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Howard Jay Graham
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THE FOURTEENTH AMENDMENT AND SCHOOL SEGREGATION

HOWARD JAY GRAHAM*

Once again intense interest and scrutiny are focused on the Fourteenth Amendment. The immediate occasion is the decision now pending in the *School Segregation Cases*.¹ Held over from 1952 term at the Supreme Court's request, these five cases were rebriefed and on December 7-9, 1953, elaborately reargued upon a series of five questions framed by the justices. The five queries² dealt with the purpose of the Amendment, the intent of framers and ratifiers, and the respective powers, under Sections One and Five, of Congress and the Judiciary. The first two questions sought "evidence" of the intention with regard to the school segregation issue. Question three related to the Court's existent powers under the text of the Amendment, regardless of framer-intent, in case historic evidence proved unclear or indecisive. Questions four and five concerned the judicial mechanics for ending segregation "assuming it is decided that segregation in public schools violates the Fourteenth Amendment."

A Rip Van Winkle, awakening from an eighty-year nap, would pinch himself in disbelief at these developments. The Fourteenth Amendment,³ he would exclaim, had been drafted in 1866 to make the former slaves citizens—to remove doubt about constitutionality of the Civil Rights Act of that year. That Act in turn, drawn

* Bibliographer, Los Angeles County Law Library (on leave of absence) and Guggenheim Fellow, 1953-54.

1. Supreme Court of the United States, October, 1953 Term, docket numbers 1, 2, 4, 8, 10: *Brown v. Board of Education of Topeka*; *Briggs v. Elliott*; *Davis v. County School Board of Prince Edward County*; *Bolling v. Sharpe*; *Gebhart v. Belton*. The corresponding docket numbers of the cases, 1952 Term, were 8, 101, 191, 413, 448.

2. 345 U. S. 972 (1953) (memorandum decision).

3. Basic monographs and articles on the history of the Fourteenth Amendment and its major clauses are: FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908); KENDRICK, *JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* (1914); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 *STAN. L. REV.* 5 (1949); Frank and Munro, *The Original Understanding of the "Equal Protection of the Laws"*, 50 *COL. L. REV.* 131 (1950); Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 *YALE L. J.* 371 (1938), 48 *YALE L. J.* 171 (1938); 1 *SELECTED ESSAYS CONSTITUTIONAL LAW* 236 (1938); McLaughlin, *The Court, the Constitution and Conkling*, 46 *AM. HIST. REV.* 45 (1940); Boudin, *Truth and Fiction About the Fourteenth Amendment*, 16 *N. Y. U. L. Q. REV.* 19 (1938); WARSOFF, *EQUALITY AND THE LAW* (1938); Graham, *Early Antislavery Backgrounds of the Fourteenth Amendment*, [1950] *Wis. L. Rev.* 479 and 610; Graham, *Procedure to Substance—Extra-Judicial Rise of Due Process, 1830-1850*, 40 *CALIF. L. REV.* 483 (1953); TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951); CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* vol. 2, c. 31-32 (1953).

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by Senator Trumbull,^{3a} had been designed to secure to the freedmen actual as well as nominal freedom, to root out slavery's "badges and incidents," to outlaw public race discrimination.⁴ The Fourteenth Amendment—universally understood as "embodying" or "incorporating" this bill—and hence as reconstituting the powers of the Federal government to the extent needed to erase the color line from American life—was ratified in 1868. Five years later, in the *Slaughter-House Cases*, the Supreme Court declared that the "one pervading purpose" of the Amendment, and indeed of all three War Amendments, had been "the freedom of the slave race [and] the security and firm establishment of that freedom."⁵ One can imagine Rip's puzzlement therefore on learning that since 1896,⁶ this Amendment, securing to all "persons" the "equal protection of the laws," had nonetheless sanctioned racial segregation in public schools, transportation, amusement, etc. Chide us, this awakened sleeper well might, for proof *he alone* had been napping!

Assuredly a sensitive American with an eye to the headlines as well as histories⁷ would have a very bad time bringing the old gentleman down to date. These are the darkest chapters in our past: Gradual, systematic breakdown of Reconstruction; betrayal of the South and Negroes alike; vindictive partisanship, reckless Executive-Legislative warfare; shameless exploitation of sectional hatreds and Negro suffrage; at length, military rule at dead end, sectional stalemate, the freedmen and Negro race jettisoned through this "separate but equal" cynicism, with its evasions and insulting defenses.

To convey this—the combined substance of Reconstruction history and of Myrdal's *An American Dilemma*⁸—to one who had experienced the thrill of Emancipation and shared the hopes and idealism of the Trumbulls, would be a harrowing task. To under-

3a. WHITE, LIFE OF TRUMBULL (1913).

4. See TENBROEK, *op. cit. supra* note 3, c. 9-12; FLACK, *op. cit. supra* note 3, c. 1; Graham, *Our "Declaratory" Fourteenth Amendment*, to be published.

5. 16 Wall. 36, 71 (U. S. 1873).

6. *Plessy v. Ferguson*, 163 U. S. 537 (1896); two excellent recent critiques are Hyman, *Segregation and the Fourteenth Amendment*, 4 VAND. L. REV. 555 (1951); Ramsmeir, *The Fourteenth Amendment and the "Separate But Equal" Doctrine*, 50 MICH. L. REV. 203 (1951).

7. For "revisionist" views and bibliographies, see also Beale, *On Rewriting Reconstruction History*, 45 AM. HIST. REV. 807 (1940); Williams, *An Analysis of Some Reconstruction Attitudes*, 12 J. OF SOUTHERN HIST. 469 (1946); BUCK, *THE ROAD TO REUNION, 1865-1900* (1937); RANDALL, *THE CIVIL WAR AND RECONSTRUCTION* (1937); COULTER, *THE SOUTH DURING RECONSTRUCTION* (1947); DUBOIS, *BLACK RECONSTRUCTION* (1935); BEALE, *THE CRITICAL YEAR* (1930). An indispensable bibliographic aid on the legal side of civil rights history is POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (Emerson and Haber, eds. 1952).

8. (1944).

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take it now, when every headline is a reminder of farflung American interests, and of the necessity for moral leadership in a world only one-third of whose population is white, would be a sobering, depressing experience for any citizen.

The initial reaction, after incredulity, at national frustration and failures of this magnitude, is anger, and search for historic villains or scapegoats. Thaddeus Stevens and Charles Sumner, the leading Ultra-Radicals and Vindictives; Andrew Johnson, the vain, pugnacious little President, as courageous (and occasionally as right) as he was inept, have served in countless histories and speeches in this regard. So have innumerable lesser, general fry—"Abolitionist fanatics," "Black Republicans," "Grant Stalwarts," "Carpetbaggers," "Scalawags" and the rest. And on the other side, their opposites, the "unrepentent Rebels, Traitors and Secesh" that figured in stump speeches for fifty years.

Our generation fortunately has outgrown such history. The Civil War and Reconstruction now are uniformly viewed as failures of statesmanship and of resource on both sides. Fanaticism was no monopoly of abolitionists. Slavery was not a "positive good;" nor its abolition "evil," nor protection of freedmen's rights "unconstitutional and unnecessary." On the other hand, neither were immediate Negro suffrage and military government the panaceas naive and designing men pretended. Negation and polarized programs at length brought both sides to near disaster. Reunion was largely at the expense of the Negro Race.⁹

Constitutional history barely has begun to benefit from this revisionism. Indeed, the whole subject has fallen on evil days. Once a favored form of American history, today it is the most neglected. McLaughlin's volume,¹⁰ published in 1935, is still the latest general coverage as such. Constitutional *Law*, of course has split off as a discipline in its own right—abstruse, technical, increasingly viewed and taught merely as a system of rules with little regard for political and social context.¹¹ The residue ob-

9. This view is taken now in nearly all modern discussions, but corrective judicial interpretation still lags. For brilliant revisionary studies of the so-called "redemptionist" movement, see WOODWARD, *THE ORIGINS OF THE NEW SOUTH* (1951); and for the politics of the Reconstruction settlement of 1877, the same author's, *REUNION AND REACTION* (1951).

10. McLAUGHLIN, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* (1935); KELLY AND HARBISON, *THE AMERICAN CONSTITUTION; ITS ORIGINS AND DEVELOPMENT* (1948) and SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* (1943) are admirable academic works; the writer is here speaking of the decline of the subject in the popular sense. Professor Crosskey's *tour de force*, cited *supra* note 3, promises to quicken popular interest in the subject.

11. For exploration of some of the consequences, see Graham, *Procedure to Substance—Extra-Judicial Rise of Due Process, 1830-1860*, 40 CALIF. L. REV. 483 (1953).

viously is difficult to manage. Even monographic treatments and judicial biographies have grown fewer. A widening gap is thus created, not only by differential rates of institutional growth, but by shifts of research interest as well.

An undesired consequence is that Americans generally are losing touch with a vital part of their past—and are doing so despite tremendous emphasis, in colleges and secondary schools, on American history and government. Constitutional democracy rests, in the long run, on popular understanding of its bases and operations. It is evident, therefore, that this growing neglect of constitutional history, and our tendency to build up arrearsages of research and understanding, are by no means healthy signs.

In so far as popular—and even professional—understanding is concerned, one finds proof of this in the present status of the Fourteenth Amendment itself. That Amendment, as mystified Van Winkle¹² reminded us, has been a part of our Constitution

12. Once briefed, however, Van Winkle proved sharp indeed. The following fragment, found among his papers with the abbreviated title, "Reargt. School Seg. Cases?," suggests that he even for a time toyed with the notion of appearing *amicus curiae* opposite his eminent fellow-New Yorker, John W. Davis, Counsel for the State of South Carolina, and dean of the American corporate bar. From the references to Roscoe Conkling's argument it is plain the old libertarian took a sardonic layman's view of some matters not heretofore lightly treated either by judges or historians:

"Were we called upon to appear before your Honors in the role of counsel for corporations seeking protection as persons under Section One, challenging what even corporations apparently at times can feel to be 'invidious and discriminating legislation,' we should be obliged to make an embarrassing admission. We should have to admit that not one word ever has been found, either in the speeches of the framers, the debates of the 39th Congress, or the proceedings of the ratifying legislatures, which expressly declares, or otherwise clearly indicates, that even *one individual*, of all that extensive group, then 'contemplated or understood' corporate 'persons' to be embraced within the protection of Section One. An impenetrable barrier of silence—absolute and inscrutable—prevails here. To maintain the corporate proposition, therefore, we perhaps should be obliged to rest our case, as did that famous advocate and upstate New Yorker, Roscoe Conkling, when he appeared before this Court in 1882, wholly upon circumstantial grounds. We might be obliged to use, as was he, the Journal of the Joint Committee of Fifteen that drafted the Amendment,—and perhaps also some inference and conjecture [See Graham, *The 'Conspiracy Theory' of the Fourteenth Amendment*, 47 YALE L. J. 371, 375-385 (1938)] to show that corporations had come within the purview of the framers. We might well despair of that task—as might even our distinguished adversary, Mr. Davis himself, at this date. [See *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U. S. 77, 83 (1938); *Wheeling Steel Corp. v. Glander*, 337 U. S. 562, 576-581 (1949).]

"But we all know that this corporate point, happily, has been foreclosed now for nearly 67 years. Not merely foreclosed, but substantially waived: In 1886, Conkling and his associate counsel were again prepared to make their extremely circumstantial argument, in a second series of *Railroad Tax Cases* involving the issues earlier left undecided when the first series had been withdrawn. At the outset of this second series of arguments, Chief Justice Waite announced from the bench, *in the only statement ever made by the full Court in deciding this crucial matter*: 'The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these Corporations. We are all of the opinion that it does.'

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eighty-five years. That it was adopted and ratified to remove all doubt about national power to protect the freedmen and to assure progressive removal of the discriminations, denials and abridgements in rights that had been a part of the slave system is generally conceded. Such has been the affirmed judicial view since 1873.¹³ In 1908, moreover, Flack published his monograph, *The Adoption of the Fourteenth Amendment*, summarizing the debates in Congress and in the ratifying legislatures. Numerous works have recovered much of the ground since.¹⁴ All agree regarding the racial motivation of the Amendment. In the meantime, however, certain collateral and secondary problems have become points of controversy. Two in particular have persisted at the judicial level: One, what framers and ratifiers contemplated or

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"We today are beset by no difficulties or handicaps of evidence in these *School Cases*. The Congressional debates are almost too voluminous. . . .

"We will show, as predecessor counsel and historians have shown many times the past 85 years, that the Fourteenth Amendment was designed to be a bulwark for the rights of the Negro race; that it was designed to prohibit *all public discriminations* based upon race and color alone: that it was designed to wipe out what the Civil War generation rightly called the 'badges and indicia' of slavery, its hateful 'vestiges and appendages.' School Segregation, we submit, comes in this category.

"On these points, happily, our evidence is abundant; and the authorities are virtually unanimous. The ante-bellum history, the Congressional debates, the researches and writings of Flack, Fairman, Frank, Graham, Boudin, tenBroeck, and Crosskey, whatever their different emphases, and whatever the doubts or disagreements on secondary details, clearly and unanimously support our position."

The notes break off abruptly at this point. Close reading shows of course that although militantly anti-separate-but-equal, the orientation here is not anti-corporate. As some of his other memoranda made clear, Van Winkle felt that "'Due process' and 'equal protection', not 'person', are the key words." "Query: Aren't they ample enough for anybody?" To renege on corporate personality at this date was by his view "Pretty close to infanticide. . . . Remorse inevitable, then perhaps another brood—or at least another brood of fictions." See the pre-Civil War history of the diversity of citizenship clause, and McGovney thereon, *A Supreme Court Fiction*, 56 HARV. L. REV. 853 (1943). Finally, he concluded with the observation, "Calvinists haven't always thought so highly of legislatures, or had such occasion to, as people 1932-195?"

Elsewhere, Van Winkle gave hearty endorsement of the punched card project, proudly noting that IBM had made itself right at home in his native Catskills. The writer wishes to express his indebtedness to Dr. Van Winkle for numerous insights and suggestions.

13. The calamitous effects of a caste system which really was established and constitutionally condoned a full generation after Reconstruction (see WOODWARD, *op. cit. supra* note 9, at 209-212 and Graham, *supra* note 4) have too long obscured this fact, as has the lush economic use made of the Amendment. Yet Justice Miller's majority opinion in the *Slaughter-House Cases*, *supra* note 5 and Justice Bradley's majority opinion in the *Civil Rights Cases*, 109 U. S. 3 (1883) both are strong expositions of the Negro Race motivation of the Amendment. It often is overlooked in this regard that Justice Bradley himself nominally accepted the "badges and incidents" thesis of Trumbull and Harlan. See also the strong Negro Race statements in *Shelley v. Kraemer*, 334 U. S. 1, 21 (1948); *Buchanan v. Warley*, 245 U. S. 60, 76-77 (1917); *Strauder v. West Virginia*, 100 U. S. 303, 306-7 (1880). Our fears and sextants, not stars, have thrown us off course. Corrective action is a simple matter.

14. See note 3 *supra*.

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understood with regard to corporate persons;¹⁵ the other, whether Section One was intended to incorporate the Bill of Rights to the extent of making *all* the first eight Amendments binding upon the States.¹⁶ Significantly, both of these controversies resulted in combing and recombining of debates for evidence to support two sets of diametrically opposed positions.¹⁷ Research of this type necessarily has been piecemeal, with attention focused on the one narrow point, and to the neglect or subordination of larger purposes.

The upshot is that after nearly a half-century of research and debate judges and historians are still unagreed about two fundamental questions concerning the Amendment's purposes. Dismayed or not, the Court meantime, by its first two questions in the *School* cases,¹⁸ directed that another minute search be made—on another narrow point—and again in a manner that tends to lose sight of the Amendment's broader objectives.

Furthermore, framer-intent, as a criterion in these matters, obviously has had a distinctly hit-and-miss application. So much so, indeed, that one wonders whether, in asking Negro counsel to search for and present evidence of framer-intent on this specific issue of school segregation the Court remembered that no such request ever had been made—or ever could have been made—with regard to countless matters and fields over which it previously had extended the Amendment's protection. Absolutely nothing, for example, is found in the debates on whether sound trucks¹⁹ or picketing²⁰ are to be regarded as constitutionally privileged free speech. There is nothing on "reasonable" rates of return for public service companies.²¹ In fact, no one ever has found a single word in the main debates suggesting that framers and ratifiers "contemplated or understood" corporations to be "persons" under the due process and equal protection clauses. Yet this last, most vital point was conceded by the Court, without formal

15. *Connecticut General Life Insurance Co. v. Johnson*, 303 U. S. 77, 83 (1938); *Wheeling Steel Corp. v. Glander*, 337 U. S. 562, 576 (1949).

16. *Adamson v. California*, 332 U. S. 46 (1947).

17. On the corporate personality issue, see Graham, *Conspiracy Theory of the Fourteenth Amendment*, 47 YALE L. J. 371 (1938), 48 YALE L. J. 171 (1938); and as an example of the diverse interpretations drawn therefrom, see HACKER, *THE TRIUMPH OF AMERICAN CAPITALISM* 388-392 (1940), and FAIRMAN, *MR. JUSTICE MILLER AND THE SUPREME COURT* 187-189 (1939). On the incorporation of the Bill of Rights problem, see Justice Black's historical appendix, *Adamson v. California*, 332 U. S. 46, 68, 92-123 (1947) and Fairman, *supra* note 3, and the companion article by Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 140 (1949).

18. See notes 1 and 2 *supra*.

19. *Saia v. New York*, 334 U. S. 558 (1948). *Kovacs v. Cooper*, 336 U. S. 77 (1949). See also *Railway Express Agency v. New York*, 336 U. S. 106 (1949).

20. *Thornhill v. Alabama*, 310 U. S. 88 (1940).

21. *Smyth v. Ames*, 169 U. S. 466 (1897).

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opinion, and with the matter of framer-intent substantially waived, exactly 67 years ago!²²

On the other hand, the evidence in the debates is overwhelming that racial discrimination *very broadly conceived* was the framers' target.²³ Added *constitutional* power thus was tapped for this very reason and an attempt at a minute (or even broad) taxonomy of discriminations was understandably avoided.²⁴ As Bingham put it, "You do not prohibit murder in the Constitution; you guarantee life in the Constitution."²⁵ And so, it was with "liberty" and "protection," and above all, *equal* protection."

No doubt these are matters to which the Justices are now devoting serious consideration. It is appropriate therefore, before turning to the central difficulty that bedevilled draftmanship and early interpretation of the Fourteenth Amendment—to say nothing of our own ability to perceive and fully comprehend the framers' purposes—to call attention to one vital objection to this whole prevailing approach. Manifestly, the trend at both the judicial and historical levels has been toward a narrow antiquarianism. Facts are being determined and treated in isolation, one at a time, and virtually out of their contexts. Where we should now be synthesizing our knowledge of the Fourteenth Amendment, we go on fragmentizing it, pulverizing it, compartmentalizing it. This obviously can get us nowhere. The orbits of inquiry are too restricted; the purposes too narrow, too disconnected. Results naturally are indecisive; and can only be increasingly so. Law office history and search—and *re*-search!—of this type could go on forever to no clear result—could become as sterile and negative as medieval scholasticism. Indeed, "constitutional scholasticism" would seem an excellent name for the trend. For even if applied evenhandedly this method is open to serious objection. It tends to make 1866 the decisive date in American history; it gives rise to innumerable searches of records for guidance that simply isn't there; it leads to obscurantism and conjecture; almost inevitably it transforms the humble "argument from silence" into both a murderous and a suicidal weapon.²⁶

22. *Santa Clara County v. Southern Pacific Ry. Co.*, 118 U. S. 394, 396 (1886) (equal protection clause); *Minneapolis and St. L. Ry. Co. v. Beckwith*, 129 U. S. 26, 28 (1889) (due process clause).

23. See TENBROEK, *op. cit. supra* note 3; Graham, *Early Antislavery Backgrounds of the Fourteenth Amendment*, [1950] *Wis. L. Rev.* 479 and 610; Frank and Munro, cited *supra* note 3; also Graham, *supra* note 4.

24. Graham, *supra* note 4.

25. CONG. GLOBE, 39th Cong., 1st Sess. 432 (1866).

26. A national conference, or an hour of professional soul-searching on "The Use and Misuse of the Argument from Silence" might have beneficial results. Fifteen years
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If we are interested in arriving at the purpose and meaning of our Fourteenth Amendment, in so far as that meaning can be determined from what was said by those who sponsored and ratified it, 1866-68, there is a simple and decisive way of doing so. The debates are extensive, but not unlimited; they simply call for systematic analysis and for *complete, detailed tabulation* of findings rather than for mere *reading, summary, and selective quotation*. Above all, the speakers' positions and remarks ought to be correlated with various background data, and the whole coded and analyzed with reference to all significant points and relationships.²⁷

The modern, efficient way to do this is by coordinate or punched card analysis. If the eyesight and energy expended in the course of the reading and searches on each successive narrow point that has arisen had been directed along these lines, we today should have a complete permanent index covering every major issue and problem included in the debates, and one that would point up significant interrelationships, not only of the framers' ideas and objectives, but of the influences and affiliations responsible for them. With the Fourteenth Amendment today the constitutional cornerstone of civil liberties in the States,²⁸ and with hundreds of thousands of dollars to be expended in the next few years by the Fund for the Republic,²⁹ on studies of their definition and enforcement, it would seem that this long overdue project must presently be undertaken.

It is interesting to note in this respect that exploration of antislavery backgrounds³⁰ meanwhile has begun to afford a clearer picture of what framers of the Fourteenth Amendment were driving at, and why they employed the phraseology they did. How the equal protection-due process-privileges-immunities trilogy crystallized from primitive natural rights theories and from earlier constitutional forms; how, during the long antislavery crusade, it became a form of shorthand for, and spearhead of, the Federal Bill of Rights; how at last in 1866 it won full-fledged con-

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ago in 47 YALE L. J. 386-387 the writer probed this problem and won numerous converts. Backsliding however has been frequent, and at times the writer himself has been sorely tempted. Resolution in these matters would be effectively aided by a truly comprehensive, multi-dimensional analysis of the debates.

27. The writer has prepared a draft schedule of a number of points and issues which in his judgment should be covered in such an analysis. He will welcome the views and suggestions of others on these matters.

28. See works cited note 3 *supra*; REPPY, CIVIL RIGHTS IN THE UNITED STATES 103 ff. (1951) and especially c. VI "Group Discrimination and the Constitution."

29. Newsweek, June 8, 1953, p. 60, col. 1.

30. See especially Graham, *supra* note 23, and TENBROEK, *op. cit. supra* note 3.

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stitutional status as a kind of universal common denominator, is a thrilling story that need not be repeated here. The heart of it is that the framers' three-clause system represented a thirty-year winnowing and synthesis of the antislavery, anti-race discrimination argument. Religious, ethical, historical appeals constituted its original forms. At the outset, the Lockean philosophy of antecedent and inalienable rights (which colonial leaders had employed so effectively in the Revolution) simply had been given a new twist. Americans, it was argued, had to live up to their Declaration. "All men" had to mean *all men*; "Governments . . . instituted to secure these rights" of "life, liberty and the pursuit of happiness"; and governments "deriving their *just* powers from the *consent* of the governed" had to bestow protection, and to bestow it equally, irrespective of race and color, or the "self-evident truths" became self-evident mockery.

Thus, from the very beginning the antislavery movement was fundamentally a quest for *protection* of the laws. Slavery was ethically repugnant, not simply because it chattelized man, but because it repudiated the very purpose of government and arbitrarily denied to some humans its protections solely on the basis of skin color.

This double-headed concept and standard of equal protection of the laws, ethically derived from Lockean theory, from the Declaration and from the comity clauses of the Articles of Confederation and Constitution, as well as from the State and Federal Bills of Rights, was already well synthesized by the 1830s.³¹ It was spelled out fully and given its most persuasive statement in two of the early documents of the organized antislavery movement: first, in the Ellsworth-Goddard argument in the *Crandall Case*,³² wherein local Black Laws in Connecticut denying out-of-state Negro children rights of education were successfully challenged; then in repeated attacks by the newly-formed Ohio Antislavery Society on similar Ohio laws which denied free Negroes rights of residence, livelihood, court testimony and education.³³ In both of these instances strong use was made of the federal comity clause, and of a nascent concept of a "general" or paramount "American" or "national" citizenship. In the Ohio attacks, moreover, the due course of law clause of the State Constitution also was employed. Thus by 1835 all three elements of our modern Fourteenth Amendment trinity are found linked together

31. Graham, *supra* note 23 *passim*.

32. 10 Conn. 339, 341-348 (1834); see Graham *supra* note 23, at 498-506, especially n. 65.

33. *Id.* at 494-498.

and used actively against racial discrimination and in behalf of the rights of the free Negroes of the North.³⁴

This, however, is barely half the story. The most fascinating part of it is how this primitive constitutional argument got broadcast³⁵ over the land—reiterated, expanded, winnowed, and clarified—until by 1866 it served the Civil War generation as a form of constitutional shorthand—an ethico-legal common denominator designed to accomplish *within* the Constitution and through the courts, precisely what, for the past thirty years, it had accomplished as a “higher law”, *above* the Constitution, and *in the minds of those* who had crusaded so long against slavery and against racial discrimination. One can sense immediately the hazards and the obstacles to this sort of constitutional transsubstantiation, and these are being treated at length in another article.³⁶ The point here is that this powerful “antislavery impulse” radiated outward from central and western New York in the early and mid-thirties.³⁷ It was a part of a “revival of religion” led by Charles G. Finney, an able lawyer turned evangelist, and by Theodore Weld, then still a student at Oneida Institute and ultimately one of the most remarkable, influential men of his generation. Backed by New York philanthropists who in 1833 organized the American Antislavery Society, and aided by dedicated groups of students attracted by his leadership and personality, Weld and his “Oneidas” moved westward. During the mid- and late-thirties they converted thousands in Ohio, west Pennsylvania and New York to their “benevolent reforms”—temperance, women’s and Negroes’ rights, and above all, to “immediate emancipation”—i. e., emancipation *immediately begun*. By means of revivals, pamphlets, newspapers; by “declarations,” resolutions, petitions, they broadcast their ethico-moral-religious-constitutional argument, abolitionizing whole communities.³⁸

Such success however, soon generated reaction, and reaction brought about reorientation.³⁹ Denied access to the Southern and border States; maligned and attacked as subversives and seditious-

34. It is impossible to overstress the fact that the antislavery movement merely was the largest part of an anti-race discrimination movement. The discriminations against free Negroes, and those against Indians for example, were as vigorously attacked as slavery, and for the same reason: race and color were arbitrary, irrational bases for distinctions in men’s rights. This fact obviously has tremendous bearing on the scope and purpose of both the Thirteenth and Fourteenth Amendments. Yet our tendency, almost from the first in construing the Amendments has been to think of slavery simply as chattelization, and to ignore the broader motivations.

35. See note 30 *supra*.

36. Graham, *supra* note 4.

37. See BARNES, *THE ANTISLAVERY IMPULSE* (1933).

38. *Ibid.*; also DUMOND, *THE ANTISLAVERY ORIGINS OF THE CIVIL WAR* (1938).

39. *Ibid.*; BARNES, *op. cit. supra* note 37.

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ists by proslave forces fearful both of emancipation and of slave insurrections, obliged to defend even their own rights to discuss and to proselytize, the American Antislavery Society leaders and their movement soon were left with no alternative but political action. This alternative they at first accepted reluctantly, then exploited brilliantly. First in the Liberty Party of 1840-44,⁴⁰ then in the Free Soil Party of 1848,⁴¹ and the Free Democracy of 1852,⁴² leaders like Salmon P. Chase⁴³—original converts of the Weld group—wrote into their platforms and speeches and resolutions these very concepts of protection and of equal protection derived from the Declaration of Independence and guaranteed by the paramount national citizenship of the comity clause and by state and federal due process. Such arguments of course were now no longer limited merely to proving the expediency and justice of abolition, but were turned against slavery and all its works. At length, after repeal of the Missouri Compromise by the Kansas-Nebraska Act, the new Republican Party, taking its stand now against *extension* of slavery, appropriated *in toto* and repeated in its own platforms and in countless speeches of its members and leaders, 1854-60,⁴⁴ this identical rhetoric and theory. Old texts thus were refurbished and given rebirth. So, at long last, the rejected stones came to stand at the head of the corner.

Nothing better ties all these developments together, or better reveals their true character and significance, than a speech made in the House in 1859 by John A. Bingham.⁴⁵ Bingham of course was the Ohio representative who just seven years later was destined to draft Sections One and Five of the Fourteenth Amendment. At this date he represented the 21st District which had been thoroughly abolitionized by the antislavery evangelists in 1835-37 while he himself was attending Franklin College near Cadiz. Franklin then had been second only to Oberlin as an antislavery stronghold. Indeed, we find records of petitions and resolutions of the Cadiz antislavery societies couched in the very phraseology for which Bingham, now in 1859, and later, manifests his preference. Moreover, his speech is made against a provision

40. The relevant planks are quoted in TENBROEK, *op. cit. supra* note 3, at 119-121; see also STANWOOD, HISTORY OF THE PRESIDENCY 218 (1904).

41. *Id.* at 240.

42. *Id.* at 253-254.

43. See HART, SALMON P. CHASE 51-52 (1899). A thorough study of Chase's role in the antislavery movement would itself do much to set the War Amendments in clearer perspective.

44. See STANWOOD, *op. cit. supra* note 40, at 271-272, 291-294 for the due process and other antislavery constitutional theory in the Republican Platforms of 1856 and 1860. Note Planks 2, 8, and 14 of 1860.

45. See DICT. AM. BIOG.; BRENNAN, BIOG. ENCYCL. . . . OF OHIO 312 (1880); Graham, *supra* note 23 at 623, 655, n. 149, 150, 255.

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in the Oregon Constitution of 1857⁴⁶ which was almost a repetition of the hateful Ohio Black laws: "No free Negro or mulatto not residing in the State at the time of the adoption of this Constitution, shall ever come, reside or be within this State, or hold any real estate, or make any contract or maintain any suit therein"

Bingham first contended⁴⁷ that these provisions violated the Federal comity clause and the rights of "citizens of the United States." "Who are citizens of the United States? They are those, and those only, who owe allegiance to the Government of the United States . . . [They are] all free persons born or domiciled within the jurisdiction of the United States, and aliens naturalized under the laws of Congress."

I invite attention to the significant fact that natural or inherent rights, which belong to all men, irrespective of all conventional regulations, are by this Constitution guaranteed by the broad and comprehensive word "person," as contradistinguished from the limited term citizen—as in the fifth article of amendments, guarding those *sacred rights* which are as *universal* and *indestructible* as the human race, that "no person shall be deprived of life, liberty, or property, but by due process of law, nor shall private property be taken without just compensation." And this guarantee *applies* to all citizens within the United States. [Italics supplied.]

Against infringement of "these wise and beneficent guarantees of political rights to the citizens of the United States as such, and of natural rights to all persons, whether citizens or strangers," stood the supremacy clause.

There, sir, is the limitation upon State sovereignty— simple, clear, and strong. No State may *rightfully*, by Constitution or statute law, impair any of these guaranteed rights either political or natural. They may not *rightfully* or *lawfully* declare that the strong citizens may deprive the weak citizens of their rights, natural or political

This provision [excluding free Negroes and mulattoes] seems to me . . . injustice and oppression incarnate. This provision, sir, excludes from the State of Oregon eight hundred thousand of the native born citizens of the other States, who are, therefore, *citizens of the United States*. I grant you that a State may restrict the exercise of the elective franchise to certain classes of citizens of the United States, to the exclusion of others; but I deny that any State may exclude a law-abiding

46. Art. I, § 35.

47. CONG. GLOBE, 35th Cong., 2d Sess. 981-985 (1859).

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citizen of the United States from coming within its territory, or abiding therein, or acquiring and enjoying property therein, or from the enjoyment therein of the "privileges and immunities" of a *citizen of the United States*. What says the Constitution:

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Art. 4, Section 2.

Here is no qualification . . . The citizens of each State, all the citizens of each State, *being citizens of the United States*, shall be entitled to "all privileges and immunities of citizens of the several States." Not to the rights and immunities of the several States; not to those constitutional rights and immunities which result exclusively from State authority or State legislation; but to "all privileges and immunities" of citizens of the United States in the several States. *There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident, that it is "the privileges and immunities of citizens of the United States" that it guarantees . . .*

[S]ir, I maintain that the persons thus excluded from the State by this section of the Oregon Constitution, are citizens by birth of the several States, and therefore *are citizens of the United States*, and as such are entitled to all the privileges and immunities of citizens of the United States, amongst which *are* the rights of life and liberty and property, and their due protection in the enjoyment thereof by law; . . .

Who, sir, are citizens of the United States? First, all free persons born and domiciled within the United States—not all free white persons, but all free persons. You will search in vain, in the Constitution of the United States, for that word white; it is not there. You will look in vain for it in that first form of National Government—the Articles of Confederation; it is not there. The omission of this word—this phrase of caste—from our national charter, was not accidental, but intentional.
. . .

This Government rests upon the absolute equality of natural rights amongst men. . . .

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

The equality of all to the right to live; to the right to know; to argue and to utter, according to conscience; to work, and enjoy the product of their toil, is the rock on which that Constitution rests— . . . The charm of that Constitution lies in

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the great democratic idea which it embodies, that *all men, before the law, are equal in respect to those rights of person which God gives, and no man or State may rightfully take away, except as a forfeiture for crime. Before your Constitution, sir, as it is, as I trust it ever will be, all men are sacred, whether white or black. . . .* [Italics supplied throughout.]

Surely, this speech alone is enough to put Sections One and Five in clearer perspective. All the clauses and concepts that Bingham and the Joint Committee were to employ seven years later are employed here. Protection and equal protection, due process of law, and a paramount national citizenship attained by removing the "ellipsis" from the comity clause, are all expressly relied on. They are relied on, moreover, to combat the type of racial classification, and racial discrimination, that were incidents of slavery, and which had been attacked by these forms repeatedly in the quarter century since their use in the *Crandall* arguments and in the Ohio Antislavery Society report on the state's Black Laws. (Indeed, use of the comity clause in this manner extended back to similar use in the debates over Missouri's admission to the Union, 1819-21,⁴⁸ and even to use, in 1778, of the comity clause of the still-unratified Articles of Confederation.)⁴⁹ It is interesting to note, furthermore, that although this speech was made two years after the *Dred Scott* decision, Bingham not only does not follow that decision, he does not even acknowledge or mention it; he simply disavows any color line as a basis for citizenship of the United States; he regards Milton's rights of communication and conscience, including the right to know—to education—as one of the great fundamental natural "rights of person which God gives and no man or state may rightfully take away," and which hence are "embodied," also, within, and secured by, "the great democratic idea that all men before the law are equal." In short, the concept and guarantee of the equal protection of the laws is already "embodied" in the Federal Constitution of 1859, notwithstanding the *Dred Scott* decision; this same concept, moreover, embraces "the equality of all . . . to the right to know"; and above all, there is no color line even in the Constitution of 1859!

It is the bearing and significance of this inherent and inalienable rights argument—"fundamental rights of person which God gives and no man or state may rightfully take away"—that calls for consideration. Patently, what we are witnessing in this speech of Bingham's—so typical of thousands in the two decades 1819-

48. See McLAUGHLIN, *op. cit. supra* note 10, c. 29; BURGESS, *THE MIDDLE PERIOD, 1817-58* c. 4 (1897).

49. Graham, *supra* note 23 at 616, n. 103.

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66⁵⁰—is a gradual constitutionalization of an ethico-moral argument or ideal. Slavery—with its theories of racial damnation, racial inferiority and racial discrimination—was inherently repugnant to the American Creed and the Christian ethic. This fact was being rapidly and increasingly sensed. As men sensed it, they fit it into the only political theory they knew: Governments existed, not to *give*, but to *protect* human rights; allegiance and protection were reciprocal—i. e., *ought to be reciprocal*; rights and duties were correlative—i. e., *had to be correlative* if Americans ever were to live with their consciences and to justify their declared political faith.⁵¹

Let us note well this point, for it is precisely the problem we still are faced with, and it is one of the keys to understanding the Fourteenth Amendment: Ethical and religious opinions were here molding and remolding constitutional doctrine. Moral premises were being translated into legal and constitutional premises—i. e., *enforceable rights*. This was being done by a “due processing” and an “equal protecting” of the Law of Nature. It was going on, as yet, largely in the public, rather than in the judicial mind, but let us not condemn it on that account. (Paraphrasing the familiar: “Is not every human a judge?”) What these men were doing was using the sanctions of a “higher”—i. e., ethico-moral law—to defeat and override the claims of an arbitrary, barbarous, positive law. Now in doing this they of course got themselves into some logical and semantic difficulties. Bootstrap arguments often tend—or end—so! Yet without bootstrap arguments to give scope to men’s conscience and idealism, and to their sense of justice or injustice, surely the law would have remained poor and barbarous indeed.⁵²

It is strange and unfortunate so little attention has been paid to this phase of the antislavery conflict. It perhaps is the classic example of moral and ethical revision of the law and of creative

50. The report and pamphlet documentation of the American Antislavery Society crusade alone is huge; add to it items broadcasting the constitutional argument, the repetition by speeches, petitions, resolutions, editorials, literary society debates, etc., over a period of two generations, throughout all the non-slave States, and one perceives that the three-clause system of Section One was no spontaneous or fortuitous creation.

51. See Graham, *supra* note 23 at 614-617, 638-643 for characteristic statements and evidence showing the evolution of this ethical interpretation of American origins and destiny.

52. For interesting recent discussions of the relations of the “is” and “ought” in law, cf. FULLER, *THE LAW QUEST OF ITSELF* (1940); CAHN, *THE SENSE OF INJUSTICE* (1949); STONE, *PROVINCE AND FUNCTION OF LAW* (1946) c. VIII “Natural Law,” especially pp. 227-238; COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* (1933). PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 230-243 (1953) has a useful hornbook discussion and bibliography of the “Principles of Morality as Sources” of law. See also, *id.* at 358-375, §§ 4.15-4.17 on “Natural Law.”

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popular jurisprudence and constitution making⁵³—at least in the nineteenth century. “Hearthstone opinions”⁵⁴ in this process obviously were far more vital and determinative than judicial opinions.⁵⁵ Constitutional Law here was growing at the base rather than at the top. The change in the *ethos* determined the change in the *leges*, and the continuous interactions run to the heart of both history and politics. Furthermore, our own generation is now bedevilled by similar problems, and is nervously groping toward affirmative re-declarations of human rights with a view toward eventual sanctions at the international level. It would seem very much worthwhile, therefore, to re-examine this experience and learn from it all we can.

Despite this high relevance, our attitude toward those responsible for the Civil War changes has tended toward indifference and hyper-criticism. In part, this is a natural result of the Reconstruction debacle—(though certainly the worst failures of that period arose not from constitutional idealism, but from the lack or the loss of it). Hence, we still are more inclined to criticize the framers’ “miserable draftsmanship,”⁵⁶ or speculate on their possible cunning, or even ulterior purposes,⁵⁷ than to consider exactly what it was they had to contend with. Another factor undoubtedly has been that natural rights-higher law thinking is no

53. A great deal has been written of the Higher Law and Natural Law content of American constitutional decisions—cf. the familiar of Corwin, Haines, Wright, Grant, and Commager—but the fascinating and elusive relations between the popular matrix and the judicial impress are almost untouched. See however, POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 16 (1938); and note 51 *supra*.

54. This happy phrase was discovered in a speech made by Rep. James F. Wilson during debates on the Thirteenth Amendment. The tenacious hold and blight of slavery, he said, extended “From hearthstone opinions to decisions of the Supreme Court of the United States . . .” *CONG. GLOBE*, 38th Cong., 1st Sess. 1201 (1864).

55. On the role of antislavery “hearthstone opinions” in expanding due process, see Graham, *Procedure to Substance, Extra Judicial Rise of Due Process, 1830-1860*, 40 *CALIF. L. REV.* 483 (1953).

56. For one example among many, see Grant, *The Natural Law Background of Due Process*, 31 *COL. L. REV.* 56, 66 (1931); or witness almost any modern law students’ class discussion. Such criticism originated in the widening gap between known intent and judicial interpretation after the *Slaughter-House* decision; it has persisted and increased in recent years as our capacity to appreciate the formerly-powerful hold of natural law theories has inevitably declined.

A related astigmatism is the view, well expressed by MOTT, *DUE PROCESS OF LAW* 166 (1926), “. . . there seems to have been a subconscious attempt on the part of the framers and ratifiers of the Fourteenth Amendment to make it as vague as possible.” The writer submits that this is hindsight with a vengeance. Possibly the shift from positive to negative form—*i. e.* moving the phrase “Congress shall have power . . .” from Section One to Section Five was dictated in part by fancied cleverness, but the antislavery backgrounds, wholly ignored by Flack and only recently rediscovered, certainly explain the rest of the draft, and incidentally expose our own long-fallacious approach to the Amendment (*i. e.* the mistaken older view that it was simply a fortuitous combination of restraint clauses plus a redundant grant of power to enforce rights already entrusted to the judiciary).

57. Cf. the perennial fascinations of the “Conspiracy Theory”; see note 3 *supra*, the articles of Graham, Boudin, McLaughlin, and references therein cited.

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longer in vogue today.⁵⁸ Indeed, it is a red flag to a law school-drilled generation. Admittedly, old imprecisions and manifest preferences for clumsy “universals”⁵⁹ in place of today’s sharp analysis have been further barriers to interest and understanding.

All we need to do, however, to purge ourselves of this bemused superciliousness toward those responsible for the Civil War constitutional changes is to consider for a moment exactly what these men had been up against. One perceives immediately that they had had to contend with one of the most difficult and confusing problems in politics and jurisprudence—the problem of the “irresolvable” conflict between the moral and the positive law—the political-legal equivalent of the scholastics’ irresistible force and immovable body! In the extreme form and terms, such a problem obviously is unsolvable, except verbally. Yet in practice it rarely is so. Solution depends ultimately upon a fact situation, and hence upon the extent to which the irresistible force does move the unmovable body—or vice versa. Politics and government are essentially accommodation and compromise. It is only the most fiercely and intensely held moral convictions that ever approach the uncompromisable, or rise Phoenix-like from repeated defeats, as did the Abolitionists. Positive law itself has a dual nature. It is *both* printed texts and human behaviour. When irreconcilable opinion intervenes as a third force, polarizing the two, arraying one against the other, we have trouble. Representative government is a means of minimizing this danger. The slavery conflict marks the one utter failure in American history—the

58. This statement obviously needs some qualification. The rapid decline of naked natural rights thinking was made possible, and perhaps inevitable, by the Fourteenth Amendment. No one officially has deplored this development. What we too often fail to appreciate is that only these thin cloaks of substantive due process and equal protection conceal and disguise our own nakedness. Our new enthusiasm for Constitutional positivism, therefore, is at times pretty smug. This was another thing that irked Van Winkle. “Intellectual prudery”, he called it. “What we need now in this School Segregation business is some ‘Mote and beam jurisprudence.’ For seventy years everyone else has benefited by this ambiguity and free-wheeling discretion. Must only the Negroes continue to be victims of it?”

59. For an interesting use of sweeping Blackstoneian “absolute rights of personal security, personal liberty and personal property,” followed by embarrassing attempts to delimit them by muddled distinctions, see the speech of Rep. James F. Wilson, House sponsor of the Civil Rights Act of 1866, *CONG. GLOBE*, 39th Cong. 1st Sess. 1115-1119 (1866). Wilson was a conscientious and able leader, but the law he had learned out of Blackstone and Kent as a harness-maker’s apprentice from the age of thirteen, simply was inadequate for the purposes at hand. The writer submits that it is either snobbery or lack of imagination to conclude from such difficulties that these men had no clear idea of what they were trying to do. The trouble is simply that our greater sophistication in the complexities of a federal system tends to distract us from their perfectly clearcut anti-race discrimination purposes. Nearly any modern law student is better equipped than these men were to deal with many phases of such a problem. But the beginning of wisdom here is to stop judging men and intent by reading history backward to 1866 and to start reading it forward to that date. The Reconstruction and post-Reconstruction shambles of the Fourteenth Amendment necessarily are poor aids for its interpretation.

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unique case where ethico-moral opinions ultimately proved uncompromisable; or, to speak more accurately, where sectional interests and taboos so rigidified, stratified, and hamstrung the federal system as to render articulated compromise and reform impossible.

From the first, of course, both sides regarded the slavery struggle as one *of, by, and for* Law. The difficulty was over the nature and sources of law. Was slavery *legal*, or was it not? All hands agreed slavery to be supported in each of the slave States by a body of statutes and decisions. But that did not satisfy anti-slavery men. Nor would it have satisfied many of us. Slavery was wrong: Ethically, morally, outrageously wrong—the wrongest, most barbarous, anachronistic institution in the civilized world.⁶⁰ Hope originally lay for its peaceful eradiction—for progressive change and attrition of the positive law through education and moral suasion. Christianity and patriotism were both powerful potential levers and solvents. Their efficacy, however, presumed and required open channels of discussion and appeal—appeal to reason and to conscience.⁶¹

Now in contrast, consider what actually occurred: cotton profits and politics, combining with morbid fears of slave insurrection, first had introverted, then isolated the South, withdrawing the institution from discussion and criticism, and at length—in abolitionists' eyes—blasphemously apotheosizing it, declaring it constitutionally sacred and beyond reach, a "positive good."⁶² Such claims were depressing and offensive enough, even when made solely with reference to slavery *in the States*. When eventually expanded (through repeal of the Missouri Compromise and by the *Dred Scott*⁶³ decision) to remove all limits upon slavery in the Territories, they became intolerable. The impasse now was complete. Slavery, wrong as ever, had been put beyond reach, made unassailable, impregnable.

Now the point is that the "higher law" always had afforded the one psychological and doctrinal escape from such an impasse. It was essentially an ethical draft on the future for the benefit of the present—an unconscious borrowing from men's ideals to

60. See NEVINS' lucid Chapter 5, "Slavery in a World Setting". 2 THE EMERGENCE OF LINCOLN (1950), (also his earlier discussions in Chapters 13-15 in his ORDEAL OF THE UNION (1947)), for an account and view of the institution on the eve of the War. Nevins' conclusion merits pondering today (with reference to slavery's *vestiges*): "But the time had come when the country, however reluctantly, must face a plain fact: if the United States was really to be the last, best hope of mankind, it could not much longer remain a slaveholding republic." (p. 168).

61. See Dumond, *op. cit. supra* note 38; NYE, FETTERED FREEDOM (1949).

62. See Graham *supra* note 23, especially pp. 631-638. JENKINS, PROSLAVERY THOUGHT IN THE OLD SOUTH (1935).

63. 19 How. 393 (U. S. 1856).

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civilize their law and humanize their politics. It was the one means of reconciling facts and ideals abstractly in the hope of doing so prospectively. Slavery and race discrimination were unconstitutional by a "higher law" than the Constitution. *Ergo*, the higher law ought to *become* the Constitution.⁶⁴

To modern-trained positivists who are inclined to reject this solution, and to dismiss it as logically "naive and unsound," it is only fair to issue this challenge: How would we, believing slavery to be morally wrong and ethically indefensible, have attacked it and attempted its overthrow *by peaceful means within a federal system so effectively controlled by pro-slave forces as to remove the institution from reach and even from constructive discussion?*

How indeed! The silence soon is shattering, and it is shattering simply because the alternatives—for antislavery Whigs and Democrats particularly—are seen to have been surrender and condonation on the one hand and resort to this unsatisfactory higher law—"court of last appeal" on the other. To be candid about it, then, the higher law was a forensic and educative device; it was the safety valve that prevented antislavery men from "blowing their tops." Our generation has been unduly smug about the matter largely because we have lacked the insight to see that—fortunately—we have escaped any such intense and irreconcilable positive law-moral law conflict in our own times. (Prohibition of course compares here as a grim joke to high tragedy. Moreover, it was so susceptible to repeal by mass evasion that the example itself underscores the differences.) War crimes undoubtedly are the nearest modern approach, and indeed a very significant one: For here again, conscience leavened and innovated the positive law, rather than confess its own impotence.⁶⁵

We can epitomize the matter by saying that ordinarily law grows interstitially and metabolically. Yet it always is a product of men's higher faculties and social challenges. When these challenges are increased to inordinate levels, responses are apt to be likewise increased. And when the challenge is an ethico-moral challenge, the law itself ultimately must grow in ethical and moral content; it will do so creatively if it is unable to do so metabolically.

64. The research of Professors Dumond, Nye, Jenkins, and Eaton *op cit. supra* notes 38, 61, and 62, points up the fact that the fatal blunder in the slavery struggle was the proscription of persuasion and conversion.

65. See CAHN, *op. cit. supra* note 52, at p. 30, citing R. H. Jackson, Trial of War Criminals, Dept. of State Pub. #2420 (1945) p. 7. ". . . the test of what legally is crime gives recognition to those things which fundamentally outraged the conscience of the American People and brought them finally to the conviction that their own liberty and civilization could not persist in the same world with Nazi Power."

If this view be taken, it is plain that the trouble throughout the long struggle over slavery was not so much that there was this inevitable dualism between moral and civil rights, but that the necessities of the case demanded that men speak these two jurisprudential languages in the same breath. That is, *forensically*, rights needed to be—and were—interchangeably regarded as preexistent ideals and as socially implemented and enforceable privileges or immunities. On the one plane stood the parchment constitution, given effect by statutes and precedents; on the other, the subjective instrument which “guaranteed” and “declared” certain antecedent natural rights. The document thus was alternately shadow and substance—an amendable legal instrument, and one which, “correctly interpreted” or “declared,” required no amendment.

Now this dualism is inherent and inevitable in natural law theory. Indeed, Professor Fuller⁶⁶ has defined natural law as a body of thought that tolerates just such confusion for the sake of its ethical advantages. Hence the dualism persisted, and it reached its climax in 1866. From our present viewpoint, it would have helped, surely, if men had perceived then, as clearly as we do today, that when *amending the Constitution* it is best to eschew declaratory theories. To do otherwise, is to put an impossible strain upon the legal vocabulary; for definitions break down and overlap, and communication and straight thinking become almost impossible.⁶⁷ The point is that these men did not, and the Civil War generation could not eschew such theories, because until after 1865 that generation rarely had known nor used any other! Thus the antislaveryites’ dualism—or if one wishes to be snobbish about it, confusion—really was inherent in their necessary job of “due processing” the Law of Nature and in “protecting” and “equal protecting” the rights of *all* human beings without regard for race or color.

It thus can be said that moral and ethical opinions were the matrix of the War Amendments. The texts and forms themselves, however, evolved under tremendous counter pressures. These identifying facts alone stamp the three amendments as unique parts of our Constitution. In geological terms, the three amendments are the “youngest,” grandest parts of the document. The forces that produced them,⁶⁸ moreover, still are growing today, both by accretion and through deep seated internal changes and pressures. We must remember, too, that these “peaks”

66. See *op. cit. supra* note 52, at 5.

67. See Graham, *supra* note 4.

68. *Id.* and the works of Graham and tenBroek, cited note 3, *supra*.

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arose cataclysmically in the Sixties because misguided men so misjudged their relation to these very facts and forces.

May it not be laid down as axiomatic, even, that the concept of equal protection of the laws, in racial matters, can no more be held today to its mid-nineteenth century bounds than due process of law could be held—perhaps we had better say here, *returned*—to that curiously imperfect understanding of it had by King John and his Barons at Runnymede. Indeed, what happened to old “*per legum terrae*,” 1215-1953,⁶⁹ would seem to be the answer absolute to those who now are offering us their depressing pictures of a cold, sterile, static equal protection—one cast forever in an 1866 mold;⁷⁰ just as what happened to that classic and carefully fitted volcanic plug of due process, after *Dred Scott*,⁷¹ ought to be warning enough to the self-styled “militants” who again are bravely trucking up their cement and mixers for another filling of these same craters. Law and ethics, these men bluntly tell us, are separate fields. So indeed they are. But spare America the day again when both together do not determine the meaning of equal protection of the laws.⁷²

Equal protection of the laws, as we can see, and as Dr. ten-Broek⁷³ has shown at much greater length, meant first of all the *full* protection of the laws. Mind: not “*separate but equal*,”

69. See Graham, *supra* note 55 for a bibliography and noting up.

70. There were many reasons why men's understanding of equal protection, as applied to educational matters, was imperfect in 1866. There were few Negro schools of any kind at that date. Slave codes for generations had denied education to slaves. After 1835, in most slave states, it was a crime to teach *any* Negro—slave or free—to read or write. (See HURD, *LAW OF FREEDOM AND BONDAGE* (1862)). Negroes were barred from public schools of the North, and still widely regarded as “racially inferior” and “incapable of education.” Even comparatively enlightened leaders then accepted segregation in schools. To argue that this means we today are bound by that understanding and practice is to transform the *mores* and laws of slave code days into constitutional sanctions, impossible to be cast off or even moderated.

71. See note 63 *supra*.

72. It is an unpleasant fact to remember that the constitutional protection accorded the Negro Race was vitiated and progress in race relations delayed a full two generations (1897-ca. 1930) because overburdened, poorly prepared, and at times negligent or incompetent counsel, *fighting single-handedly and at random a discrimination against an individual client*, proved no match for a battery of railroad, steamship or associated State counsel in the crucial cases 1875-1896. This situation, fortunately unique in our law, obviously is a powerful argument for reopening many of these issues and for accelerating revisionism. “Jim Crow” too often gained entrance by something very close to default or left-handed social favoritism.

73. *Op. cit. supra* note 3, at 176-180, 222. Both the Freedmen's Bureau and Civil Rights Bills of 1866 secured the Freedmen “full and equal benefit of all laws,” the former in Section 7, and the latter in Section 8. The Civil Rights bill was of course passed over President Johnson's veto; and the Fourteenth Amendment was drafted and adopted to remove all doubt about Congress's power in the premises. Virtually every speaker in the debates on the Fourteenth Amendments—Republicans and Democrats alike—said or agreed that the Amendment was designed to embody or incorporate the Civil Rights Act. “*Full and equal*” therefore is strictly the canonical reading. See Graham, *supra* note 4.

therefore, but “*full and equal*” was the protection conceived and accorded. It was only by one of the strangest perversions of the English language on record that the word “*separate*” was warped into use as a synonym for “*full*” and the disjunctive substituted for the conjunctive.⁷⁴ That “*but*” alone is the giveaway—a thorn in the mind and conscience of every American to whom it is not also an insult.

No Americans today ask or expect segregated Court systems or legislatures. If a state Constitution provided for such, including a “*separate but equal*” Supreme Court, no man would venture to suggest that Negroes and whites were thereby “*equally protected*.” Why? Because the very concept is odious. Yet the main reason it is more odious in this one instance than in the others is that 85 years of toleration⁷⁵ and 57 of pretense⁷⁶ have blunted our sensibilities to “*separate but equal*” in these other areas. The racial standard is the sole basis for the distinction in either case.

Suppose that we grant for sake of argument, what no one is obliged nor disposed to grant—that an outright majority of the framers and ratifiers of 1866-68 did regard race segregation, in *their* public schools, as a peculiar form of race discrimination—as one which *in their* judgment, would remain unaffected by the Fourteenth Amendment. Does it follow—dare it follow—we *today* are bound by that imperfect understanding of *equal protection* of the laws? Must we, and our children, obliged to live in a world, and assume moral leadership in a world, only one-third of whose population is white, where racism daily is becoming more menacing and hateful, and a stain upon our national honor, must we accept that understanding? Must we *enforce* that understanding? For all time? Regardless? Can one generation fetter all that come after it? Freeze standards of ethics? Rigidify law? Did the generation that struck shackles from slaves, somehow shackle our minds? Our conscience? Our common sense?

To ask such questions, is to answer them. The Doctrine of Changed Conditions, applicable in constitutional cases, certainly has special force and validity in this type of situation. Law can-

74. *Plessy v. Ferguson*, *supra* note 6.

75 Early post-ratification interpretation of the Thirteenth and Fourteenth Amendments was quite in harmony with their purposes. See not only the Bradley-Woods decision at Circuit in the *Slaughter-House Cases*, 4 Fed. Cas. 891, No. 2,234 (C. C. D. La. 1870), but also Judge Woods' decision in *U. S. v. Hall*, 22 Fed. Cas. 79, No. 15,282 (C. C. S. D. Ala. 1871) holding even that Congress had power to reach state inaction. See also the Thirteenth Amendment-Civil Rights Act cases: *U. S. v. Rhodes*, 27 Fed. Cas. 785, No. 16,151 (C. C. D. Ky. 1866); *Master of Elizabeth Turner*, 24 Fed. Cas. 337, No. 14,247 (C. C. D. Md. 1867). For the factors that deflected interpretation, see Graham, *supra* note 4.

76. See *id.* for *Plessy v. Ferguson*, *supra* note 6, in historical perspective.

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not exist in a vacuum. The *equal* protection of the laws must always be, in part, an ethical and moral concept. It must grow in relevance and fulfillment with “the felt necessities of the times, . . . prevalent moral and political theories, intuitions of public policy”⁷⁷—*ours* and our childrens’; as well as our ancestors’.

Law office history, willy-nilly, is a confining, proscriptive enterprise. One never would suspect, for example, from the State briefs and arguments in the present *School Segregation Cases*, that our Fourteenth Amendment had any ethical or moral content at all. Still less, that the spirit and text must sometimes determine intent. Much of the current pro-segregation argument reduces simply to this: that because the Civil War generation still practiced discrimination, it could never have intended to abolish it. Here again, Van Winkle’s research stands us in good stead. Such a demoralized, emasculated equal protection, he pointed out, certainly was not the brand originally offered to the Supreme Court. Roscoe Conkling, indeed, was most emphatic on these matters. The determinative point, Conkling declared, when arguing for extension of the Amendment to corporations *regardless of framer intent*, was the plain meaning and spirit of these words. “The true question, in exploring the meanings of the Fourteenth Amendment, is not, in a given case, whether the framers foresaw that particular case and acted in reference to it—the inquiry is, does the case fall within the expressed intention of the Amendment. All the cases compassed by the letter of the language, must be included, unless obviously repugnant or foreign to its spirit and purpose.”⁷⁸

After quoting the celebrated declaration to this effect, made by Chief Justice Marshall in the *Dartmouth College Case*,⁷⁹ Conkling developed the point at some length, then concluded:⁸⁰

Man being human, and his vision finite, it is well that saving ordinances need not be shrunken in their uses or duration to the measure of what the framers foresaw. . . .

Truths and principles do not die with occasions; nor do they apply only to events which have cast their shadows before.

The statesman has no horoscope which maps the measureless spaces of a nation’s life, and lays down in advance all the bearings of its career. . . .

77. HOLMES, *THE COMMON LAW* 1 (1881).

78. *Oral Argument of Roscoe Conkling* [in *San Mateo County v. Southern Pacific Railroad*, 116 U. S. 138 (1882)] pp. 31-32.

79. 4 Wheaton 518, 644-645 (U. S. 1819).

80. *Supra* note 78 at 33-34.

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All that wisdom and science in legislation can do, is to establish just principles and laws; this done, every case which afterwards falls within them, is a case for which they were established. . . .

Those who devised the Fourteenth Amendment . . . builded not for a day, but for all time; not for a few, or *for a race*; [emphasis added] but for man. They planted in the Constitution a monumental truth. . . . That truth is but the golden rule, so entrenched as to curb the many who would do to the few as they would not have the few do to them.

May this persuasive eloquence, honored by a unanimous Supreme Court in 1886,⁸¹ soon take on new lustre and significance.

81. *Santa Clara County v. Southern Pacific Ry. Co.*, 118 U. S. 394, 396 (1886).