the basis of settlement." *E.g.*, Nashville Journal (Ill.), June 14, 1866, at 2, col. 2; Daily Journal (Ill.), June 18, 1866, at 2, cols. 1-2; Bulletin (Pa.), May 30, 1866, at 1, col. 2; Evening Telegraph (Pa.), May 28, 1866, at 4, col. 1; *But see* Cleveland Leader (Ohio), October 6, 1866, at 2, col. 1 (predicts that Southern intransigence will require the imposition of additional conditions).

<sup>10</sup>The title of a speech delivered at the annual Jackson Day Banquet in Columbus, Ohio, on January 8, 1866, capsulized the Democratic position: "The Constitution as it is, the Union as it was, and the Negroes where they are." G. PORTER, OHIO POLITICS DURING THE CIVIL WAR PERIOD 150 (1968).

<sup>11</sup>Thaddeus Stevens, the leading radical, represented Pennsylvania in Congress. John Bingham, author of § 1 of the fourteenth amendment, represented Ohio in Congress. John Trumbull, sponsor of both the Civil Rights Bill and the Freedman Bureau Bill, was an Illinois Senator whose term expired in 1866.

<sup>12</sup>The tour is described in E. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 428-438 (1960). Johnson succeeded only in driving many moderate Republicans into support of Congress' policy. The brother of Ohio Governor Cox had favored much of "My Policy"; but after Johnson's tour, he rejected it. Charles Cox wrote his brother:

I think your position is correct. Johnson has killed himself and party and men of any brains are ashamed to be advocates of his policy. While I was at home during the summer I was inclined to favor Johnson's policy of reconstruction and I still think it has a right sort of a principle at its foundation, but the man who is its champion has ruined it by his own vulgar advocacy of it. — I do not believe that Congress is entirely right, by any means. I think there was much that was disgraceful in the proceedings of its last session, but yet I believe the Union Republican Party is the only safe one for the government and the country and it is more likely than any other to reconcile the differences among the people.

Letter from Charles Cox to Jacob Cox (September 24, 1866) Jacob Cox Papers, Oberlin College Library.

<sup>13</sup>For example, twenty-eight delegates from a "Southern Loyalist" convention in Philadelphia stopped in Ohio for four days and made speeches in different parts of the state. Porter, *supra* note 10, at 233.

<sup>14</sup>*E.g.*, Elyria Independent Democrat (Ohio), Oct. 3, 1866, at 2, col. 1 ("the choice is between Congress [the amendment] or the President [my policy]"); Carrol Union Press (Ohio), Sept. 26, 1866, at 1, cols. 2-4 (same);

## FOCUS OF THE RATIFICATION DEBATE

Unfortunately, the debate in Pennsylvania, Ohio, and Illinois did not focus exclusively or even primarily on the first section of the 14th amendment. The principal issue in these states was control of the national government. Men who had spilled blood and lost kin in order to preserve the Union were loathe to welcome back into its councils those who had deserted the Union and fought for the Confederacy. Northerners who had resented Southern domination of the national government before the war vowed never again to submit to that domination.<sup>15</sup> As one Unionist declared: "This country belongs to Union men — and Union men only . . . ."<sup>16</sup> On the Fourth of July General Logan, campaigning for the at large congressional seat in Illinois, bluntly declared: "The restoration of this country is the work of loyal men, and not the work of traitors."<sup>17</sup> Thus, Republicans demanded "irreversible guarantees" against any resurgence of the slavocracy.<sup>18</sup>

Those Northerners who had regarded the Union war effort as folly immediately renewed their pre-war relationships with their ideological brethren below the Mason-Dixon line. Generally, Democrats believed that a truly national government could be established only if the Southern states were promptly and unconditionally restored to the Union.<sup>19</sup>

Evening Telegraph (Pa.), August 30, 1866, at 4, cols. 1-2 (same). *See generally* Porter, *supra* note 10, at 232 ("The fight in the campaign was made on the congressional elections and the issue was Johnsonism against the Civil Rights and Freedmen's Bureau Acts and the Fourteenth Amendment.")

<sup>15</sup>"The nature of the opposition to the Johnson plan of Reconstruction was a firm conviction that its success would wreck the Republican party, and by restoring the Democracy to power, bring back Southern supremacy and Northern vassalage." S. COLLUM, FIFTY YEARS OF PUBLIC SERVICE — RECOLLECTIONS OF SHELBY CULLON 146 (1914).

<sup>16</sup>Rock Island Union (Ill.), Jan. 24, 1866, at 2, col. 3.

<sup>17</sup>The Independent (Ill.), July 20, 1866, at 1, cols. 4-7.

<sup>18</sup>Carl Schwarz, who had toured the South, warned:

Mark my words: You admit the late rebel States to representation and power in the National Government such as they are, unconditionally, you remove the breaks from the reactionary movement without having first secured and fortified the results of the war by amendments to our Federal Constitution; and I predict the reaction will go so far as to call in question all legislation that was had during the absence from Congress of the eleven rebel States. Whether so atrocious a movement will ultimately succeed will rest with the people; but it is certain that if the President's policy prevails it will be attempted, and the attempt will not be checked before having plunged the Republic into disasters of the wildest confusion.

Columbus Morning Journal (Ohio), May 5, 1866, at 2, cols. 2-3.

The 14th amendment constituted the guarantees demanded. Dayton Daily Journal (Ohio), September 14, 1866, at 2, col. 2. *See also* Evening Telegraph (Pa.), April 26, 1866, at 4, cols. 2-3 (nation must impose conditions to secure "revolution"); Buckeye State (Ohio), January 11, 1866, at 2, col. 1 (Southern states cannot be readmitted until rights of loyal men are secured); Springfield Daily Republic (Ohio), Jan. 31, 1866, at 2, cols. 2-3 (rebel states cannot be readmitted except on terms that ensure security); Ohio State Journal (Ohio), April 2, 1866, at 2, cols. 1-2 (South must show repentance); Gallipolis Journal (Ohio), July 5, 1866, at 2, cols. 1-2 (constitutional guarantee needed to make secession impossible); Ironton Register (Ohio), August 2, 1866, at 2, cols. 2-3 (measures needed to secure Union); Dayton Daily Journal (Ohio), September 14, 1866, at 2, col. 2 (South must respect § 1 guarantees before it can be readmitted); Cleveland Leader (Ohio), September 27, 1866, at 2, col. 1 (security of the Republic requires Southern submission to amendment); Danville Plaindealer (Ill.), November 15, 1866, at 1, cols. 6-9 (must have assurance that South will not dominate government).

<sup>19</sup> It is certain that all will be lost unless the states are restored to their constitutional relations to the general government; and every day's delay increases the difficulties of restoration and the dangers of

Consequently, the public focused primarily on sections two and three, the representation and disqualification provisions of the amendment. Of the two, the representation provision received more attention because the Democratic Party might regain control of the national government if the South were promptly and unconditionally restored to the Union.<sup>20</sup> The Republican Party had come into power as a sectional party. Despite Lincoln's shrewd efforts to expand its base of support, the party's strength was still confined largely to the Midwest and Northeast.<sup>21</sup> The Democratic Party retained substantial strength in those areas as well, and it reigned supreme in the unreconstructed South. Prior to the war, slaves had been counted as three-fifths a person for the purpose of determining how many congressional representatives a state got. Now that the slaves were freed, they would be counted as a whole person for that purpose. The South — the Democratic South — would thus get more representatives than it had had before the war.<sup>22</sup>

This perverse prospect frightened Congressional Republicans, and they rallied behind section two with sighs of relief. Section two gave the South an unpalatable choice: extend suffrage to blacks or accept a reduction in the number of its representatives.<sup>23</sup> Republicans could cheerfully accommodate

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our situation. Will a more favorable or auspicious time ever come? I think not. The people who were in rebellion have ceased their resistance to the government; acknowledged its authority; avowed their wish to remain under its protection, and are living in obedience to its laws. What more can they do? The rest is with us. We fought them four years in the field to make them stay in the Union, and now they have yielded to the demand, and avow a willingness and wish to do all we required, we ought not to fight them in Congress to make them go out.

MaComb Eagle (Ill.), May 19, 1866, at 1, cols. 3-6 (letter from former Congressman O.H. Browning).

<sup>20</sup>Many called the representation question the "most important" or the "only" issue. Evening Telegraph (Pa.), May 9, 1866, at 4, col. 2; Evening Dispatch (Pa.), September 17, 1866, at 4, col. 1; Public Ledger (Pa.), May 16, 1866, at 2, col. 1; Steubenville Herald (Ohio), Jan. 31, 1866, at 1, col. 4; Cleveland Leader (Ohio), Jan. 12, 1866, at 2, col. 1; Springfield Daily Republic (Ohio), Oct. 4, 1866, at 2, col. 1; Brookline Republican (Ill.), May 30, 1866, at 2, col. 3; Alton Telegraph (Ill.), August 31, 1866, at 1, col. 4; Ottawa Free Trader (Ill.), Sept. 1, 1866, at 2, col. 4; Carlville Free Democrat (Ill.), Nov. 4, 1866, at 2, col. 1.

<sup>21</sup>See generally A. CRANDALL, THE EARLY HISTORY OF THE REPUBLICAN PARTY (1960); G. MAYER, THE REPUBLICAN PARTY (2d ed. 1967).

<sup>22</sup>Many papers carried tables which demonstrated how the South would get more seats than it had before the war because it could now count freed slaves as whole persons and how the proposed amendment would "remedy" that result by "equalizing" representation. E.g., Bedford Inquirer (Pa.), May 18, 1866, at 2, col. 3; Dayton Daily Empire (Ohio), June 22, 1866, at 2, col. 1; Marion Independent (Ohio), July 26, 1866, at 2, col. 2 and September 20, 1866, at 2, col. 1; Steubenville Herald (Ohio), Oct. 3, 1866, at 2, col. 4; Freeport Bulletin (Ill.), Sept. 6, 1866, at 2, col. 1.

The most common conclusion was that the South would gain thirteen seats. One critic exploded: "Thirteen representatives are to be given the rebel states as the reward of rebellion." Carlville Democrat (Ill.) May 21, 1866, at 2, col. 2. See also Johnstown Tribune (Pa.), Jan. 19, 1866, at 2, col. 1 (South cannot be permitted to profit from increased representation due to abolition of the old 3/5 rule); Pittston Gazette (Pa.), Jan. 11, 1866, at 2, col. 1 (representation must be adjusted to avoid injustice of South's increasing its representation because slaves are free). But see Freeport Bulletin, *supra* ("After a new apportionment, even though every negro should be counted as a white man, the natural increase of the North, and its overwhelming majority in population, will place the South in a minority in the halls of Congress of more than two to one.") Cf. Putnam County Sentinel (Ohio), at 2, cols. 2-3 (If Ohio counts negroes but does not let them vote, why should not South Carolina?).

<sup>23</sup>The Evening Express put the point poetically: "Count your black brutes or men — but if you count them brutes do not expect us to count them men." Evening Express (Pa.), Jan. 24, 1866, at 2, col. 1. See also Piatt Independent (Ill.), May 2, 1866, at 2, col. 1. South Carolina with its large black population was a favorite example of the injustice of letting the South count non-voting blacks. It had 291,300 whites and 412,320

either choice. If the South extended suffrage to blacks, they would vote Republican and Republicans could be elected from the South. If the South accepted a reduction in the number of representatives, the Republicans would at least have to deal with fewer Democratic Congressmen. Although Democrats railed against both the unconstitutionality and injustice of the scheme,<sup>24</sup> Republicans insisted that it alone would prevent unrepentant rebels from seizing control of the government.<sup>25</sup>

The disqualification provision girded the section two guarantee by barring such traitors from public office unless and until they were pardoned.<sup>26</sup> Some Republicans despised rebel leaders.<sup>27</sup> Others feared their political savvy.<sup>28</sup> Whatever the reasons, Republicans wanted them excluded from public office until reconstruction was complete. Again, Democrats objected to this mean-spirited bar; but Republicans insisted that "treason be made odious."<sup>29</sup>

Republicans repeatedly asked: "Who should control the government?"<sup>30</sup>

blacks. With only 68,158 white males over 20, it would nevertheless get five representatives. California with 206,442 white males over 20 would get only three representatives. *Marion Independent* (Ohio), September 20, 1866, at 2, col. 1. *Cf.* *Chicago Tribune* (Ill.), Jan. 6, 1866, at 2, col. 1 ("If the Southern States will not give the ballot to the negro, must they not abandon all claim to sixteen of their members of Congress who now represent the negro, and to the thirty-four members who would represent him after the next adjustment of representation?").

<sup>24</sup>The constitutional objections are stated fully in the Ohio Senate and House resolutions rescinding ratification of the fourteenth amendment. *Ohio Senate Journal* 7 (1868); *Ohio House Journal* 10 (1868). Republicans accused the Democrats of having "Constitution on the brain," an obvious play on the Democratic charge that the Republicans had "nigger on the brain." *Zanesville Daily Courier* (Ohio), Apr. 2, 1866, at 2, col. 1.

<sup>25</sup>One student of the campaign in Illinois has concluded that this argument "obscured the necessity of engaging in any genuine political debate over the future of the black American." G. Cardwell, *The Rise of the Stalwarts and the Transformation of Illinois Republican Politics, 1860-1880*, at 97 (unpublished doctoral dissertation, University of Virginia 1976).

<sup>26</sup>The original disqualification provision was widely criticized as "too punitive and difficult to enforce." *Carlisle Free Democrat* (Ill.), May 10, 1866, at 2, col. 2. *Cf.* *The Age* (Pa.), May 19, 1866, at 2, col. 2 (disfranchisement section meeting great — and deserved — criticism). *But see* *Eric Weekly Gazette* (Pa.), June 7, 1866, at 2, col. 2 (people will support a more stringent disfranchisement provision).

<sup>27</sup>Ohio Congressman Bingham, for example, declared that Confederate leaders "ought to thank God they are permitted to live anywhere on this side of deepest hell." Speech of John A. Bingham at Bowerstown, Ohio, August 24, 1866, *SPEECHES OF THE CAMPAIGN OF 1866*, at 19 (Cincinnati Commercial ed. 1866).

<sup>28</sup>*Columbus Morning Journal* (Ohio), May 5, 1866, at 2, cols. 2-3.

<sup>29</sup>*Metropolis Promulgator* (Ill.), August 9, 1866, at 2, cols. 2-3 ("It would be unfit, unjust, and indecent in the last degree, to allow these classes of ring leaders of treason to exercise any official control over the country."). *But see* *Pittsburgh Chronicle* (Pa.), June 9, 1866, at 2, col. 1 ("We would have preferred . . . that the bar to leading rebels holding office had been confined to general offices, and had not comprised offices under State governments . . .").

<sup>30</sup>*Shamokin Herald* (Pa.), October 4, 1866, at 2, cols. 1-2 (should loyal North or rebel South decide "the national creed?"); *Bedford Inquirer* (Pa.), March 16, 1866, at 2, col. 1 (shall loyal men "make the terms . . . upon which rebel states are restored?"); *Norwalk Weekly Reflector* (Ohio), March 6, 1866, at 2, col. 1 (should loyal men control government?); *Canton Repository* (Ohio), August 29, 1866, at 2, col. 1 (shall the "fruits of war" be lost to rebels?); *Gallipolis Journal* (Ohio), July 5, 1866, at 2, cols. 1-2 (shall loyal determine the "policy and principles upon which national government will be conducted?"); *Cleveland Leader* (Ohio), February 22, 1866, at 2, col. 1 (can we entrust government to traitors?); *Central Illinoian* (Ill.), October 4, 1866, at 2, col. 1 (should loyal men or traitors control government?); *Lacon Home Journal* (Ill.), July 11, 1866, at 2, col. 2 (shall life of nation be given into the keeping "of those whose hands are not yet washed of blood?").

Confident that the people wanted those who had supported and prosecuted the war to retain control, the Republicans offered the 14th amendment as insurance that loyalists would retain control. They appealed to the patriotism of the returning soldier, his family, and his friends.<sup>31</sup> In short, Republicans tried to transform the ratification debate into a loyalty referendum. They succeeded to an extent, and to that extent they forestalled serious analysis of more complex reconstruction issues, particularly those raised by § 1.<sup>32</sup>

Republicans failed to stifle all debate on § 1, however, because the Democrats chose to run "against the nigger"<sup>33</sup>; and they necessarily concentrated their attacks on that section which made the freedman a citizen and guaranteed him and all others due process and equal protection. The Democrats denounced § 1 as a "nigger Magna Charta"<sup>34</sup> and warned that it made "Sambo" the political and social equal of the white man.<sup>35</sup> In particular, it guaranteed him the right to vote.<sup>36</sup> The Democrats recoiled in horror at "a thick-lipped Sambo" in the voting booth<sup>37</sup> or "a sweet-scented Dinah"<sup>38</sup> in the

<sup>31</sup>Republicans sought to capture the soldier vote by a series of reunions and picnics for veterans. During the campaign these were organized in accordance with the "Soldier Love Feast System," in which soldiers were called together in the name of brotherhood to lend support at Republican campaign rallies. A.C. Babcock, who later became chairman of the Illinois Republican party's central committee, informed Trumbull of the soldiers' influence in his county:

You are right in attributing our success in part to the Soldiers Love Feast. The evening prior to the election some 500 of the boys left here on a special train for Lewistown with two bands & hard tack & sow belly in abundance. . . . The effect was magnificent, democrats admit it gave up thirty votes. Had we inaugurated the Love Feast System a month before the election we would have carried the county by 350.

M. Robinson, *Illinois Politics in the Post Civil War Era* 20-21 (unpublished doctoral dissertation, University of Wyoming, 1973).

<sup>32</sup>"Republicans thus concentrated on bloody shirt issues, using war themes as a substitute for their reluctance to give solid meaning to the Fourteenth Amendment." J. Bonadio, *Ohio Politics During Reconstruction, 1865-1868*, at 223 (unpublished doctoral dissertation, Yale University 1964). Democrats frequently excoriated their opponents for refusing to address the issues raised by § 1. *E.g.*, Dayton Daily Empire, September 7, 1866, at 2, cols. 1-2.

<sup>33</sup>*E.g.*, Lewisburg Chronicle (Pa.), September 26, 1866, at 2, col. 3. One student who has studied the 1866 campaign in Ohio closely has concluded that "[the Democrats'] most important issue, however, was their past and future favorite — to condemn Republicans as the proponents of racial equality." R. Sawrey, *Ohio and Reconstruction: The Search for Future Security, 1865-1868*, at 149 (unpublished doctoral dissertation, University of Cincinnati 1979). Running "against the nigger" made good tactical sense because of widespread antipathy toward blacks in these states. By 1860, 713,527 southern-born Americans lived in the North; and of this number, 530,843 lived in Illinois, Indiana, Iowa, and Ohio. The states of Illinois, Indiana, Iowa, and Ohio prohibited or severely restricted Negro migration and settlement within their boundaries. Indiana forbade Negro testimony in court against white men. Marriage between blacks and whites was illegal in Indiana, Iowa, and Michigan. Lawmakers in Ohio excluded Negroes from the state militia and kept Negro children from attending white schools. Black codes requiring that Negroes obtain certificates of freedom and post bonds as security against poor behavior were set up in Indiana, Iowa, and Minnesota. P. Swenson, *The Midwest and the Abandonment of Radical Reconstruction 1864-1867*, at 98-99 (unpublished doctoral dissertation, Washington University 1972).

<sup>34</sup>Lancaster Intelligencer (Pa.), May 9, 1866, at 2, col. 2.

<sup>35</sup>In the following year Ohio Democrats resorted to the tactic of parading young girls, dressed in white, carrying banners inscribed with the appeal: "Fathers, save us from negro equality." Porter, *supra* note 10, at 2417.

<sup>36</sup>Harrisburg Daily Patriot & Union (Pa.), April 9, 1866, at 2, cols. 1-2.

<sup>37</sup>Newton Weekly Press (Ill.), November 2, 1866, at 2, col. 1.

<sup>38</sup>Appendix to the Pennsylvania Legislative Record LXIX (1867). See also Daily Quincy Herald (Ill.), April 29, 1866, at 2, col. 1.



drawing room. They described blacks as “ignorant, besotted, and brutal.”<sup>39</sup> They expressed doubt that the black man would ever work;<sup>40</sup> consequently, they did not believe blacks would ever become “self-dependent.”<sup>41</sup> Black women who sought seats on a street car were “fat wenches,”<sup>42</sup> and black men who spoke in public were “depraved wretches.”<sup>43</sup> Their language was caricatured;<sup>44</sup> their appearance, lampooned;<sup>45</sup> their origin, ridiculed;<sup>46</sup> their character, assailed.<sup>47</sup> The Democrats demanded a government of white men, by white men, for white men. The darling of Ohio’s anti-war Democrats, C.L. Vallandigham, did not mince words when he spoke in the waning days of the campaign at Rossville, Ohio:

If it is not a white’s man Government, then it is either totally black or it is mixed. [Applause.] I was taught — it was the doctrine of the fathers; it was the idea of the Constitution, the fundamental theory of all parties; that this was a white man’s Government, “made by white men for the Government of white men.” That is the doctrine of the President today, and of the whole Democratic party of the United States, and by that doctrine we must stand or fall. If this is to be a black man’s government — no; if it is to be a mulatto government, part black and part white — than I renounce it forever. (Cries of “So do we.”)<sup>48</sup>

In this manner Democrats tried to divert public attention from the other amendment sections, which they contemptuously described as the “sugar that coats the nigger pill.”<sup>49</sup>

Republicans tried to defuse this racist attack with a series of simple assertions about the meaning of § 1. First, it only guaranteed civil freedom. The privileges and immunities which it protected were those natural rights essential to the pursuit of happiness in a free society. Voting was not such a natural right. Second, the equal protection clause only guaranteed blacks equal opportunity before the law. It did not make them the political or social equals of

<sup>39</sup>Ashland Union (Ohio), July 18, 1866, at 2, col. 2.

<sup>40</sup>Cincinnati Enquirer (Ohio), January 5, 1866, at 2, col. 2.

<sup>41</sup>The Age (Pa.), June 7, 1866, at 2, col. 2.

<sup>42</sup>Robinson Constitution (Ill.), May 16, 1866, at 2, col. 3.

<sup>43</sup>Menard County Axis (Ill.), October 26, 1866, at 2, cols. 2-3.

<sup>44</sup>Ebensburg Democrat and Sentinel (Pa.), October 11, 1866, at 1, cols. 2-3.

<sup>45</sup>Quincy Daily Herald (Ill.), April 26, 1866, at 2, col. 1.

<sup>46</sup>Ottawa Free Trader (Ill.), January 6, 1866, at 2, col. 2.

<sup>47</sup>Cincinnati Enquirer (Ohio), April 14, 1866, at 2, cols. 2-3.

<sup>48</sup>The Crisis (Ohio), October 24, 1866, at 307, cols. 3-4. The Republican reply was pointed: this is a government of *loyal* men for *loyal* men. Norwalk Weekly Reflector (Ohio), May 8, 1866, at 2, col. 1. A year later, Rutherford B. Hayes, running for governor in Ohio, declared:

It is not the Government of any class or sect or nationality or race . . . . It is not the Government of the native born or of the foreign born, of the rich man or of the poor man, of the white man or of the colored man — it is the Government of the freeman.

Porter, *supra* note 10, at 244.

<sup>49</sup>Public Ledger (Pa.), Sept. 26, 1866, at 2, col. 2.

white men. Third, the due process clause guaranteed only procedural fairness. These assertions were consistent with the single most common explanation of the first section: it constitutionalized the Civil Rights Bill.

### EXTERNAL LEGISLATIVE HISTORY

After all, the conditions that had prompted Congress to enact the Civil Rights Bill in the spring of 1866 also concerned those who were at the same time working on the various proposals that ultimately became § 1 of the 14th amendment. The Republican majority in general and the radicals in particular believed that white Southerners brutalized the freedman.<sup>50</sup> The Black Codes had convinced a majority in Congress that white Southerners intended to reinstitute slavery by denying newly freed blacks the rights to contract, hold property, and sue.<sup>51</sup> Stories about blacks being summarily punished or punished more severely than whites appalled the congressional majority.<sup>52</sup>

The debate on the Freedmen's Bureau Bill highlighted Republican concern for the rights of the newly freed slave. They repeatedly asserted that white Southerners abused the newly freed slave and that the national government was therefore obliged to intervene on his behalf: ". . . to neglect the poor freedman and treat him as if he had no rights is wrong and despicably cruel."<sup>53</sup> Until Southern governments gave freedmen access to the courts so that they could enforce their rights of person and property, the United States government had to protect them.<sup>54</sup> Republicans consequently criticized the President for vetoing the Freedmen's Bureau Bill, "We have made the negro free and what we now want is to have it secured on no uncertain basis — one that will repel

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<sup>50</sup>Ottawa Weekly Republican (Ill.), Jan. 7, 1866, at 2, col. 1 (blacks mistreated in the South); Jacksonville Journal (Ill.), Mar. 8, 1866, at 2, col. 1 (Freedman's Bureau would be unnecessary if Southern states protected blacks); Galena Gazette (Ill.), Apr. 3, 1866, at 2, cols. 1-2 (black men in the South are at the mercy of their most brutal and unrelenting enemies).

<sup>51</sup>Harrisburg Daily Telegraph (Pa.), March 28, 1866, at 2, col. 1; Erie Tri-Weekly Gazette (Pa.), February 15, 1866, at 2, cols. 2-3; Ohio State Journal (Ohio), February 2, 1866, at 2, cols. 2-3; Jackson Standard (Ohio), June 21, 1866, at 1, cols. 5-6; Springfield Daily Republic (Ohio), at 2, col. 2; Putnam County Sentinel (Ill.), August 16, 1866, at 1, col. 6.

<sup>52</sup>E.g., Germantown Telegraph (Pa.), June 6, 1866, at 2, col. 1 (reservation of flogging for blacks alone criticized). The editor of the Bedford Inquirer (Pa.), June 8, 1866, at 2, col. 2, elaborated:

. . . in South Carolina and Florida flogging is still a legalized punishment for the blacks; and in the former State the law is so worked that unless a colored man, fined for a slight breach of law, happens to have money in his pocket at the moment of conviction to pay the fine, he will be, if the magistrate chooses, disgraced by flogging. Let the reader imagine what would happen if our legislature should pass a law declaring that if an offender, fined to the amount of five dollars, "does not immediately pay the fine he shall suffer corporal punishment." The first attempt to enforce such a law would create a riot; and the public voice would acquit of all blame those who should to the utmost extent resist such an iniquitous and disgraceful enactment. And suppose, instead of being of general application, the law should condemn only one class of men, say the shipwrights, or stevedores, or the journeymen carpenters?

*Id.*

<sup>53</sup>Ashtabula Sentinel (Ohio), April 4, 1866, at 2, col. 2.

<sup>54</sup>Zanesville Courier (Ohio), April 3, 1866, at 2, col. 1.

every attempt of any power to infringe upon his right as a free man."<sup>55</sup>

The Memphis<sup>56</sup> and New Orleans<sup>57</sup> incidents reinforced the view that white Southerners treated the freedmen like animals. Reaction to these summer disturbances split along party lines. Democrats characterized them as riots perpetuated by ignorant and shiftless blacks, egged on by their manipulative white sympathizers.<sup>58</sup> Republicans characterized the disturbances as "massacres."<sup>59</sup> The "assault on defenseless negroes"<sup>60</sup> at Memphis proved to the radicals that Southern whites would kill any blacks who asserted their rights.<sup>61</sup> The later "slaughter" of loyal blacks and whites who had gathered in New Orleans to discuss political questions only confirmed this belief.<sup>62</sup> The New Orleans incident especially infuriated Republicans because there the mob had trampled on the fundamental rights of speech and assembly.<sup>63</sup>

This external legislative history — the specific problem which caused the legislature to act — suggests that Congress passed the Civil Rights Bill and thereafter promulgated §1 of the 14th amendment in order to secure civil freedom for blacks. Congress had two reasons for writing the guarantees of the Civil Rights Act into the first section of the 14th amendment. One, Congress wanted to eliminate any lingering doubts about the constitutionality of the Civil Rights Act.<sup>64</sup> Congressman Bingham, who is generally credited with drafting § 1 and who insistently argued for black rights, had himself voted against the Civil Rights Bill on the ground that the enforcement clause of the 13th amendment did not empower Congress to enact the Bill.<sup>65</sup> Two, Congress

<sup>55</sup>Grundy County Herald (Ill.), February 28, 1866, at 2, col. 1.

<sup>56</sup>On April 30 and May 1, a group of whites assisted by some Memphis police destroyed part of the Negro section of that city, killing 46 Negroes. See generally J. MCPHERSON, *THE STRUGGLE FOR EQUALITY: ABOLITIONISTS AND THE NEGRO IN THE CIVIL WAR AND RECONSTRUCTION* 358-359 (1964).

<sup>57</sup>In New Orleans a racially mixed group of Republicans met on July 30 to discuss a Negro suffrage amendment to the state constitution. A mob of whites attacked the convention; and aided, or led, by the local police, they slaughtered many of those in attendance. See generally McKittrick, *supra* note 12, at 424-427.

<sup>58</sup>The Picket Guard (Ill.), August 8, 1866, at 2, col. 2. See also *The Age* (Pa.), Aug. 3, 1866, at 2, col. 1 (riot at New Orleans was an attempted revolution); *Crawford Democrat* (Pa.), August 11, 1866, at 2, col. 2 (riot at New Orleans was part of a plan to overthrow the government); *Warren Constitution* (Ohio), May 24, 1866, at 2, col. 3 (abolitionists caused negro riot at Memphis); *Newton Weekly Press* (Ill.), May 25, 1866, at 2, cols. 3-4 (negro insurrection at Memphis would have been barbarous if it had succeeded).

<sup>59</sup>*North American* (Pa.), August 7, 1866, at 2, col. 1. Ohio Congressman Shellabarger later concluded that evidence presented at congressional hearings on the New Orleans riot "showed overwhelmingly a deliberately arranged plan for a massacre." Letter from Samuel Shellabarger to James Comly, December 29, 1866, James Comly Papers, Ohio Historical Society.

<sup>60</sup>*Freeport Bulletin* (Ill.), July 12, 1866, at 2, col. 1.

<sup>61</sup>*Johnstown Tribune* (Pa.), May 18, 1866, at 2, col. 4.

<sup>62</sup>*Warren Mail* (Pa.), August 14, 1866, at 2, col. 1.

<sup>63</sup>*Evening Telegraph* (Pa.), August 1, 1866, at 2, col. 1; *Sunday Dispatch* (Pa.), August 26, 1866, at 2, col. 1.

<sup>64</sup>*Circleville Union* (Ohio), May 11, 1866, at 1, cols. 4-6.

<sup>65</sup>*Zanesville Daily Courier* (Ohio), April 30, 1866, at 2, col. 1; *Coshocton Age* (Ohio), May 4, 1866, at 2, col. 3; *Alton Telegraph* (Ill.), May 4, 1866, at 2, col. 1. The text to Bingham's speech against the Civil Rights Bill was carried in many newspapers in these states. See, e.g., *Pittsburg Chronicle* (Pa.), March 29, 1866, at 2, cols. 3-5.

wanted to insure that a later Democratic majority could not repeal the Civil Rights Act.<sup>66</sup> The Republican pre-occupation with the representation question illustrates how much they feared the possibility that Democrats might regain control of the national government. Republicans were determined to put the civil liberties of the freedmen beyond the reach of any such transient legislative majority.

### THE PRIVILEGES AND IMMUNITIES CLAUSE

The debate over § 1 reveals the nature and scope of those civil liberties which voters in Pennsylvania, Ohio, and Illinois thought it was intended to protect. The debate focused primarily on the privileges and immunities clause and secondarily on the equal protection clause. The due process guarantee was little discussed. That fact is surprising because courts have subsequently relied upon the clauses in inverse relation to the importance which contemporaries gave them.

In the first place, advocates in these three states insisted that the privileges and immunities of citizenship were natural rights. Thus, Congressman Bingham said that § 1 protected "the inborn rights" of man,<sup>67</sup> and Republicans repeatedly identified the Declaration of Independence as the source of § 1.<sup>68</sup> Very early in the year the Chicago Tribune, the major Republican paper in Illinois, had argued that "every man feels that he, for himself, has a right to live, and to use the faculties which God has given him, and to share fairly in the benefits as well as the responsibilities of human society."<sup>69</sup> As Congress struggled to develop a reconstruction program, it had to decide whether to recognize this right as an "indefeasible birthright."<sup>70</sup> In § 1, it did. Blacks had to be made citizens because they, like all individuals, had natural rights and should therefore be equal before the law.<sup>71</sup>

The Democrats conceded that § 1 reflected belief in a "higher law."<sup>72</sup> Many Democrats denounced that belief as "very dangerous" because "it often leads man into the most absurd propositions, and nations into the very depths of anarchy."<sup>73</sup> Democrats worried that the radicals would argue that suffrage was a natural right, and thus they insisted that a citizen enjoyed only those liberties given him by society through its laws. In this view a man had no rights

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<sup>66</sup>North American (Pa.), June 8, 1866, at 2, col. 1.

<sup>67</sup>The Buckeye State (Ohio), May 31, 1866, at 1, cols. 2-6.

<sup>68</sup>*Id.*, March 29, 1866, at 2, cols. 1-2; Ogle County Press (Ill.), March 17, 1866, at 1, cols. 2-3; Newton Weekly Press (Ill.), October 26, 1866, at 2, cols. 1-2.

<sup>69</sup>Chicago Tribune (Ill.), January 24, 1866, at 2, cols. 2-3.

<sup>70</sup>Marietta Register (Ohio), February 1, 1866, at 2, col. 2.

<sup>71</sup>Elyria Independent Democrat (Ohio), January 24, 1866, at 2, col. 1; Zanesville Daily Courier (Ohio), June 21, 1866, at 2, col. 1.

<sup>72</sup>The Age (Pa.), August 29, 1866, at 2, col. 1.

<sup>73</sup>Daily Post (Pa.), January 19, 1866, at 2, col. 3.

by virtue of his humanity alone; rather, man had only those rights which a majority of his fellows deemed he could exercise wisely.

Section 1 reflected a contrary view, however. It was Congress' attempt "to secure to every state a Republican government and educate the most stolidly ignorant class of the American people in the subject of human rights."<sup>74</sup> Indeed, § 1 was especially needed to protect the human rights of "poor whites and Northern sojourners in Rebellom" as well as to "root out all the remains of Slavery."<sup>75</sup> As one Republican congressional candidate declared at Springfield, Ohio, Southerners were waging "a war of actual extermination by systematic and universal murder of the Union men of the South."<sup>76</sup>

What specific natural rights did a citizen enjoy? He enjoyed the rights to life, liberty, and property.<sup>77</sup> One proponent elaborated, "We understand man's natural rights to be those inalienable rights with which Nature's God has endowed him, such as life, liberty, self-protection, the enjoyment of property, the pursuit of happiness, etc., and his civil rights, the machinery by and with which he can protect his natural rights."<sup>78</sup> The preceding elaboration identified civil rights as those rights necessary to the protection of the person's natural rights, and Congress in passing the Civil Rights Bill had left no doubt about the nature and scope of the civil rights which it believed necessary for that purpose.

People in Pennsylvania, Ohio, and Illinois had followed closely the congressional debate over the Civil Rights Bill, and they understood that it repudiated the *Dred Scott* decision<sup>79</sup> and guaranteed every privilege and immunity of citizenship except voting.<sup>80</sup> As the Carlinville Free Democrat explained, "The immunities granted the freedmen by this bill are only such as are indispensable to a condition of freedom — such as non-voting whites have always enjoyed — Freedom — civil rights — is all that this bill proposes to give the negro."<sup>81</sup> In discussions of the Bill in Illinois, Ohio, and Pennsylvania, the following civil rights were repeatedly emphasized as "indispensable": the

<sup>74</sup>The Buckeye State (Ohio), April 19, 1866, at 2, cols. 1-2.

<sup>75</sup>Lewisburg Chronicle (Pa.), April 13, 1866, at 2, cols. 1-2.

<sup>76</sup>Delaware Gazette (Ohio), Aug. 31, 1866, at 1, cols. 3-8 (speech of Congressman Samuel Shellabarger).

<sup>77</sup>Danville Plaindealer (Ill.), April 5, 1866, at 2, cols. 1-2 ("... they are clothed with the immunities of citizenship — clothed with the right of protecting life, defending liberty, holding and transferring property.") See also North American (Pa.), October 6, 1866, at 2, col. 1; Carrol Union Press (Ohio), August 29, 1866, at 2, col. 3; Chicago Tribune (Ill.), May 19, 1866, at 2, col. 2. Senator Trumbull quoted Blackstone: "The natural rights of individuals may be said to include the right of personal security, the right of personal liberty, and the right to acquire and enjoy property." Weekly Dayton Journal (Ohio), April 17, 1866, at 1, cols. 4-5.

<sup>78</sup>Danville Plaindealer (Ill.), September 6, 1866, at 2, cols. 1-2.

<sup>79</sup>Freeport Journal (Ill.), March 28, 1866, at 2, cols. 1-2.

<sup>80</sup>North American Weekly (Pa.), February 5, 1866, at 2, col. 1; Belleville Advocate (Ill.), February 23, 1866, at 2, col. 3.

<sup>81</sup>Carlinville Free Democrat (Ill.), April 12, 1866, at 2, cols. 2-3.

right to contract, to sue, to testify, and otherwise resort to courts; to inherit, to hold, and transfer property; and to the full and equal benefit of all laws for the protection of person and property.<sup>82</sup>

Civil rights did not include political rights.<sup>83</sup> The Civil Rights Bill “did not affect any political rights such as suffrage, the right to hold office, or to sit on juries.”<sup>84</sup> One Republican asserted that everyone familiar with the term “civil rights” understood that it differed from “political rights”:<sup>85</sup>

Bouvier in discussing the term Rights, says: ‘It is more proper, when considering their object to divide them into political and civil rights. Political rights consist in the power to participate directly or indirectly in the establishment or management of government. Civil rights are those which have no relation to the establishment, support or management of the government.’

In particular, the Civil Rights Bill did not confer the right to vote on blacks.<sup>86</sup> Citizenship alone did not confer the right to vote.<sup>87</sup>

Supporters of the Bill had to make these points repeatedly because Democrats in all three states denounced the Civil Rights Bill as the “nigger equality bill.”<sup>88</sup> “Monstrous,”<sup>89</sup> “atrocious,”<sup>90</sup> “obnoxious,”<sup>91</sup> and “iniquitous”<sup>92</sup> were the adjectives typically used to describe the bill. Democrats insisted that it conferred absolute equality on blacks, including the right to vote.<sup>93</sup> Every time a Democrat decried such a result, however, a Republican denied any such result was intended.<sup>94</sup>

Supporters of the Civil Rights Bill made one other important point in the

<sup>82</sup>Public Ledger (Pa.), March 13, 1866, at 2, col. 2; The Agitator (Pa.), April 18, 1866, at 2, col. 2; Cincinnati Enquirer (Ohio), Jan. 20, 1866, at 2, col. 1; Chicago Tribune (Ill.), March 17, 1866, at 2, col. 1; Danville Plaindealer (Ill.), April 5, 1866, at 2, cols. 1-2; The Independent (Ill.), April 13, 1866, at 2, col. 1; Centralia Sentinel (Ill.), April 19, 1866, at 1, cols. 5-6.

<sup>83</sup>Pittsburg Chronicle (Pa.), April 11, 1866, at 2, col. 1; Dayton Daily Journal (Ohio), July 9, 1866, at 2, col. 1.

<sup>84</sup>Daily Express (Pa.), April 10, 1866, at 2, col. 2.

<sup>85</sup>Bedford Inquirer (Pa.), April 20, 1866, at 2, col. 1.

<sup>86</sup>Grayville Independent (Ill.), April 20, 1866, at 2, col. 1; Springfield Daily Republic (Ohio), February 16, 1866, at 2, cols. 1-2.

<sup>87</sup>Danville Plaindealer (Ill.), April 5, 1866, at 2, cols. 1-2.

<sup>88</sup>The Independent (Ill.), April 13, 1866, at 2, col. 1. *See also* Circleville Democrat (Ohio), May 4, 1866, at 2, col. 1 (Civil Rights Bill requires associations “perfectly revolting to all sensible persons”).

<sup>89</sup>Menard County Axis (Ill.), February 17, 1866, at 2, col. 2.

<sup>90</sup>Bedford Gazette (Pa.), April 13, 1866, at 2, col. 1.

<sup>91</sup>Weekly Sentinel (Ill.), April 13, 1866, at 2, col. 1.

<sup>92</sup>MaComb Eagle (Ill.), April 14, 1866, at 2, col. 3.

<sup>93</sup>Bedford Gazette (Pa.), April 6, 1866, at 2, col. 2; Ebsburg Democrat and Sentinel (Pa.), April 19, 1866, at 2, col. 1; Belleville Democrat (Ill.), April 28, 1866, at 2, col. 1.

<sup>94</sup>Springfield Daily Republic (Ohio), Apr. 4, 1866, at 2, cols. 2-3 (Civil Rights Bill does not coerce private or voluntary association).

debate that spring: government is obliged to protect its citizens. The failure of the Southern state governments to protect the freedmen had outraged Unionists.<sup>95</sup> Their point, however, rested on a broader philosophical premise, namely:

. . . that foundation truth of all political science, that to secure these rights, governments are instituted among men, deriving their just power from the consent of the governed. They are built upon the consent of the governed, [and] they have no other object than to secure the inalienable rights of their citizens.<sup>96</sup>

An individual citizen not only had a right to governmental protection, he had a right to as much protection as any other citizen. Indeed, he had a right to the same protection as any other citizen.

The debate on the Civil Rights Bill in these states illuminates their citizens' understanding of § 1 of the 14th amendment because they believed that it simply, "made constitutional" the Bill's guarantee of civil rights.<sup>97</sup> On August 29, 1866, Colonel McKee, campaigning at Hillsboro, Ohio, said what almost all supporters of the amendment said: "Section one simply repeats the declaration of the Civil Rights Bill."<sup>98</sup> Similarly, Senator Lane of Kansas, passing through Illinois, told his audience "The first clause in that Constitutional Amendment is simply a re-affirmation of the first clause of the Civil Rights bill, declaring the citizenship of all men born in the United States, without regard to race or color."<sup>99</sup> When a stump speaker expanded on the point, he generally listed the very rights enumerated in the Civil Rights Bill:

. . . the first section of this amendment . . . [gives citizens] the rights, immunities, and privileges of American citizenship which are the civil rights — the right to sue and be sued, to be protected in their person and property, the right of locomotion — the right to go where they please and live where they please, and own property where they please . . .<sup>100</sup>

When supporters did not mention the Civil Rights Bill specifically, they invariably explained that § 1 protected civil rights or civil liberty, as did Illinois

<sup>95</sup>Daily Express (Pa.), May 28, 1866, at 2, col. 1; Freeport Journal (Ill.), February 28, 1866, at 2, cols. 1-2.

<sup>96</sup>Newton Weekly Press (Ill.), October 26, 1866, at 2, cols. 1-2.

<sup>97</sup>Lancaster Daily Express (Pa.), June 14, 1866, at 2, col. 2; Brooksville Republican (Pa.), June 20, 1866, at 2, cols. 1-2; Chicago Tribune (Ill.), May 5, 1866, at 2, col. 1 (§ 1 reenacts Civil Rights Bill); Cleveland Leader (Ohio), May 1, 1866, at 2, col. 1 (§ 1 incorporates provisions of the Civil Rights Bill); Columbus Morning Journal (Ohio), June 20, 1866, at 2, col. 3 (§ 1 protects civil rights "in accordance with the new law on the subject"); Morgan Herald (Ohio), May 11, 1866, at 2, cols. 2-3 (§ 1 "nearly identical" with Civil Rights Bill); Bulletin (Pa.), April 30, 1866, at 4, cols. 1-2 (§ 1 incorporates provisions of the Bill of Rights); Lancaster Express (Pa.), May 4, 1866, at 2, cols. 1-2 (Civil Rights Bill "nestled" in § 1).

Opponents conceded that § 1 constitutionalized the Civil Rights Bill. The Crisis (Ohio), June 27, 1866, at 1, cols. 1-3; Jacksonville Weekly Sentinel (Ill.), June 21, 1866, at 2, cols. 1-2.

<sup>98</sup>Highland Weekly News (Ohio), September 6, 1866, at 1, cols. 3-7.

<sup>99</sup>Rock Island Union (Ill.), September 5, 1866, at 2, cols. 1-2.

<sup>100</sup>Dayton Daily Journal (Ohio), July 9, 1866, at 2, col. 1.

Congressmen Jehu Baker in a letter to his constituents.<sup>101</sup> These proponents could scarcely have had in mind a different set of civil rights from those they had so shortly before included in the Civil Rights Bill.

An analysis of their more detailed explanations of § 1 reinforces the conclusion that it was intended to guarantee the natural rights of a citizen and those civil rights necessary to secure his natural rights:

In the first place we regard the negro as a man, so created and constituted as to entitle him to a position among the various classes of the human race naturally possessed of all the rights and subject to all the conditions which the Creator designs to confer or impose upon human beings. He differs from the Caucasian race in color, and perhaps, in some features of mental constitution. It matters not whether he is equal, inferior, or superior in any, or all his natural qualities to the white race, it is certain he is not so far inferior in any particular, he is not so destitute of any attribute, nor so possessed of any peculiarities distinct from others of the human family, to change or essentially to modify his natural rights or obligations."<sup>102</sup>

Supporters like Ohio Congressman Eckley frequently stated that § 1 secured life, liberty, and property to all citizens.<sup>103</sup> While some critics complained that § 1 failed to identify more specifically the privileges and immunities of citizenship,<sup>104</sup> others had little trouble identifying them:

The privileges and immunities, respecting which the hireling writer makes inquiry, are those of not having your private letters opened and read by emissaries of the oligarchy to ascertain your sentiments and correspondents; of not having your political sentiments regulated by the same absolute authority; of not being beaten, maimed, murdered or driven away for exercising the freedom of speech or of the press; of holding meetings or conventions for lawful purposes; the privilege of looking after your own property in your own way; of collecting your debts by lawful means, without being bound as an incendiary; of organizing your political party and voting your own ticket without intimidation or molestation.<sup>105</sup>

This listing suggests that proponents understood that the privileges and immunities of citizenship embraced a broad range of fundamental rights. More specifically, their statements and reactions to events (particularly events in the

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<sup>101</sup>Madison County Courier (Ill.), June 21, 1866, at 1, cols. 1-3. See also North American (Pa.), June 14, 1866, at 2, col. 1; Germantown Telegraph (Pa.), June 20, 1866, at 3, col. 1; Johnstown Tribune (Pa.), July 6, 1866, at 2, col. 4; Harrisburg Patriot (Pa.), September 7, 1866, at 2, col. 1-2; Circleville Union (Ohio), October 5, 1866, at 2, col. 4; Marietta Register (Ohio), June 28, 1866, at 1, col. 6; Galena Weekly Gazette (Ill.), May 6, 1866, at 2, col. 1; Danville Plaindealer (Ill.), August 9, 1866, at 2, col. 1; Carlinville Free Democrat (Ill.), May 2, 1866, at 2, col. 2; Carthage Gazette (Ill.), November 1, 1866, at 2, cols. 1-2.

<sup>102</sup>Danville Commercial (Ill.), May 3, 1866, at 1, col. 2.

<sup>103</sup>Stark County Republican (Ohio), May 31, 1866, at 1, col. 8.

<sup>104</sup>Erie Weekly Gazette (Pa.), May 10, 1866, at 2, col. 2; Marion Democratic Mirror (Ohio), August 30, 1866, at 2, col. 3.

<sup>105</sup>North American (Pa.), September 26, 1866, at 2, cols. 1-2.



South) indicate that they included most first amendment rights in the privileges and immunities of citizenship.<sup>106</sup>

Such statements and reactions scarcely prove, however, that they equated such fundamental rights with all those enumerated in the Bill of Rights. While some proponents did observe that § 1 simply "reinstates what is already in the Constitution,"<sup>107</sup> they had in mind the privileges and immunities clause of article IV rather than the Bill of Rights.<sup>108</sup> There is no record in Pennsylvania, Ohio, or Illinois of any advocate of the 14th amendment explaining that the privileges and immunities clause guaranteed those rights enshrined in the Bill of Rights.

Even the Democrats, who relentlessly savaged the privileges and immunities clause because it conferred substantive rights on blacks, never contended that it gave them all the rights guaranteed in the Bill of Rights. Democrats simply asserted that it made the negro "the political equal of the white man." Campaigning for a congressional seat in Ohio, General George Morgan warned that:

... the object of this proposed amendment, then, is to create negro judges, jurors, and legislators, and if you refuse to make negroes your political equals, then you are to be partially disfranchised.

I ask you, Ohioans, are you prepared for this? If you are, then vote for Mr. Delano, [the incumbent and Morgan's opponent] and if elected, he will aid you in placing yourselves, your wives, sons and daughters, on a level with the negroes.<sup>109</sup>

One radical Republican, tired of hearing the political equality charge, retorted: "It is the glory of the Republican party that the worst accusation its enemies can bring against it is that if it had the power it would establish the principle of universal political equality."<sup>110</sup> While the more radical Republicans did favor political equality for blacks, they too interpreted § 1 as guaranteeing only natural and civil rights, not political rights.

Voting was the most important political right, and many Democrats insisted that voting was a privilege and immunity of citizenship.<sup>111</sup> They fre-

<sup>106</sup>*E.g.*, *Belleville Advocate* (Ill.), June 8, 1866, at 2, col. 1 (complaint that Mississippi Black Code forbids assembly).

<sup>107</sup>*Ottawa Free Trader* (Ill.), June 16, 1866, at 2, col. 3.

<sup>108</sup>*Alton Weekly Telegraph* (Ill.), May 11, 1866, at 1, col. 6.

<sup>109</sup>Speech of General George Morgan at Coshocton, Aug. 21, 1866, *Campaign Speeches of 1866*, at 15 (Cincinnati Commercial ed. 1866).

<sup>110</sup>*Evening Telegraph* (Pa.), July 12, 1866, at 4, col. 1.

<sup>111</sup>*The Age* (Pa.), May 9, 1866, at 2, cols. 1-2 and June 15, 1866, at 2, col. 1; *Daily Post* (Pa.), September 26, 1866, at 2, cols. 3-4; *Madison County Democrat* (Ohio), September 27, 1866, at 2, cols. 4-7; *Joliet Signal* (Ill.), August 14, 1866, at 2, col. 2; *Bedford Gazette* (Pa.), June 22, 1866, at 2, col. 2 and August 31, 1866, at 2, col. 2; *Johnstown Democrat* (Pa.), August 22, 1866, at 2, col. 2; *Public Ledger* (Pa.), September 29, 1866, at 2, col. 2; *Alton Democrat* (Ill.), May 12, 1866, at 2, col. 1.

Only a handful of Republicans in Illinois, Ohio, and Pennsylvania subscribed to that view. Among Il-

quently cited a dictionary definition of citizens to prove their assertion:

Webster's unabridged Dictionary, page 208, thus truly defines the meaning of the word CITIZENS: 'CITIZENS, in the United States a person, native or naturalized, WHO HAS THE PRIVILEGE of EXERCISING THE ELECTIVE FRANCHISE, as the qualification which enables him to VOTE FOR RULERS, and to purchase and hold real estate.'<sup>112</sup>

W. Joseph Allen, the Democratic candidate for Congress from the 13th District of Illinois, made the same argument and relied on the same authority in September when he spoke at Alton.<sup>113</sup> C.H. Mitchner, a Democrat who opposed Bingham in Ohio, similarly insisted that citizenship included the right to vote.<sup>114</sup> Democrats thus denounced the amendment as the "negro suffrage amendment"<sup>115</sup> or even more crudely as "nigger suffrage with its toilet made."<sup>116</sup>

More responsible Democrats made two different points on the voting issue: 1) that the amendment would force negro suffrage on the South<sup>117</sup> and 2) that Republicans favored negro suffrage.<sup>118</sup> These Democrats conceded that § 1 did not explicitly extend voting rights to blacks but claimed that "the nigger in the wood pile [was] plainly visible."<sup>119</sup> The mere prospect that triumphant Republicans might subsequently give the franchise to blacks made negro suffrage the issue.<sup>120</sup>

Republicans denied that negro suffrage was the issue.<sup>121</sup> First, they ex-

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Illinois' Republican Congressmen, for example, only John Farnsworth believed that voting was a natural right. G. Cardwell, *The Rise of the Stalwarts and the Transformation of Illinois Republican Politics, 1860-1880* at 110 (unpublished doctoral dissertation, University of Virginia 1976). Trumbull also believed that voting was a privilege rather than a right. *Id.* at 109. One Ohio Congressman, James Garfield, admitted that he thought voting was probably a natural right.

<sup>112</sup>Lancaster Intelligencer (Pa.), October 25, 1866, at 2, col. 1. See also Dayton Daily Empire (Ohio), September 28, 1866, at 2, col. 1.

<sup>113</sup>Grayville Independent (Ill.), September 28, 1866, at 1, cols. 3-5.

<sup>114</sup>Cadiz Sentinel (Ohio), July 25, 1866, at 1, cols. 2-4.

<sup>115</sup>Mt. Vernon Democratic Banner (Ohio), June 30, 1866, at 2, col. 3.

<sup>116</sup>Johnstown Democrat (Pa.), June 27, 1866, at 2, col. 4.

<sup>117</sup>Pittsburgh Post (Pa.), February 5, 1866, at 2, col. 1; Lancaster Intelligencer (Pa.), April 18, 1866, at 2, col. 2; Dayton Daily Empire (Ohio), September 25, 1866, at 2, cols. 1-2; Fulton County Ledger (Ill.), June 26, 1866, at 2, col. 1; Alton Daily Democrat (Ill.), October 11, 1866, at 4, cols. 1-2 and October 9, 1866, at 4, cols. 1-2.

<sup>118</sup>Crawford Democrat (Pa.), October 6, 1866, at 2, col. 1. The Age (Pa.), Mar. 13, 1866, at 2, col. 1.

<sup>119</sup>The Democrat (Ill.), July 28, 1866, at 2, cols. 3-5.

<sup>120</sup>Johnstown Democrat (Pa.), May 30, 1866, at 2, col. 3; Alton Daily Democrat (Ill.), September 24, 1866, at 2, col. 1. Democratic fears were justified. The next year in Ohio Republican radicals sought to amend the Ohio constitution in order to give blacks the right to vote. While the Republican effort thus confirmed Democratic fears, it also reaffirmed the Republican construction of the 14th amendment. The 1867 effort would have been unnecessary if the amendment itself had conferred the franchise.

<sup>121</sup>Evening Telegraph (Pa.), March 27, 1866, at 4, col. 1; Zanesville Morning Signal (Ohio), January 22, 1866, at 2, col. 1; Coshocton Democrat (Ohio), February 27, 1866, at 1, col. 7; Gallipolis Journal (Ohio), August 30, 1866, at 2, cols. 1-2; Dayton Daily Journal (Ohio), September 11, 1866, at 2, cols. 2-3; Metropolis Promulgator (Ill.), September 6, 1866, at 1, cols. 4-5. The Age exploded in exasperation:

They [Republicans] vote in favor of negro suffrage, and advocate negro suffrage, and preach in

plained that voting was not a privilege and immunity of citizenship.<sup>122</sup> General Logan, running for Congress in Illinois, used the same example others used to prove the point: women and children were citizens, but they could not vote.<sup>123</sup> Green B. Raum, running in the 13th Illinois District, repeated Logan's argument that the amendment conferred no franchise. Charles Lippincott, another Illinois congressional candidate in the 9th district, also repeated the argument in his speeches.<sup>124</sup>

Second, Republicans pointed to § 2, which remitted all suffrage questions to the states. For example, Ohio Congressman Shellabarger declared very early in the debate that the second section of the amendment left the power to regulate suffrage with the states.<sup>125</sup> Very late in the debate, Rutherford B. Hayes, defending § 2 as intended solely to correct the overrepresentation of Southerners in Congress, reiterated the point that the states retained control over suffrage.<sup>126</sup>

Third, Republicans reported that the more radical members of their party were disappointed precisely because the amendment did not guarantee negro suffrage. Illinois Senator Yates, who publicly favored universal suffrage, also admitted publicly that the 14th amendment did not guarantee it.<sup>127</sup> The most

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defense of negro suffrage, and yet declare that negro suffrage is *not* the issue. (Pa.), September 16, 1866, at 2, col. 1. Cf. Marietta Times (Ohio), Feb. 15, 1866, at 2, col. 3.

<sup>122</sup>Springfield Daily Republic (Ohio), Feb. 16, 1866, at 2, cols. 1-2 (suffrage is not a natural right). One Ohio politician Murat Halstead clearly distinguished between social and political rights on the one hand and civil rights on the other. Halstead argued, for example, that suffrage was not a natural right and "therefore men who favored some civil rights for Negroes, need not worry their conscience over their refusal to grant them the vote." R. Sawrey, *Ohio and Reconstruction: The Search for Future Security, 1865-1868*, at fn. 52 (unpublished doctoral dissertation, University of Cincinnati 1979). But see The Carthage Gazette (Ill.), Dec. 13, 1866, at 2, cols. 3-4 (suffrage is a natural right). Also, some blacks claimed that suffrage was a natural right. Alton Telegraph (Ill.), Jan. 19, 1866, at 2, col. 1 (report on speeches by black orators at City Hall).

<sup>123</sup>The Independent (Ill.), July 20, 1866, at 1, cols. 4-7. See also Bellefonte Central Press (Pa.), September 26, 1866, at 2, col. 1; Morgan County Herald (Ohio), August 17, 1866, p. 1, cols. 2-8 (speech of Schuyler Colfax); Carrol Union Press (Ohio), September 26, 1866, at 1, cols. 2-4; Marshall County Republican (Ill.), September 20, 1866, at 2, cols. 1-2.

<sup>124</sup>G. Cardwell, *The Rise of the Stalwarts and the Transformation of Illinois Republican Politics, 1860-1880*, at 120 (unpublished doctoral dissertation, University of Virginia 1976).

<sup>125</sup>Weekly Dayton Journal (Ohio), April 17, 1866, at 1, cols. 1-3. See also Portage County Democrat, January 31, 1866, at 2, col. 3; Urbann Citizen & Gazette (Ohio), May 3, 1866, at 2, col. 2; Madison County Courier (Ill.), June 28, 1866, at 4, cols. 1-3; Danville Plaindealer (Ill.), February 8, 1866, at 2, col. 1; Germantown Telegraph (Pa.), June 13, 1866, at 2, col. 1; Youngstown Mahoning Courier (Ohio), May 2, 1866, at 2, col. 1; Columbus Morning Journal (Ohio), April 24, 1866, at 2, cols. 3-4; Salem Republican (Ohio), May 2, 1866, at 2, col. 1. Two years later, the 1868 National Republican Platform still recognized that suffrage in the loyal states "properly belongs to the people of those states."

<sup>126</sup>Speech of Rutherford B. Hayes in Cincinnati, Sept. 7, 1866. *Speeches of 1866*, at 28 (Cincinnati Commercial ed. 1866). Hayes did not publicly repeat what he had earlier confided to his diary:

My decided preference: Suffrage for *all* in the South, colored and white, to depend on education; sooner or later in the North also — say, all new voters to be able to write and read. III DIARY & LETTERS OF RUTHERFORD B. HAYES 25 (Williams, ed. 1924).

<sup>127</sup>Centralia Sentinel (Ill.), June 28, 1866, at 1, cols. 5-6; Carthage Gazette (Ill.), October 4, 1866, at 1, cols. 2-8 (speech at Jacksonville on September 15, 1866). In fact, many Republicans opposed giving the vote to blacks. General Lippincott, who ran for the ninth Illinois Congressional District seat in 1866, wrote to Trumbull in the summer of 1865 that the freedmen should not have the vote because they were too ignorant. G. Cardwell, *The Rise of the Stalwarts and the Transformation of Illinois Republican Politics*,

abused radical of them all, Congressman Thaddeus Stevens of Pennsylvania, also conceded that the states retained control of the franchise.<sup>128</sup> In Ohio the abolitionists from the Reserve agreed to lay aside their demands for negro suffrage and accept the 14th amendment.<sup>129</sup> Many Republican papers whose editors favored universal suffrage endorsed the amendment only reluctantly because it did not guarantee suffrage.<sup>130</sup>

The fact that many radicals generally favored political equality for blacks and particularly favored voting rights for blacks does not prove that the privileges and immunities clause conferred political rights on blacks. The Republicans defense of § 1 in Illinois, Ohio and Pennsylvania demonstrated just the opposite. Radicals did not control the Republican party. Having failed to shape the amendment entirely to their liking, the radicals accepted § 1 as a compromise.<sup>131</sup> It recognized the natural rights of a citizen and guaranteed him those civil rights necessary to the protection of his natural rights. The privileges and immunities clause conferred no political rights, however.

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1860-1880, at 94 (unpublished doctoral dissertation, University of Virginia 1976).

<sup>128</sup>Ironton Register (Ohio), August 30, 1866, at 2, col. 2; Dayton Daily Journal (Ohio), May 1, 1866, at cols. 1-2.

<sup>129</sup>Porter, *supra* note 10 at 226. Thus, a radical like Ohio Congressman John Ashley accepted the amendment because "it is the best proposition we can get." R. Horowitz, *James M. Ashley: A Biography* 275-278 (unpublished doctoral dissertation, City University of New York 1973).

<sup>130</sup>Ebsenburg Alleghanian (Pa.), October 4, 1866, at 2, cols. 2-3 (would have preferred impartial suffrage); Chicago Tribune (Ill.), April 30, 1866 (expresses regret that plan does not include suffrage provisions); Peoria Weekly Transcript (Ill.), May 10, 1866, at 1, col. 3 (would have included guarantee of suffrage). *But see* Huntingdon Globe (Pa.), January 31, 1866, at 2, col. 1 (favors amendment that does not encourage "universe extension of the franchise").

<sup>131</sup>Republican journals invariably described the amendment as a reasonable, moderate, practical compromise. Lancaster Gazette (Ohio), June 14, 1866, at 2, col. 1; Highland Weekly News (Ohio), June 14, 1866, at 2, col. 2; Marietta Register (Ohio), June 14, 1866, at 2, col. 1; Dayton Daily Journal (Ohio), May 12, 1866, at 2, col. 2; Lewisburg Chronicle (Pa.), June 26, 1866, at 2, cols. 1-2; Germantown Telegraph (Pa.), May 2, 1866, at 3, col. 1.

To support their characterization, they pointed out that it left the question of suffrage to the states. Metropolis Promulgator (Ill.), July 5, 1866, at 1, col. 5; Gallipolis Journal (Ohio), May 17, 1866, at 2, col. 2; Marion Independent (Ohio), June 28, 1866, at 1, col. 5. This same characterization of the amendment is found in the private correspondence of Republican political leaders in Ohio. F. Bonadio, *Ohio Politics During Reconstruction, 1865-1868*, at 206 (unpublished doctoral dissertation, Yale University 1964).

In addition, the Republican press praised the committee report which supported the amendment. Ebsenburg Alleghanian (Pa.), May 3, 1866, at 2, col. 2; Shamokin Herald (Pa.), June 14, 1866, at 2, col. 1. *But see* Chicago Tribune (Ill.), June 11, 1866, at 2, cols. 1-2.

The Democratic press described the amendment less enthusiastically. Ebsenburg Democrat and Sentinel (Pa.), May 17, 1866, at 2, col. 3:

After five months of severe labor the revolutionary faction in Congress has at last brought forth what is called by their journals "a plan of reconstruction," the main part of which is a proposed amendment to the Constitution, which, when stripped of verbiage, is as follows:

Sec. 1. Negroes shall be made citizens.

Sec. 2. States which do not give negroes the privilege of voting shall not count them as population in the apportionment of representatives.

Sec. 3. Only negroes and white men who opposed the rebellion shall vote at the next Presidential election.

Sec. 4. Slave owners shall not be paid for the loss of their slaves by emancipation, and neither States or the Federal Government shall pay the rebel debt.

Sec. 5. Congress shall have power to pass any law it may see fit to pass, without regard to the Constitutional rights of the people and of the States, and without fear of an executive veto.

One must discount the contrary claims of the Democrats for several reasons. First, the fevered imaginings of the opposition are seldom a safe guide to meaning. Their desire to exploit negrophobia in these states distorted their analysis of § 1. Second, many Democrats admitted the accuracy of the Republican construction of § 1. While these Democrats feared that the 14th amendment was but the first step in the radical program, they recognized that it was only a first — and limited — step. Third, the defenders of the amendment consistently explained the limited scope of the § 1 guarantee.

### THE EQUAL PROTECTION CLAUSE

Although those who debated § 1 focused primarily on the privileges and immunities clause, they also examined the equal protection clause. Indeed, many advocates of the amendment emphasized the equal protection clause as the critical § 1 guarantee.<sup>132</sup> For example, on the eve of the Ohio Union Party Convention in Columbus, a supporter urged the party to declare as its first principle that “one man has just as many rights as another.”<sup>133</sup> Those who advocated the amendment in Illinois, Ohio, and Pennsylvania also gave a uniform and consistent explanation of the equal protection guarantee:

The Union party is not the advocate of special legislation for, or special privileges to, any class of men on account of caste or color. It simply demands equality before the law, and an equality of privileges to all men. None of the legislation and organic amendments which may be considered as favorable to the freedmen, is of a special character. No special privileges are conferred upon the negroes as negroes. All the recent legislation, amendments, and proposed amendments, which seem to be so obnoxious to the latter day Democratic saints, are equal and universal in their nature and application. They protect the rights and punish the crimes of all men without distinction of color, and prevent the enforcement of other laws and customs which are not equal and universal in their character and application, but are derogatory to the rights of a class. And the Union party has not been prompted to this action out of a love for the negroes as negroes, but it comprehends that justice to all men is the interest of all men, and that a wrong done to the humblest is an injury and peril to all. Let every man seek his own social position without

<sup>132</sup>Jackson Standard (Ohio), September 27, 1866, at 1, cols. 2-7 (speech of Thaddeus Stevens: fundamental creed of Republican party is equality before the law); Zanesville Daily Courier (Ohio), August 14, 1866, at 2, col. 2 (speech of John Bingham: equal protection is the key to § 1); Salem Republican, September 5, 1866, at 1, cols. 6-7 (same); Evening Telegraph (Pa.), June 14, 1866, at 4, col. 1 (editorial: fundamental idea of § 1 is equality of all citizens before the law); North American (Pa.), May 14, 1866, at 2, col. 1 (editorial: platform of Republican party is the principle of equality before the law); Alton Telegraph (Ill.), Nov. 30, 1866, at 2, cols. 2-3 (editorial: equal protection is the most important principle in § 1).

Republican newspapers frequently ran a list of party “demands,” and the demand for equal protection was often listed first. *E.g.*, Cleveland Leader (Ohio), Oct. 9, 1866, at 2, col. 1.

<sup>133</sup>Columbus Morning Journal (Ohio), June 11, 1866, at 2, cols. 2-3. *Cf.* Morgan County Herald (Ohio), Feb. 23, 1866, at 2, col. 1 (radicalism defined as the attempt to translate Jefferson’s theory that all men are created equal into “a living letter in our Constitution”).

hinderance, or sink to his own social level. Let those associate who are congenial to each other. With this the Union party has nothing to do. Its province is to enact laws which will grant the same civil immunities, and do equal and exact justice, to all.<sup>134</sup>

First, Republicans insisted only on equality before the law.<sup>135</sup> They did not demand equality of condition or circumstance. Second, the Republicans insisted on the abolition of all class legislation.<sup>136</sup> They did not demand special legislation for blacks. Indeed, they consistently defended themselves against the charge that they favored blacks by pointing out that both the Civil Rights Bill and § 1 of the 14th amendment protected all persons, regardless of race.<sup>137</sup> Third, the Republicans insisted that the state protect its citizens and all others within its jurisdiction.<sup>138</sup> Fourth and finally, Republicans insisted that the law did not and could not make blacks the social equals of whites.<sup>139</sup>

The radical Anna E. Dickson's answer to the social equality charge was widely quoted, "Andrew Johnson knows full well that social rights has no more to do with the question of civil rights than his policy has to do with honor, justice, and manliness."<sup>140</sup> Republicans repeatedly emphasized that no law could command one man to socialize with another. At the same time, they insisted that every man should be free to associate with whomever he wished.<sup>141</sup>

Advocates of the 14th amendment had to make the latter point repeatedly because the Democrats ranted endlessly about "nigger equality." To vote Republican was to elevate blacks or degrade whites by giving political rights to the freedmen and inviting their social embrace.<sup>142</sup> Democrats like the Ohioan C.L. Valandingham, for example, eschewed any careful analysis of the equal protection concept and repeatedly asserted that the amendment was intended

<sup>134</sup>Danville Plaindealer (Ill.), May 10, 1866, at 2, col. 2.

<sup>135</sup>Ashtabula Sentinel (Ohio), June 20, 1866, at 1, cols. 1-2; Marietta Register (Ohio), August 9, 1866, at 1, cols. 4-6; Danville Plaindealer (Ill.), June 14, 1866, at 2, col. 2.

<sup>136</sup>Highland County News (Ohio), April 26, 1866, at 2, col. 2; Albion Independent (Ill.), May 4, 1866, at 1, col. 4.

<sup>137</sup>Clinton Public and Central Transcript (Ohio), Feb. 15, 1866, at 2, cols. 1-2; Daily Express (Pa.), Apr. 7, 1866, at 2, col. 1; North American (Pa.), Apr. 7, 1866, at 2, col. 1; Bulletin (Pa.), Apr. 10, 1866, at 4, cols. 1-2.

<sup>138</sup>Danville Commercial (Ill.), November 1, 1866, at 1, col. 5.

<sup>139</sup>See *infra* note 147.

<sup>140</sup>Steubenville Herald (Ohio), May 30, 1866, at 1, cols. 2-4. She then added a withering comment about the President's drunken tirade the evening he vetoed the Freedmen's Bureau Bill:

Civilly, I stand here disfranchised, classed on the level with black men, children, and idiots, but I can truly and proudly declare that I do not believe that any amount of legal degrading of civil rights or wrongs inflicted, could reduce me or any other respectable woman to the social level of the man capable of making the speech on the 22d of last February. (Applause.)

<sup>141</sup>Danville Commercial (Ill.), May 10, 1866, at 1, col. 1.

<sup>142</sup>Circleville Democrat (Ohio), June 22, 1866, at 1, cols. 3-7 (speech by Senator Hendricks of Indiana); Lancaster Intelligencer (Pa.), Jan. 31, 1866, at 2, col. 6.

to enforce negro social and political equality.<sup>143</sup> He often regaled his audiences with the apparently amusing possibility that blacks and whites might alternate as President and Vice-President.<sup>144</sup>

Some Democrats were more careful to assert simply that the amendment would foist "negro equality" and "amalgamation" on the country.<sup>145</sup> Others predicted that the Republican radicals, if they returned to power, would act even more solicitously on behalf of blacks.<sup>146</sup> Congress was already pre-occupied with blacks and their supposed "rights."<sup>147</sup> None made the accusation more colorfully than a "Johnson Republican" Major Moreau, who dissolved his audience into laughter with the following observation: "Congress has had nigger in the lobby, nigger in the gallery, nigger on the brain, and in my opinion, nigger in closer quarters."<sup>148</sup> Outrage at this alleged pre-occupation prompted one Illinois Congressman to ask his colleagues to set aside one day as "white man's day,"<sup>149</sup> and another critic recommended that the congressional radicals sing the following doxology:

From Africa the negroes came  
 Arise, oh, Congress, bless his name  
 Stand up good Stevens bless the day  
 He is the object of our love  
 In him we live, in him we move  
 Fore him we preach, for him we pray  
 For him we meet from day to day  
 The colored gods from Africa.<sup>150</sup>

Whatever the validity of the Democratic concern that Republicans might pass pro-black legislation in the future, their worries did not constitute an interpretation of the equal protection clause.

All this ranting exasperated Republicans, who occasionally retorted with some pointed barbs about the Democratic fear of social equality. They pointed out that the number of mulattos in the South bespoke some hypocrisy about the undesirability of any social contact between white and black. Commenting on a report that 777 out of 1064 negro school children in Mississippi were "mixed," one observer clucked: "The practice must have been different from

<sup>143</sup>Warren Constitution (Ohio), July 17, 1866, at 1, cols. 3-7.

<sup>144</sup>*Id.*

<sup>145</sup>Bellefonte Democratic Watchman (Pa.), June 22, 1866, at 2, col. 1.

<sup>146</sup>The Age (Pa.), April 13, 1866, at 2, cols. 1-2.

<sup>147</sup>Mt. Vernon Democratic Banner (Ohio), September 8, 1866, at 1, cols. 3-7; Constitution and Union (Ill.), October 20, 1866, at 1, col. 3. *But see* Warren Mail (Pa.), Aug. 18, 1866, at 2, col. 3.

<sup>148</sup>Democratic Union (Ohio), September 21, 1866, at 1, cols. 2-5.

<sup>149</sup>Mt. Vernon Democratic Banner (Ohio), September 8, 1866, at 1, cols. 3-7.

<sup>150</sup>Mercer County Press (Ill.), Oct. 18, 1866, at 1, col. 7.

the preach somewhere."<sup>151</sup> They ridiculed the fear itself as unfounded.<sup>152</sup> Sometimes they even conceded the Democratic point with a devilish thrust, "... for how would it be possible to make one of the ignorant unwashed and uncombed Democracy the 'equal in every respect' of an intelligent clean-faced, and thoroughly loyal black?"<sup>153</sup> All these points were debater's points, however. The principal Republican response was to repeat again and again that the 14th amendment guaranteed only legal equality, not political or social equality.<sup>154</sup> Occasionally, a Republican candidate would even vent his own racism in rejecting the social equality charge as did General Logan:<sup>155</sup> "The Negro equality talk against the amendment is all a bugbear and humbug. I don't consider a 'nigger' my equal."

### THE DUE PROCESS CLAUSE

Those who debated § 1 of the 14th amendment paid scant attention to the due process clause. A speaker might occasionally list it among the § 1 guarantees, but he almost never elaborated its meaning. Any elaboration followed this pattern:

<sup>151</sup>Zanesville Daily Courier (Ohio), April 17, 1866, at 2, col. 1. Another editor expanded on the point:

We really pity the poor "white trash" who are afraid of becoming "contaminated" with the darkey. In the District of Columbia the "white trash" have had so much to do with the darkey that they have taken the color nearly all out of him. The "white trash" of the South have so long taken the darkey to their embrace that they ought not to turn up their nose when they meet him in the galleries of Congress. We don't believe a negro wench would be safe even in the company of the editor of the Argue — he would soon be trying the bleaching process so fashionable among his brethren down South.

Rock Island Union (Ill.), January 10, 1866, at 2, col. 4. See also Germantown Telegraph (Pa.), December 19, 1866, at 3, col. 1.

<sup>152</sup> If you propose any measures that looks like protecting the black man in his freedom to labor and receive the just rewards of it, why he comes running up to you with alarm in his face and says: "Look here — are you for negro equality." [Laughter] Or as they generally put it, "Are you in favor of your daughter marrying a big buck nigger?" [Laughter] For although it is not very much to the credit of the sister sex, they are precisely the ones that these gentlemen think our sons are in the greatest danger. They never seem to think our sons are in the slightest peril from associations of that kind, but our daughters are. [Great laughing and cheers.] Well now, gentlemen, you laugh derisively. If you did not know that the thing is true, and if you had not heard it again and again, (and seen it) by men who pretended to be men of sense, pretent to be public teacher and the light of the world, you would not sit there tamely and even listen to my suggesting such an idea as that. [A voice — That's a fact.] Gentlemen, that vile insinuation is thrust into our teeth again and again, and so often until we have come to pass it with scorn without thought or second consideration. Those of us, my friends, who have daughters would not probably relish the idea of their marrying big bucks of any kind. [Laughter] and I do not suppose we have any apprehension of the sort. [A voice — None at all.] For my part, I should burn with shame and mortified indignation, if I supposed that any legislation, any Constitutional enactment was required to be thrown around my daughters to shield their purity, and the integrity and high sublimity of their personal virtue. [Good and Applause.] Shame, shame upon those men who will, in this vile way, attempt to make a little capital of such a contemptible piece of sophistry.

Ironton Register (Ohio), July 12, 1866, at 1, col. 5. See also Ashland Times (Ohio), January 4, 1866, at 2, col. 2; Marion Independent (Ohio), May 31, 1866, at 2, col. 5.

<sup>153</sup>Johnstown Tribune (Pa.), August 24, 1866, at 2, col. 2.

<sup>154</sup>Cf. Brookville Republican (Pa.), January 9, 1867, at 2, cols. 2-3 (negro social equality is not possible); Bedford Inquirer (Pa.), March 11, 1866, at 2, col. 1 (social equality is impossible); Ottawa Weekly Republican (Ill.), Aug. 30, 1866, at 2, col. 1 (equal rights do not dictate social equality).

<sup>155</sup>G. Cardwell, *The Rise of the Stalwarts and the Transformation of Illinois Republican Politics, 1860-1880* at 93 (unpublished doctoral dissertation, University of Virginia 1976).



How clearly right and necessary to liberty is this! The Constitution already declares generally that no person shall "be deprived of life, liberty, or property without due process of law." This declares particularly that no State shall do it — a wholesome and needed check upon the great abuse of liberty which several of the States have practiced, and which they manifest too much purpose to continue.<sup>156</sup>

A phrase said to mean only what it meant in the fifth amendment could scarcely have been intended as a shorthand expression for every other right included in the Bill of Rights. Even more telling is the failure of the Democrats to shred the due process guarantee as they shredded the privileges and immunities guarantee. They opposed granting blacks any substantive rights. If they had even suspected that the due process clause was a Trojan Horse concealing the Bill of Rights or any other set of substantive rights, they would have attacked it venomously. Their silence confirmed the understanding that it insured only procedural regularity and fairness.

#### THE ENFORCEMENT CLAUSE

The public record in these states is replete with explanations of the need for the national government to protect its citizens in the exercise of their rights because § 5, which gave Congress the authority to enforce the § 1 guarantees, raised yet another issue: did the states retain their traditional sovereign authority to regulate citizenship or was that power now centralized in the national government? Proponents downplayed the extent to which Congress could interfere with state authority. Opponents exaggerated the extent to which Congress would interfere.

The Democrats accused the radicals of "a desire to revolutionize our system of government . . . from a federation of independent states . . . into a consolidated empire."<sup>157</sup> On the stump Democrats argued forcefully against the amendment on the ground that it violated states' rights:

The first sentence in the first section, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside," embodies the radical object and end. It is a brief sentence, but it makes a radical change in our political system, changing the national body politic from a white man's government to a mixed government of negroes and white men. It takes from the states the reserved right to determine who shall and who

<sup>156</sup>Metropolis Promulgator (Ill.), July 26, 1866, at 2, cols. 1-2.

<sup>157</sup>Quincy Daily Herald (Ill.), January 30, 1866, at 2, col. 1. *See also* The Age (Pa.), August 18, 1866, at 2, col. 1 (radicals favor a strong national government, "the sun from which the States must receive their light, heat, and power"); The Crisis (Ohio), Feb. 21, 1866, at 28, cols. 3-4 (Congress given "the power to interfere in the local affairs of the states to an indefinite degree"); Alton Democrat (Ill.), May 16, 1866, at 2, col. 1 (amendment violates Constitution by giving Congress power over the states); Joliet Signal (Ill.), June 26, 1866, at 2, col. 2 (amendment changes "whole nature of the Federal compact").

shall not be admitted to state citizenship, and invests negroes and Indians — with their posterity — with the privileges and immunities of citizenship. And the states are prohibited from abridging the privileges and immunities of the negro thus make a citizen of the U.S., and of the state wherein he resides. Among the important privileges of the citizen of a state is the right of the franchise, to hold office, and etc., and should the amendment be ratified by the states it will be claimed that no state can constitutionally withhold from the negro the citizen's privilege of voting, holding office, etc.<sup>158</sup>

Democrats feared either that § 1 itself gave blacks political rights or that Congress would give them political rights in the guise of enforcing the privileges and immunities guarantee. Colonel Dickey, in his last debate with General Logan for the Illinois at large congressional seat, asserted, for example, that § 1 dictated that blacks sit on juries and attend public schools.<sup>159</sup> Hugh Jewett, speaking at a Democratic mass meeting in Columbus, Ohio, on June 26, 1866, argued that § 1 permitted blacks to occupy any and all public offices.<sup>160</sup> George Pendleton, speaking on the stump in mid-summer at Reading, Pennsylvania, warned his audience that Congress would have the power under § 5 to define the privileges and immunities of citizenship.<sup>161</sup> States had traditionally defined these privileges and immunities, and the Democrats protested endlessly against the national government's assumption of that authority. In short, Democrats argued that §§ 1 and 5 invaded the reserved powers of the states.

While Republicans did not deny that the amendment conferred broad enforcement powers on Congress, they emphasized that Congress would exercise them only if the states failed to act responsibly. The Republicans demanded that government protect its citizens' exercise of their rights.<sup>162</sup> If state governments refused or failed, the national government must act. Throughout the fall campaign, Republican candidates and speakers never wavered on that point. Ohio Congressman John Bingham, the father of § 1, could not have spoken more clearly:

There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution, to do that by Congressional enactment which hitherto they have not had the power to do, and

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<sup>158</sup>Jacksonville Weekly Sentinel (Ill.), June 21, 1866, at 2, cols. 1-2.

<sup>159</sup>Mercer County Press (Ill.), November 1, 1866, at 2, cols. 3-9.

<sup>160</sup>Marion Democratic Mirror (Ohio), July 19, 1866, at 1, cols. 4-8.

<sup>161</sup>The Crisis (Ohio), Aug. 1, 1866, at 210, cols. 1-4. *See also id.*, Sept. 12, 1866, at 258, col. 3.

<sup>162</sup>Ebensburg Alleghanian (Pa.), Apr. 5, 1866, at 2, col. 1; Adams Sentinel (Pa.), October 2, 1866, at 2, col. 1; Ohio Repository (Ohio), Sept. 12, 1866, at 2, cols. 1-2.

have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the in-born rights of every person within the jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any state.<sup>163</sup>

When Ohio Governor Cox sent the amendment to the legislature in early January, he echoed Bingham's point:

If these rights are in good faith protected by State laws and State authorities, there will be no need of federal legislation on the subject, and the power will remain in abeyance; but if they are systematically violated, those who violate them will be themselves responsible for all the necessary interference of the central government.<sup>164</sup>

Furthermore, the Republicans insisted the privileges and immunities were derived from national, not state, citizenship. Proponents dismissed as absurd any suggestion that "there [could] be such a thing as State citizenship, independent of or inconsistent with United States citizenship."<sup>165</sup> Governor Oglesby of Illinois, speaking at Jacksonville in April 1866, reminded his cheering audience:

I am a citizen of Illinois, and if I go to Georgia, I am a citizen of Georgia, because the Constitution of my country makes me such. I am a citizen of Illinois by virtue of my birth under the flag of my country in the State of Kentucky, and no man can say that I am not. [Applause.] I defy them to meet us on this doctrine. We will show to them who is a citizen. [Cheers and applause.]<sup>166</sup>

#### THE RATIFICATION DEBATE IN THE PENNSYLVANIA HOUSE AND SENATE

In the elections that concluded this debate, the people in Pennsylvania, Ohio and Illinois voted overwhelmingly in favor of the 14th amendment, "The great political contest of 1866 is over. The people have spoken, and Congress is sustained. It is glorious news to the loyal and true, but death to "My Policy."<sup>167</sup> Republican governors were elected in Illinois and Pennsylvania. Republican majorities were returned in all houses of the state legislatures. The congressional delegations from all three states were skewed in favor of the Republicans. The Democrats could only wail: "[Republican] puffery of [the 14th] amendment put to blush the extravagant advertisements of patent medi-

<sup>163</sup>Pomeroy Weekly Telegraph (Ohio), May 31, 1866, at 1, cols. 5-6. Bingham reiterated the point in a campaign appearance in Harrison County in August when he said that the amendment did not deprive a state of any right which it had previously had but only "imposed a limitation upon the states to correct their abuses of power." Ironton Register (Ohio), September 13, 1866, at 1, cols. 4-7. See also Ironton Register (Ohio), Sept. 27, 1866, at 2, col. 3 (states cannot trample the rights of citizens); Ottawa Weekly Republic (Ill.), Aug. 9, 1866, at 2, col. 1 (freedmen cannot be left unprotected).

<sup>164</sup>Ohio Exec. Doc., Part I 282 (1867).

<sup>165</sup>Carthage Gazette (Ill.), April 5, 1866, at 2, cols. 2-3.

<sup>166</sup>*Id.*, May 3, 1866, at 1, cols. 3-7.

<sup>167</sup>Carroll County Mirror (Ill.), November 14, 1866, at 2, cols. 1-4.

cines."<sup>168</sup>

The people had spoken, and their chosen representatives promptly carried out their wishes. They immediately ratified the 14th amendment.<sup>169</sup> Only in Pennsylvania was the legislative debate recorded, and the transcript reads like a reprise of the six month campaign debate that preceded it. First, proponents of the amendment consistently identified the Declaration of Independence as the source of the § 1 guarantees. On January 31, 1867, Representative Kinney said: "[the amendments] urge that we come back to those ideas of government enunciated in the immortal Declaration of Independence. . . ."<sup>170</sup> On February 6, Representative Allen said that § 1 embodied the premise of the Declaration.<sup>171</sup> Senator Browne recited the language of the Declaration in his explanation and defense of the amendment,<sup>172</sup> as did Representative Mann on the House side.<sup>173</sup> Representative Day urged ratification to insure that, ". . . the rights to life, liberty and property; in short, the inalienable rights enunciated in the Declaration of Independence, not . . . be accepted as "glittering generalities," but as original, self-evident truths, fundamental in their character and essential elements in the ground-work of our Republican system of government."<sup>174</sup>

These proponents believed that every person had natural rights, and they repeatedly emphasized their belief that § 1 protected these fundamental rights. Senator Bigham spoke of the "birthright of every human being";<sup>175</sup> Representative Ewing, of "the common right of humanity."<sup>176</sup> Senator Lowry declared that "every child of God shall stand upon equality before the law, and shall have and enjoy equal and exact justice."<sup>177</sup> Toward the end of the debate in the Senate, Senator Browne implored his colleagues to recognize that respect for "the rights of man is fundamental to the national existence."<sup>178</sup>

Second, the proponents explained over and over again that § 1 wove the principles of the Civil Rights Bill into the Constitution. Senator Bigham blunt-

<sup>168</sup>Lancaster Intelligencer (Pa.), November 28, 1866, at 2, col. 1.

<sup>169</sup>In Ohio the Senate adopted a ratification resolution on January 3, 1867, the same day it was introduced. Ohio Sen. J. 9 (1867). The House concurred the following day. Ohio House Journal 13 (1867). In Illinois the Senate debated ratification for less than three hours before adopting it. Ill. Sen. J. 76 (1867). The Illinois House rejected a motion to refer the proposed amendment to committee and promptly concurred in the Senate's decision. Ill. House J. 154 (1867). Only in Pennsylvania did the Senate and House consider the amendment at length. Both voted to ratify by 2-1 margins. Pa. Senate J. 23 (1867); Pa. House J. 278 (1867).

<sup>170</sup>Appendix to the Pennsylvania Legislative Record LIV (1867).

<sup>171</sup>*Id.* at XCIX.

<sup>172</sup>*Id.* at XXXII.

<sup>173</sup>*Id.* at XLVIII.

<sup>174</sup>*Id.* at LXV.

<sup>175</sup>*Id.* at XVI.

<sup>176</sup>*Id.* at LIX.

<sup>177</sup>*Id.* at XXVIII.

<sup>178</sup>*Id.* at XXXIV.

ly stated that § 1 embodied the Civil Rights Bill,<sup>179</sup> and Senator Browne agreed that it “secure[d] civil rights to every individual born in the land.”<sup>180</sup> Representative Day cheerfully admitted that the purpose of § 1 was “to write in substance the civil rights bill.”<sup>181</sup> Twice in January, Representative Mann recounted at length the many infringements of civil rights that had occurred in the South as evidence that § 1 was needed.<sup>182</sup> Even opponents conceded that § 1 guaranteed civil rights.<sup>183</sup>

They argued additionally, of course, that it also guaranteed political rights, particularly the right to vote.<sup>184</sup> The third major point proponents made was that neither § 1 nor § 2 enfranchised blacks. Representative Allen illustrated the point with the same example that Republicans had used throughout the fall campaign:

... it has been argued further, in connection with this first section, that it gives to all the men in these Southern States the right of suffrage without distinction between whites and blacks. Do not gentlemen remember that all citizens of the State of Pennsylvania are not voters? Do they pretend to understand that every citizen of this State is entitled to vote?<sup>185</sup>

Women and children were citizens but not voters. Thus, negroes might also be citizens but not voters. The one Republican who declared himself in favor of impartial suffrage, Senator Landon, prefaced his remarks with the admission that the amendment did not grant that right to blacks.<sup>186</sup>

Senator Landon was also the only Republican who declared himself in favor of total equality between blacks and whites. Democrats insisted, as they had in the fall campaign, that the amendment elevated black men to the level of white men.<sup>187</sup> Republicans replied, as they had in the fall campaign, that it only guaranteed equal opportunity before the law. Representative Mann elaborated:

<sup>179</sup>*Id.* at XV.

<sup>180</sup>*Id.* at XXXI.

<sup>181</sup>*Id.* at LXV.

<sup>182</sup>*Id.* at XLI, XLV.

<sup>183</sup>*Id.* at LXVII.

<sup>184</sup>*Id.* at LI (Senator Donovan: voting is a privilege and immunity of citizenship); at XXV (Senator Burnett: Congress given power to impose negro suffrage).

<sup>185</sup>*Id.* at XCIX.

<sup>186</sup>*Id.* at IX.

<sup>187</sup>Representative Kurtz elaborated the point:

Believing, also, that all races of hybrids, the results of amalgamation, or the intermingling of different and opposing races of men, become debased, debauched, and degraded, I am opposed to all possible schemes and pretexts by which the legal barriers heretofore existing between the white and black races in America are to be removed, and opportunities and inducements held out for the association of the two races, upon such terms of equality as will naturally result in the gradual, but certain, blending of the two into one mixed race or people.

*Id.* at LII-LIII.

I do not see how it is possible for human wisdom to frame a more perfect amendment to the Constitution of the United States than this section. It supplies a deficiency which every man has felt; it makes every person equal before the law; it aims to make every court in the United States what justice is represented to be, blind to the personal standing of those who come before it. Its adoption will prohibit any judge in any State from looking at the wealth or poverty, the intelligence or ignorance, the condition and surroundings, or even the color of the skin, of any person coming before him. It will require the court to look solely at the merits of the claim which he presents, or the details of the crime with which he is charged; and that I submit, is a duty that ought to be required of every judicial tribunal. The "equal protection of the law" is the talismanic charm which is to raise this Government to a position which it has never yet been able to occupy.<sup>188</sup>

The fourth major Republican point was thus that § 1 guaranteed legal rather than political or social equality. Angry at the racist slurs of Representative Diese, Representative Allen remarked that Diese had obviously been "educated in the school of Southern chivalry" and added:

Now, I wish merely to say to the gentleman from Clinton, that if this constitutional amendment is adopted, it would yet be his constitutional right, if he so desires, to associate with Sambo or Dinah, or whoever he may call the negro, that he can do so, but I do not consider myself obligated, nor can any candid man consider himself obligated in any such way. It leaves every person the right to choose his own associates, and does not say whether they shall be white or black.<sup>189</sup>

Fifth, the Republicans insisted that government was obliged to protect its citizens. Representative Mann demanded to know "the worth of a government that wilfully neglects to protect all its citizens in their rights of life, liberty, and property."<sup>190</sup> His colleague M'Camant lambasted the Democrats for prattling about Southern states' rights when the rights of four million former slaves and white Unionists went unprotected.<sup>191</sup> M'Creary scoffed at the Democratic suggestion that Southern rebels could look after the rights of blacks.<sup>192</sup> When the debate resumed in the House on February 6, Lee lamented: "The courts of the South have neither the power nor the disposition to punish offenders unless they happen to be Unionmen or negroes."<sup>193</sup>

Since the Southern state governments had failed to protect the rights of

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<sup>188</sup>*Id.* at XCIX.

<sup>189</sup>*Id.*

<sup>190</sup>*Id.*

<sup>191</sup>*Id.* at LVI.

<sup>192</sup>*Id.* at LXXI.

<sup>193</sup>*Id.* at CIV.

those within their jurisdiction, the national government must discharge that duty. Republicans did not flinch from Democratic charges that the amendment consolidated such power in Congress' hands.<sup>194</sup> Republicans rejoiced, sixth, that the national government could now insure the rights of all. M'Creary explained: "The merest vagrant, therefore, cannot be confined without having the right to appeal to the courts of the United States, for them to decide whether he has been deprived of his liberty justly and in due process of law."<sup>195</sup> Senator Browne rebuked those who worried about preserving the authority of the states:

But, sir, it is for the rights of States these gentlemen are concerned. Are, then, States of more importance than men? For what are States created but to conserve the rights of men? They are but as the husk to the grain, the hull to the kernel, or the casket to the precious jewel it contains. When a State becomes the oppressor instead of the protector of its citizens, it deserves to be destroyed. To save these rebel States and secure them in the power they have forfeited, Senators are willing to leave millions of loyal white and black men to be trampled under the heel of those who were lately rebels in arms, and are defiant rebels still.<sup>196</sup>

These Republican legislators understood that § 5 nationalized the protection of civil liberty. Indeed, they favored the amendment for just that reason.

#### LESSONS FROM THE DEBATE

A consensus about the meaning of § 1 emerged from the ratification debate in Pennsylvania, Ohio, and Illinois at odds at many points with the interpretation which the Supreme Court has given the section. First, the record demonstrates that no one in these states believed that the due process clause protected any substantive rights, much less all those rights enumerated in the Bill of Rights. At no point in this debate did any advocate of § 1 contend that the Court could invoke the due process clause as a guarantee of substantive rights. No one even hinted that the due process clause incorporated any — much less all — of the Bill of Rights' guarantees.

Similarly, no one in these states ever claimed that the privileges and immunities clause incorporated the Bill of Rights. Advocates of § 1 did insist that the clause protected fundamental rights, and they repeatedly cited the Declaration of Independence as evidence that men enjoyed natural rights which no government could abridge. Their rhetoric thus lends a superficial plausibility to the claim that the privileges and immunities clause was intended to incorporate the Bill of Rights. Afterall, those rights were presumably the natural ones

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<sup>194</sup>*Id.* at XIII (Senator Wallace: amendment destroys federal system); at XLI (Representative Jenks: Congress given powers to regulate matters traditionally reserved to the states).

<sup>195</sup>*Id.* at XCVII.

<sup>196</sup>*Id.* at XXXIII.

which the Founding Fathers had deemed fundamental. The difficulty with that theory is that the debate on specific points does not support it. Although the advocates of § 1 did not hesitate to invoke the Founding Fathers in their behalf, they never explained that the privileges and immunities clause was a shorthand statement of the Bill of Rights. Is it likely that advocates on the stump would have overlooked such a convenient — and appealing — explanation on the very issue on which they were most frequently challenged?

Even more telling is the silence of the amendment's critics. They objected to the privileges and immunities clause precisely because it conferred substantive rights on blacks. Indeed, they speculated endlessly about those rights which it gave blacks. Yet they never asserted that it gave blacks all those rights listed in the Bill of Rights. One accusation which they did make, for example, was that the privileges and immunities clause gave blacks the right to sit on juries. If these critics had suspected that the clause incorporated the Bill of Rights, they could have supported their accusation with that fact because the sixth amendment guarantees one a jury of his peers. They did not. They did not because it was not a fact. So far as one can tell from surviving records, no one in these states ever publicly or privately contemplated the possibility that the privilege and immunities clause incorporated the Bill of Rights.

The clause was intended to protect a broad range of fundamental rights, however; and the record thus suggests, second, that the Court has from the beginning erred in reading it narrowly. Admittedly, advocates said that § 1 made the black a citizen of the United States, but they never implied that United States citizenship gave the black only those privileges and immunities peculiar to national citizenship, in contradistinction to some different set of privileges and immunities peculiar to state citizenship. A citizen was a citizen, and advocates of § 1 intended to cloak all citizens of the United States with all the traditional privileges and immunities of that status. Republicans fretted continuously that Southern states systematically denied blacks the privileges and immunities of citizenship. They would not have adopted a guarantee that only prevented those states from abridging a limited number of privileges and immunities. Again, the critics understood that § 1 was intended to protect all the traditional privileges and immunities of citizenship. They objected to it on precisely that ground.

The record in these states suggests, third and conversely, that the Court has given the equal protection guarantee a breadth its advocates never intended. They recognized the equal protection principle as a fundamental one solely because it forbade all class legislation and required instead that the government treat all within its jurisdiction equally. They thus indignantly dismissed the accusation that § 1 favored blacks. Rather, they sought to ban all special or class legislation. Their explanation of the equal protection clause leaves little doubt that they would have condemned governmentally mandated affirmative action programs. Such programs embody the very evil which the advocates of



§ 1 in these states said it was designed to prevent. General Butler, campaigning for the Union ticket in Illinois in October, explained the equal protection guarantee by quoting the late President:

I believe it is stated in the Constitution of Illinois that all men are born equal. Many eminent men have tried to define it, but their definitions have all needed some explanation. If you mean that all men are born with equal rights, then the Declaration of Independence is correct. But men are created differently. Some are born with different physical powers from others, and some with greater intellectual powers, and so on. Therefore, they are not exactly equal. But Abraham Lincoln, of Illinois, has stated this question with more clearness than any one who has heretofore attempted it, and in a manner which needs no explanation. With that peculiar terseness for which he was more renowned than anything else except patriotism and honesty, he says: 'Every man has the right to be the equal of every other man — if he can.' [Tremendous cheering.]<sup>197</sup>

While the § 1 guarantees thus limited the scope of governmental power, § 5 did give the national government the ultimate authority to enforce those guarantees. Fourth, the record in those states contradicts the Court's frequent intimations that the old doctrine of states' rights survived ratification of the 14th amendment. While the amendment did not destroy the federal system, it did radically alter the distribution of governmental authority within that system. Both its advocates and its critics understood that fact. Ohio Democrats opened their campaign with the charge that "an organized conspiracy exists, having for its object a fundamental change in our system that shall make the General Government supreme."<sup>198</sup> Late in the Illinois campaign, Colonel W. H. Benneson and Major H.V. Sullivan of Quincy warned their fellow citizens, "If the proposed amendments of the Constitution be adopted, new and enormous powers will be claimed and exercised by Congress as warranted by such amendments, and the whole structure of our government will perhaps gradually, but yet surely, be revolutionized."<sup>199</sup> That prospect did not disturb Republicans. They insisted that the national government had both the power and the duty to police state governments. Henceforth, the national government was to be the guarantor of the civil liberties of all Americans.

If the ratification debates in other states reflect a similar consensus, a major reassessment of the Supreme Court's 14th amendment jurisprudence would be required. Almost from the beginning the Court appears to have erred in its assessment of the original understanding.<sup>200</sup> Pursuing its initial error erratically

<sup>197</sup>Danville Plaindealer (Ill.), November 1, 1866, at 2, cols. 1-5.

<sup>198</sup>Coshocton Democrat (Ohio), May 29, 1866, at 2, cols. 1-4.

<sup>199</sup>MaComb Eagle (Ill.), November 3, 1866, at 2, cols. 2-5.

<sup>200</sup>In the very first case which came before the Court, a five man majority gutted the privileges and immunities clause by holding that it was never intended "to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the states." *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 77 (1872).

through the succeeding century, the Court has arguably wandered so far afield from the original understanding that its decisions have created an amendment wholly different from the one the Court is ostensibly obliged to interpret.<sup>201</sup> If constitutional law questions are never finally settled until they are settled right — and if they are never settled right until they are settled in conformity to the original understanding — then many 14th amendment questions long thought settled are today in fact unsettled.

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<sup>201</sup>In the last two decades, for example, the Court has held that the due process clause guarantees substantive privacy rights. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) *reh'g denied*, 410 U.S. 959. (a woman has a constitutionally protected right to abort her fetus).

