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Searching for the Intent of the Framers of Fourteenth Amendment

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SEARCHING FOR THE INTENT OF THE FRAMERS OF FOURTEENTH AMENDMENT

*by Robert J. Kaczorowski**

IN 1946 JUSTICE HUGO BLACK DECLARED that one of the objects of the fourteenth amendment was to apply the Bill of Rights to the States.[1] He was confident that an analysis of the intent of the framers of the amendment would support his assertion. A few years later the Supreme Court requested such an investigation, but when the analysis was made and the results presented to it, the Supreme Court concluded that the framers' intent could not be determined.[2]

Since courts have frequently based decisions upon their findings as to the intent of the framers of a constitutional amendment or a specific legislative act, the Supreme Court's conclusion that the intent behind the fourteenth amendment cannot be determined is of great significance to the application of the amendment to subsequent cases that have come before the courts. Moreover, the Supreme Court's conclusion is surprising in that it attributes some special or unusual qualities to the fourteenth amendment and, by implication, impeaches an established method of adjudication. The study requested by the Supreme Court is only one of several which have been conducted before and since the *School Desegregation Cases.*

The uncertainty surrounding the intent of the framers of the fourteenth amendment has had profound implications on the application of that amendment to civil rights issues. It has probably led the Supreme Court to take a moderate position on the authority over civil rights which the amendment confers upon the national government, thereby largely limiting the application of the amendment to state action.[3] Even that authority has been usually limited to positive forms

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1. Adamson v. California 332 U.S. 46 (1946) (dissenting opinion).

2. Brown v. Board of Education of Topeka 347 U.S. 483 (1954). The Court ordered studies be made of the intent of the framers of the fourteenth amendment. Chief Justice Earl Warren, in the majority opinion, ruled the studies inconclusive. *Id.* at 489.

3. Long-standing precedents date back to U.S. v. Cruikshank, 92 U.S. 542 (1875); U.S. v. Harris, 106 U.S. 629 (1883); and The Civil Rights Cases 109 U.S. 3 (1883): See L. MILLER, THE PETITIONERS (1966) and P. L. MURPHY, THE CONSTITUTION IN CRISIS TIMES, 1918-1969 at 413-414 (1972).

of state action, such as unequal laws and discriminatory policies of public officials; it has not been extended to negative forms of state inaction such as the failure of public agencies and officials to protect civil rights from violations by private sources. Consequently, infringements of civil rights by private parties have not been proscribed by the fourteenth amendment.

The inability of the federal government to reach private forms of discrimination by application of the fourteenth amendment has forced Congress to adopt highly controversial and, to many, specious legislation. For example, Congress aggravated opposition to an already controversial issue by outlawing under the commerce clause,[4] discrimination in privately owned places of public accommodations. The Supreme Court has added to its critics by acquiescing in this Congressional act.[5] Furthermore, by basing the protection of civil rights on grounds other than the rights themselves, Congress and the courts have put such protection upon a very tenuous foundation; a hostile Congress might repeal the law; or a hostile Court might find such laws an unconstitutional extension of the commerce power. More seriously, the Court has accepted the apparently erroneous judicial interpretation of the fourteenth amendment's privileges and immunities clause by assuming that civil rights are not among the privileges and immunities of United States citizens which the framers intended the federal government to secure.[6] Congress and the Supreme Court have thus left unresolved the question of what is the full responsibility of the national government for protecting the rights of its citizens.

The absence of a conclusive and persuasive assessment of the intent of the framers of the fourteenth amendment has thus had a profound

4. Civil Rights Act of 1964, 42 U.S.C. § 2000a (1964).

5. Heart of Atlanta Motel v. U.S., 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

6. Butchers' Benovelent Ass'n v. Crescent City Live Stock Landing and Slaughter House Co., 16 Wall. 36 (1973). The contradiction between the interpretation of the fourteenth amendment by the Supreme Court in the Slaughter-House Cases, Cruikshank, Harris, and the Civil Rights Cases, and the recent interpretation of the Civil Rights Act of 1866 in Jones v. Mayer Co., 342 U.S. 409 (1968) (prohibiting discrimination by private individuals in the leasing, renting, or selling of property) becomes apparent upon realizing that the fourteenth amendment was acknowledged to have incorporated the Civil Rights Act. The same same men enacted the fourteenth amendment and the Civil Rights Act within two months of one another and it was felt that both had the same scope and effect. Thus, the application of the reasoning in Jones v. Mayer Co., to fourteenth amendment cases could result in a reversal of the Slaughterhouse ruling.

impact upon the law and civil rights. This study will show that the uncertainty surrounding the intent of the framers of the fourteenth amendment is due less to any special difficulties inherent in the amendment and he circumstances surrounding its adoption, than to the inadequacies and errors of the studies that have been made on the subject. Hopefully, this study will also demonstrate that inquiries into the intent of the framers of any laws or constitutional amendments are an historical rather than a judicial or legal function. This task is best performed by professionally trained historians who seek an understanding of past actions as the actors perceived them, rather than by legal scholars or lawyers, untrained in historical methodology and conceptualization who seek to resolve the issues of their own times. Studies of the fourteenth amendment will be analysed to demonstrate the methodological and conceptual errors that produced erroneous conclusions concerning the intent of the framers. Out of this analysis will emerge suggestions for a more conclusive and accurate assessment of the framers' intent and what that assessment might find; specifically, that the framers intended to provide the national government with full authority over civil rights, which they believed to be the same as the privileges and immunities of the United States citizenship. With this concept of he fourteenth amendment, the Supreme Court could resurrect the amendment's long dormant privileges and immunities clause, confront civil rights issues squarely as denials of rights of United States citizens, and apply the protection of the national government to any infringements, whether the result of state action, state inaction, or actions of private individuals. This would not only make the national protection of civil rights full and complete, but would place that protection beyond the reach of future legislative repeal.

Constitutional historian Paul L. Murphy has noted that judicial appeals to history have been especially prevalent in recent years.[7] He

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7. Murphy, *Time To Reclaim: The Current Challenge of American Constitutional History,* 64 AM. HIST. REV. 64 (1963); for other discussion of judicial uses of history *see* C. A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969); Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse,* 1965 SUP. CT. REV. 89; Kelly, *Clio and the Court: An Illicit Love Affair,* 1965 SUP. CT. REV. 119; and, while critical of the court's reasoning, R. L. Kohl offers historical evidence to show that its decision was correct in *The Civil Rights Act of 1866, Its Hour Comes Round at Last: Jones v. Alfred H. Mayer Co.,* 55 VA. L. REV. 272 (1969).

has also noted, however, that lawyers are poorly trained to investigate the past and reach valid conclusions about it. Their lack of training in the use of historical materials and methodology has frequently produced inaccurate and erroneous judgments about the past. Too frequently the legal profession has relied upon historical works long outdated. Limited in their perspective by their role as advocates confined to the facts of a present issue, lawyers have attempted to find in the past, answers to the specific issues confronting them in the court room. This "presentism" has led many lawyers, as well as historians attempting to achieve similar purposes, to confuse their problems, questions and perceptions with those of persons of the past. Thus, the lawyer-historian living in the mid-twentieth century, forced to deal with specific issues in a specific legal and historical context, asks of historical figures what they did about the same issues in the hope of eliciting some guides for the present.

The futility of such a process is obvious, for one cannot determine what people of an earlier day intended by their behavior if one asks of them a question of present concern. The questions that have been asked of the past have been the wrong questions, and the context of evaluating past behavior has also been erroneous for one cannot read back into history one's own definitions and historical context. So, when the litigants in the *School Desegregation Cases* went back to the 1860's seeking answers to the problem of school desegregation in the 1950's, the answers they found were inconclusive. Their conclusions could not have been otherwise, since school desegregation was not the issue with which American society was involved in the 1860's.

Lawyer-historians have also restricted themselves to the use of a narrow selection of historical materials. They have relied too heavily for legal definitions upon Supreme Court decisions, thus overlooking lower federal and state court decisions as well as opinions of legal scholars not associated with the courts. Moreover, they have attempted to define the intent of the framers of specific enactments by using almost exclusively congressional or legislative debates. The materials of the historian are as varied as the records of man, and to understand the meaning of the actions of historical figures, the historian must carefully select *all* the materials necessary to conceptualize the framework within which these figures were operating.

However, not even the right materials will benefit the observer who makes erroneous assumptions about the past. Lawyer-historians, like

professional historians, have frequently based their studies upon incorrect historical assumptions. This article will show that the studies of the fourteenth amendment over the last eighty years have been predicated upon the assumption that the civil rights program of the Reconstruction period was the product of a small group of extremists who were out of step with the rest of Northern society.[8] Furthermore, most of these studies either implicitly assume or explicitly state that these Radicals,[9] in proposing their civil rights program, had little or no regard for the Negro, but were motivated by self-seeking political goals and a desire for revenge against the South. Even those who see the Radicals as sincerely concerned with Negro rights, nevertheless assume that this concern was not shared by the general population. Thus, it is assumed that even if the Radicals were working to enact a meaningful civil rights program, an unsympathetic public refused to provide the support necessary for the success of the program. Consequently, proposals which had ostensibly purported to benefit the Negro are seen either as mere political strategems or as providing the Negro with only minimal security. What was proclaimed to be an exercise of the absolute power of national government over protection

8. The studies to which these comments are directed are essentially those analyzed in this paper.

9. The term "Radical" was applied to a group of Congressional Republicans who were ostensibly led by Charles Sumner in the Senate and Thaddeus Stevens in the House and were thought to be characterized by a desire for vengeance against the South as evidenced by their desire to indefinitely exclude the Southern states from the union; by uncompromising loyalty toward the Freedmen because of their support for Negro suffrage; and as implacable enemies of President Johnson because of their unreasoning opposition to his plan of restoring the Southern states to the Union as quickly and with as little change as possible. However, this term was applied indiscriminately by Democrats and conservative supporters of President Johnson to any one or any proposal that sought to aid the Freedmen or advance the Congressional Plan of Reconstruction against the President's policy, which would have left the Southern state governments in the hands of former Confederate leaders. While individuals within the Republican Party can be identified as "Radicals," their radicalism consisted less in the positions they took on the issues or the unanimity with which they voted on them than in their timing; for they embraced these positions earlier than the other members of their party. Since the rest of the party came almost universally to accept their positions, the "Radicals" were actually the vanguard of the Republican Party. Therefore, the term "Radical" served more as an epithet for pro-Negro and anti-Southern views than it did as a description of specific positions on the issues confronting the United States after the Civil War. *See* E. L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 53-67 (1960); H. L. TREFOUSSE, THE RADICAL REPUBLICANS (1969); LINCOLN'S VANGUARD FOR RADICAL JUSTICE (1969), and for the best analyses of the literature on Reconstruction, *see* note 18 *infra*.

of fundamental rights has been interpreted by most observers as a constitutionally innocuous tactic to keep the South under Radical control. At best, it is thought to have minimally increased the power of national government over fundamental rights.

Almost all of these studies have looked at the issue of civil rights isolated from the more pervasive problems of Reconstruction of which it was a part. Nor have Reconstruction and civil rights been analyzed as problems which evolved out of the issues of the Civil War. Thus, these studies, by limiting their consideration of earlier civil rights issues exclusively to the specific issues of their own time, have reached conclusions which are incomplete at best and erroneous at worst.

The first scholarly studies of the fourteenth amendment were made at the turn of the century. Some of these early studies gave the fourteenth amendment a broad scope and an expansive definition. John W. Burgess, a constitutional scholar and political scientist, wrote in 1890 that, through the thirteenth and fourteenth amendments, the national government absorbed complete power over the whole domain of civil liberty. Furthermore, he agreed with the dissenting opinions in the *Slaughterhouse Cases* which insisted that the fourteenth amendment incorporated the Bill of Rights.[10] Burgess claimed that after seventy years of debate and four years of war, the nation

> gave its first attention to the nationalization in constitutional law of the domain of civil liberty. There is no doubt that those who framed the thirteenth and fourteenth amendments intended to occupy the whole ground and thought they had done so. The opposition charged that these amendments would nationalize the whole sphere of civil liberty; the majority accepted the view; and the legislation of the Congress for their elaboration and enforcement proceeded upon that view.[11]

Burgess' interpretation of the fourteenth amendment as incorporating the Bill of Rights was shared by Horace E. Flack, a fellow in political science at Johns Hopkins University.[12] Flack found support

10. J. W. BURGESS, 1 POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 227-230 (1890).

11. J. W. BURGESS, *supra* note 10, at 225.

12. H. E. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT especially at 19-20, 40, 45, 57, 58-59, 152-3 (1908).

for this interpretation in contemporary newspapers, state legislative debates on the ratification of the fourteenth amendment, and early cases involving the Civil Rights Act.[13] He concluded that this evidence demonstrated that contemporaries believed that Congress intended to nationalize the Bill of Rights. Nevertheless, while Flack and Burgess interpreted Congress' intent as bringing the Bill of Rights within the protective shield of the national government, they also believed that the power thus conferred was restricted to violations of these rights resulting from state action.[14] Both men exemplify the influence of the Supreme Court decisions concerning the fourteenth

13. The Civil Rights Act of 1866, 14 STAT. 27, was enacted by Congress just two months before it proposed the fourteenth amendment for ratification by the states. The Act defined United States citizenship and spelled out certain civil rights of U. S. citizens. Those specified were the rights to make and enforce contracts, to be parties to suits, to give testimony in the courts, to purchase, lease, rent and inherit property, the right to equal punishment for crime, and the right "to full and equal benefits of all laws and proceedings for the security of person and property..." It also specified that any person who infringed these rights was liable to fine and imprisonment, that the federal courts were to have jurisdiction over "all crimes and offenses committed against the provisions of the act, . . . of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the states or locality where they may be any of the rights secured to them by the first section of this act. . . ." The Act further obliges federal officials as well as the military to carry out the provisions of the act under penalty of a $1,000 fine.

14. J. W. BURGESS, *supra* note 10, at 22. J. W. BURGESS, RECONSTRUCTION AND THE CONSTITUTION, 1866-1876 at 76-77 (1902); H. E. FLACK, *supra* note 12, at 21-22. That the framers perceived the problem concerning civil rights as one in which whites as well as blacks were involved and one that included infringements by private individuals as well as state action and state inaction is evident from their correspondence with Union loyalists and officials in the South, testimony given at committee hearings and speeches made by them. *See, e.g.*, Letters from John C. Underwood to Samuel P. Chase, May 21, 1866 (container 97), Samuel P. Chase Papers, Library of Congress (hereinafter cited as L. C.); Grant Goodrich to Lyman Trumbull, Feb. 1, 1866 (Vol. 63, reel 17); Trumbull to Mrs. Gary, June 27, 1866 (Vol. 57, reel 19), Lyman Trumbull Papers, L. C., Microfilm Collection; Brig. Gen. J. W. Sprague to John Sherman, April 4, 1866 (Vol. 98), John Sherman Papers, L. C.; Gen. George A. Custer to Zachariah Chandler, Jan. 14, 1866 (container 4), Zachariah Chandler Papers, L. C.; REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION AT THE FIRST SESSION THIRTY-NINTH CONGRESS (1866); *see especially* the comments of the author of the Civil Rights Act, Senator Lyman Trumbull of Illinois, answering the criticism that the Act was intended to subject state officials to punishment for faithfully discharging their duties: "Not state officials especially, but everybody who violates the law. It is the intention to punish everybody who violates the law." CONG. GLOBE, 39th Cong., 1st. Sess. 500 (1866), for fuller discussion of this point see R. KACZOROWSKI, THE NATIONALIZATION OF CIVIL RIGHTS: CONSTITUTIONAL THEORY PRACTICE IN A RACIST SOCIETY, 1866-1883, 1971 (unpublished dissertation).

amendment upon scholars' perceptions of the framers' intent. Neither Burgess nor Flack saw the contradiction inherent in their broad view of the powers conferred upon the national government and their view of the amendment's restricted application to state action. They overlooked as well the rule handed down by Chief Justice John Marshall in *McCulloch v. Maryland*[15] which stated that Congress may exercise its powers in whatever way it deems appropriate. If the National government was given the power over Bill of Rights guarantees, it could utilize that power in whatever way and to whatever extent it deemed appropriate, not simply against the States.

The first professionally trained historian to investigate the intent of the framers of the fourteenth amendment was Benjamin A. Kendrick,[16] a student of William Dunning who had a profound impact upon Reconstruction historiography. The Dunning, or "New South," School attempted to redeem the South's reputation from the acrimonious charges made against it during the Civil War and Reconstruction. Enhancing the South's reputation, however, required a corresponding diminution of the reputations of the men regarded to be most responsible for Reconstruction. It is not surprising, therefore, that Kendrick's view of Reconstruction portrayed a vengeful group of Radical Republicans using Negro rights as a vehicle to perpetuate their political ascendancy. He viewed Congressional Reconstruction, then, as an essentially selfish political power play by which the Radicals intended to consolidate their power over the national government.

Thus, Kendrick did not see that the problem confronting the nation in 1866 involved the nature of freedom for whites as well as blacks, the role and power of the national government in securing freedom, and how this freedom was to be translated into statutory law and constitutional amendments. Ignoring these problems, and overly concerned with the political question of Negro suffrage, Kendrick failed to see the significance of the framers equating natural rights with the status of freedom conferred by the thirteenth amendment upon all inhabitants of the United States. He wrote that "[e]mancipation vitalizes only natural rights, not political rights";[17]

15. McCulloch v. Maryland, 4 Wheat. 316 (1819).

16. B. B. KENDRICK, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 39th Cong. 1865-67 (1914) in COLUMBIA UNIV. STUDIES Vol. 62 (1914).

17. *Id.* at 203; *see also id.* at 227-230.

but he overlooked the implications of that statement for federal citizenship. Since natural rights were traditionally protected by the states, by empowering the federal government to secure these rights the thirteenth amendment would have had to incorporate these rights into United States citizenship.

The Dunning School of Analysis has dominated American' conceptions of Reconstruction and of the Radical Republicans down to recent times.[18] In addition to this unfavorable view of Reconstruction, constitutional scholars have also been influenced by an interpretation of the fourteenth amendment by the Supreme Court that virtually transforms the amendment into an instrument of economic laissez-faire benefitting industrial and business development in the nineteenth and twentieth centuries.[19] Proceeding from a hostile view of Reconstruction and a judicial application of the fourteenth amendment that was probably unforseen by its framers, constitutional scholars have not been able to settle satisfactorily the question of intent. When Justice Black asserted that no one had examined the intent of the framers of the fourteenth amendment and that such an examination would reveal that the framers intended to incorporate the Bill of Rights, he reflected the legal profession's unfamiliarity with the limitations of existing historical writing and analysis and the methods and problems of historiography.

One of the most influential legal studies of the question was made by Charles Fairman in 1948.[20] Fairman's study attempted to test Jus-

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18. The best analyses of the literature on Reconstruction are L. Kincaid, *Victim of Circumstance: An Interpretation of Changing Attitudes Toward Republican Policy Makers and Reconstruction,* 57 J. AM. HIST. 48 (1970); LaWanda and John Cox, *Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography,* 38 J. SO. HIST. 303 (1967); Weisberger, *The Dark and Bloody Ground of Reconstruction Historiography,* 25 J. SO. HIST. 427 (1959).

19. The "conspiracy theory" of the fourteenth amendment which depicts the framers as conspiratorially devising an instrument for the protection of property interests behind the smoke screen of equal rights has been well settled; the author will therefore avoid going into that question. *See* Graham, *The "Conspiracy Theory" of The Fourteenth Amendment,* 47 YALE L. J. 371 (1937) and 48 YALE L. J. 171 (1938); Boudin, *Truth and Fiction About the Fourteenth Amendment,* 16 N. Y. U. L. REV. 19 (1938); Hurst, Book Review, 52 HARV. L. REV. 851 (1939).

20. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1948) Other aspects of Fairman's analysis is subjected to an exhaustive critique by William Crosskey in *Charles Fairman, "Legislative History" and the Constitutional Limitations on State Authority,* to which Fairman responded in *A Reply to Professor Crosskey,* both in 22 U. CHI. L. REV. 1 and 144 respectively

tice Black's suggestion that perhaps the Fourteenth Amendment incorporated the Bill of Rights. Fairman thought that for an accurate determination of Congress' intent, one must not simply run through the debates looking for the use of the term "Bill of Rights" but rather, "one needs to catch the spirit of the occasion, to listen patiently to speeches referring even obliquely to our subject, to consider reflectively the necessary implications of comments on drafting that culminated in the clauses of Section 1."[21] One must also go beyond the views of the framers, and "appreciate the significance of the action of the state legislatures when they considered ratification."

Fairman, apparently comprehensive in his perspective, noted the importance of the Freedman's Bureau and Civil Rights Bills of 1866 to an understanding of the actions of the framers of the fourteenth amendment. Thus, he noted Senator Lyman Trumbull's comments concerning the purpose and intent of the Civil Rights Bill and concluded that Trumbull, the Bill's author, intended to extend the protection of Congress to the inalienable rights of free men as possessed by every United States citizen. According to Fairman, Trumbull apparently equated these inalienable rights with the privileges and immunities of United States citizens. Fairman did not, however, explore the possibility that others defined these concepts in the same way, despite the fact that he included in his article the comments of Democratic Congressman Michael C. Kerr of Indiana who criticized the Bill precisely because he believed it attempted to give Congress the power to enforce the Bill of Rights. Fairman dismissed Trumbull's definitions, saying that he had read and quoted his authorities uncritically. Instead of using the definitions of the Bill's author as an indication of the Bill's intent. Fairman rejected them as incorrect.[22]

It is interesting to note that Fairman overlooked a similar definition of the Bill given in the House by its floor manager, James F. Wilson of Iowa. Fairman would have considered Wilson's definitions incorrect as well, for having cited the same authorities as Trumbull, Wilson said: "From this it is easy to gather an understanding that civil rights are the natural rights of man; and these are the rights

(1954). Professor of political science and law at Harvard University, Fairman is also the biographer of Supreme Court Justice Samuel F. Miller, who wrote the majority opinion in the *Slaughterhouse Cases* which made the initial narrow definition of the fourteenth amendment.

21. Fairman, *supra* note 20, at 5-6.

22. *Id.* at 16-18, 39.

which this bill proposes to protect every citizen in the enjoyment of throughout the entire dominion of the Republic."[23] Since he defined civil rights by the all-encompassing concept, "natural rights of man," Wilson actually sacrificed breadth for precision when he later said, "Now, sir, in relation to the great fundamental rights embraced in the bill of rights, the citizen being possessed of them is entitled to a remedy . . . ." Wilson then went on to argue that Congress could provide that remedy when the states failed to do so and that this was the object of the Bill.[24]

Fairman overlooked the comments of many other senators and congressmen that indicated the framers' intent. In fact, Fairman included statements of only five Senators (only two of whom supported the Bill) and only four Congressmen (again, only two of whom supported the Bill) concerning the Civil Rights Bill. The only comments he included which could be used to explicate the concepts of the Bill were Senator Trumbull's which he simply dismissed as incorrect. The views of one of the Senators on the Bill's constitutionality which Fairman did present, he at best presented incorrectly. He stated that Senator Reverdy Johnson, Democrat from Maryland, who was generally regarded as one of the best legal minds in the State, believed the Bill to be without any constitutional authority whatsoever. In fact, however, Johnson said, in the very speech that Fairman had cited, that Congress had the authority to pass the Bill and to protect United States citizens in their basic rights, as these had been defined by Senator Trumbull. What he protested as unconstitutional was the attempt to include Negroes within that protection since the Supreme Court in the *Dred Scott Case*[25] specifically excluded Negroes from United States citizenship. Johnson argued that for Negroes to enjoy this protection as citizens of the nation, a constitutional amendment was necessary. Furthermore, he urged in the same speech that such an amendment be adopted. So, Johnson was not arguing that the attempt of Congress to protect the fundamental rights of United States citizens was unconstitutional, as Fairman stated. On the contrary, Johnson said that to deny that Congress had such power was disgraceful. It was only after President Johnson vetoed the Bill that

23. CONG. GLOBE, 39th Cong., 1st Sess. at 1117 (1866).
24. *Id.* at 1294.
25. Johnson had successfully argued the Dred Scott Case before the Supreme Court.

Senator Johnson opposed the effort to protect basic rights of United States citizens.[26]

A more careful, thorough and "reflective consideration" of these debates might have prevented these factual and interpretive errors. It certainly would have shown that Senator Trumbull and Congressman Wilson were not the only framers of the Civil Rights Bill who defined the privileges and immunities of United States citizens as the inalienable and natural rights of free men. One of the "necessary implications of comments" which equated and interchanged such terms as "privileges and immunities," "civil rights," "natural rights of free men," "fundamental rights of free men" and "the rights to life, liberty and property"[27] is that virtually every senator and congressman operated under such a definition.

These concepts were so fully discussed in Congress in February and March, 1866 in relation to the Civil Rights Bill that an exhaustive discussion was unnecessary when in May and June of that year the same concepts were again before Congress in the form of Section I of the fourteenth amendment. While Fairman noted the importance of the debates leading to the adoption of the Civil Rights Act to an understanding of the framers' intent, he ignored much of the content of these debates and, having discovered that relatively little discussion was given to section I of the amendment, he concluded that "the spirit of the occasion" was political and that the framers of the fourteenth amendment were really unconcerned with constitutional questions. "We must remind ourselves, too," he said, "that that was the Age of Hate in American politics—that a tremendous struggle was going on within the party that had saved the Union and between the Congressional leaders and the President."[28] The Radicals won this political struggle, he continued, and the fourteenth amendment was the fruit of their political victory.

The assumption that Reconstruction was an Age of Hate and that the framers were politically motivated prompted Fairman to find

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26. Fairman, *supra* note 20, at 16-19, 37-41; Cong. Globe, *supra* note 23, 504-509, 528-530, 574, 1775-1778; B. C. STEINER, LIFE OF REVERDY JOHNSON 118-125 (1949). Fairman fails to identify correctly one of the Congressmen. He mentions "Martin F. Thayer" with the intention of referring, presumably, to M. Russell Thayer.

27. *See, e.g.*, the comments of Congressmen Frederick E. Woodbridge, James F. Wilson, John A. Bingham, and Senator Jacob Howard, quoted elsewhere in the text.

28. Fairman, *supra* note 20, at 9.

other motives for evidence that suggested a deeper concern for the basic rights of United States citizens. For example, he quoted Republican Congressman Frederick E. Woodbridge of Vermont speaking on the fourteenth amendment.

> It merely gives the power to Congress to enact those laws which will give to a citizen of the United States the natural rights which necessarily pertain to citizenship. It is intended to enable Congress by its enactments when necessary to give to a citizen of the United States, in whatever State he may be, those privileges and immunities which are guaranteed to him under the Constitution of the United States. It is intended to enable Congress to give to all citizens the inalienable rights of life and liberty, and to every citizen in whatever state he may be that protection to his property which is extended to the other citizens of the state.[29]

But Fairman dismissed this explanation of the framers' intent because, "one will observe, [it] is rather hazy. Congress was to be given power to give to the citizen his natural inalienable rights to life and liberty, the privileges and immunities already guaranteed to him by the Constitution, and as to his property the same protection that the local law extended to the local citizens."[30] Fairman failed to appreciate that the national protection of these rights and guarantees was necessary because they were being violated by private action with the approval and cooperation of state authorities and/or state law. Congressman Wilson, in the speech quoted above, cited this predicament as evidence of the necessity for Congress to enact the Civil Rights Act:

> We are establishing no new right, declaring no new principle. It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen. I am aware, sir, that this doctrine is denied in many of the States; but this only proves the necessity for the enactment of the remedial and protective features of this bill. If the States would all observe the rights of our citizens, there would be no need of this bill. If the States would all practice the constitutional declaration, that
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> > 'The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States,' (*Article four, section two, Constitution of the United States*),

29. *Id.* at 32.
30. *Id.* at 33.

and enforce it, as meaning that the citizen has

> 'The right of protection by the Government, the enjoyment of life and liberty, with the right to acquire and posssess property of every kind, and to pursue and obtain happiness and safety; to claim the benefit of the writ of *habeas corpus;* to institute and maintain actions of any kind in the courts of the State; to take, hold, and dispose of property, either real or personal; to be exempt from higher taxes or impositions than are paid by the other citizens of the State.' (*Corfield v. Coryell 4 Washington's Circuit Court Reports,* p. 380),

we might very well refrain from the enactment of this bill into a law. If they would recognize that 'general citizenship' (Story on the Constitution, volume two, page 604) which under this clause entitles every citizen to security and protection of personal rights, (Campbell v. Morris, 3 Harris & McHenry, 535,) we might safely withhold action. And if, above all, Mr. Speaker, the States should admit, and practice the admission, that a citizen does not surrender these rights because he may happen to be a citizen of the State which would deprive him of them, we might, without doing violence to the duty devolved upon us, leave the whole subject to the several States. But, sir, the practice of the States leaves us no avenue of escape, and we must do our duty by supplying the protection which the States deny.[31]

The statements of Congressmen Woodbridge and Wilson are evidence that Congress did indeed intend to "nationalize the whole sphere of civil liberty" as John Burgess argued so long ago.[32]

Congressman John A. Bingham defined the fourteenth amendment specifically in terms of the Bill of Rights: "The proposition pending before the House is simply a proposition to arm the Congress . . . with the power to enforce the Bill of Rights as it stands in the Constitution today. It 'hath that extent—no more.' "[33] Fairman commented: "Bingham certainly says that the effect of this proposal is to arm Congress with power to enforce the Bill of Rights: it will do this

31. CONG. GLOBE, 39th Cong., 1st Sess. 1117-18. *See also supra* note 14 for non-congressional sources on this point.

32. *See supra* note 7.

33. Fairman, *supra* note 20, at 33.

and nothing more." But then Fairman queried: "What bill of rights?" And answered:

> Once more he makes it clear by the context: The bill of rights that says that the citizens of the United States shall be entitled to the privileges and immunities of citizens of the United States in the several states (which he refers to, but misquotes, Art. IV § 2) and that no person shall be deprived of life, liberty, or property without due process of law (which is one of the fifth amendment's limitations upon the federal government). And this measure would take from the state no authority it now enjoys under the Constitution; it would impose no obligation to which the state is not already bound. . . . Bingham, however, had been insisting that 'the bill of rights as it stands in the Constitution today' that he would empower Congress to enforce against the states, had been binding upon them ever since 1789.[34]

Fairman was so sure that the Bill of Rights was not applicable against the states that he failed to see the reasonableness of Bingham's thinking. If, as Bingham believed, the rights of man are natural and inalienable, then they are his, independent of any government. The function of government is not to grant these rights but to secure them.[35] Furthermore, they are to be secured against every attempt to infringe or deny them. Freedom and the rights of which it is comprised may have been left to the protection of the states; but if the states failed to protect them what recourse did the individual have? The framers of the fourteenth amendment were saying in these statements that national government was empowered, indeed, obliged, to give the individual that protection should the states refuse it. Yet, Fairman stated that Bingham's use of the term "bill of rights" and its identity with "privileges and immunities" and the rights to life, liberty and property was a "specious gesture," "a fine literary phrase not referring precisely to the first eight Amendments."[36] Although Fairman quoted a campaign speech in which Bingham declared that the fourteenth amendment included the rights of free speech and freedom of religion, he insisted that "never in the reported debates did he (Bingham) refer specifically to Amendments I to VIII."[37]

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34. *Id.* at 33-34.
35. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1117-18, 1151-52, 1159, 1262-63.
36. Fairman, *supra* note 20, at 26.
37. *Id.* at 126.

Senator Jacob Howard, Republican from Michigan and spokesman of the Republican caucus on the fourteenth amendment, did, however, specifically refer to the Bill of Rights. Fairman, notes that Howard said:

> Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.[38]

Of this statement Fairman said:

> Here at last is a clear statement that the new privileges and immunities clause is intended to incorporate the federal Bill of Rights. For the first time, 'the first eight amendments' are specified. On this point Howard's statement seems full and unequivocal. It must be given very serious consideration, coming from the Senator who had the measure in charge.[39]

Nevertheless, he apparently failed to consider Senator Howard's statement seriously, since he stubbornly insisted that

> No one in debate ever runs down the list of the federal Bill of Rights: religious liberty, freedom of speech and of the press, the right to keep and bear arms, no unreasonable searches or seizures, no compulsory self-incrimination, trial jury, [*sic*] grand jury, etc.

38. *Id.* at 57.
39. *Id.* at 58.

> The due process clause, and particularly the words 'life, liberty, and property' are mentioned frequently. As we shall see in a moment, on one occasion Bingham speaks of 'cruel and unusual punishments.' But never, even once, does advocate or opponent say 'the first eight amendments.'[40]

Fairman insisted that the framers' thinking was obscure and superficial, and that they "had a very imperfect awareness of the essential difficulty." He was unwilling to seek any further clarification of their "imperfect awareness" or obscure and seemingly erroneous legal conceptions beyond the assumption that their only concern was selfish political interests. Instead, he said: "We need not enter here into the large subject of extrinsic aids in constitutional interpretation. That would only complicate a fairly simple problem." Yet he did just that, perhaps unaware of doing so when he stated that "Eighty years of adjudication has taught us distinctions and subtleties where the men of 1866 did not even perceive the need for analysis."[41] Fairman did not entertain the possibility that the specific term "Bill of Rights" was not more frequently used because it and the other terms used by the framers to denote the rights they were seeking to protect, all referred to the same corpus of basic rights summed up in the concept of the right to life, liberty and property. Such an explanation is suggested by the interchangeable use of the terms by those framers' quoted in this paper. Yet, "eighty years of adjudication" had blinded Fairman to this interpretation of the framers' apparent ignorance of legal "distinctions and subtleties."

Therefore, when Fairman charged that the framers "had a very imperfect awareness of the essential difficulty" he obviously meant that they did not perceive their problems and their solutions as he did in the twentieth century; nor did they use his definitions for the legal conceptions with which they were dealing. Imposing his assumptions and his definitions upon the framers, Fairman failed to validly answer the question that prompted his study.

Another influential legal study of the framers' intent was made by Alexander M. Bickel in 1955.[42] As Fairman responded to Justice Hugo

40. *Id.* at 44-45.

41. *Id.* at 9, 24, 66.

42. Bickel, *The Original Understanding and The Segregation Decision*, 69 HARV. L. REV. 1 (1955). [Hereinafter cited as Bickel]. Bickel was clerk to Justice Felix Frankfurter when the School Desegregation Cases were first argued before the Court in 1952.

Black in the *Adamson Case,* Bickel responded to Chief Justice Earl Warren in the *School Desegregation Cases.* When these cases were first argued before the Supreme Court in 1952, the Court ordered counsel for both sides to investigate the intent of the framers of the fourteenth amendment in order to answer the following questions:

> 1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the fourteenth amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?
>
> 2. If neither the Congress in submitting nor the States in ratifying the fourteenth amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment
>
> (a) that future Congresses might, in the exercise of their power under section 5 of the amendment, abolish such segregation, or
>
> (b) that it would be within the judicial power, in light of future conditions, to construe the amendment as abolishing such segregation of its own force?
>
> 3. On the assumption that the answers to questions 2(a) and 2(b) do not dispose of the issue, is it within the judicial power, in construing the amendment, to abolish segregation in public schools?[43]

Chief Justice Warren, in his opinion for a unanimous Court, declared that the evidence presented concerning these questions was inconclusive. Bickel, however, asserted that conclusive answers could be gleaned from history. He said that "it is possible, in the Chief Justice's words, for historical materials to cast some light although they are inconclusive and although, in any event, the clock cannot be turned back. But only examination in some detail of the relevant materials themselves can make clear just how this has proved possible in the *Segregation Cases.*"[44] The "relevant materials" to which Bickel referred were the Congressional debates concerning the fourteenth amendment.

The questions posed by the Supreme Court which served as the

43. Brown v. Board of Education of Topeka, 345 U.S. 972 (1954).
44. Bickel, *supra*, note 42, at 6.

basis and guide to Bickel's study were not suited to securing an understanding of the framers' perception of their own behavior. Rather, they were actually an obstacle to such an understanding because they sought to interpret that behavior solely in the context of an issue of the mid-twentieth century. Thus, it is not surprising that Bickel found the record less than clear on this issue; nevertheless he asserted that most of the framers did not intend to include desegregated schools within the protection of the fourteenth amendment. He supported this conclusion by using the Civil Rights Act of 1866 as a guide to the rights and scope of protection the framers sought to include in the fourteenth amendment.

To arrive at a definition of the rights which the framers sought to protect, Bickel analyzed contributions of Congressman Wilson to the Civil Rights Bill debates. He quoted Wilson's statement that "civil rights and immunities" did not include all matters civil, social and political. They did not include for example the right to vote. "Nor do they mean that all citizens shall sit on the juries, or that their children shall attend the same schools. These are not civil rights or immunities." Wilson then went on to explain that he understood civil rights to be "the absolute rights of individuals, such as—" 'The right of personal security, the right of personal liberty, and the right to acquire and enjoy property.' " A "right," Wilson said, "is that which any man is entitled to have, or to do, or to require from others, within the limits of prescribed law."[45]

As to immunities, Wilson stated: "A colored citizen shall not, because he is colored, be subjected to obligations, duties, pains . . . . This is the spirit and scope of the bill, and it goes not one step beyond." He also noted that the Bill was intended to put a stop "at once and forever" to barbaric laws and inhuman treatment of blacks by whites. From these quotations, Bickel concluded that "Wilson thus presented the Civil Rights Bill to the House as a measure of limited and definite objectives."[46]

Yet, this definition of the scope of the Bill is not supported by Wilson's comments even as Bickel quoted them. To protect individuals in all "that which any man is entitled to have, or to do, or to require from others" is quite an expansive scope for any law. That Wilson excluded unsegregated schools and jury duty from this broad

45. Quoted in Bickel, *supra*, note 42, at 16-17.
46. Bickel, *supra* note 42, at 17.

concept of rights does not necessarily mean that he intended the Bill to be "limited"; it means simply that he did not regard these particular rights to be among those which he designated as "the absolute rights of individuals." Furthermore, that Wilson believed these to be excluded from the protection of the nation does not mean that all of the Senators and Congressmen did; the best study of this subject concludes that the opinions in Congress ranged so widely throughout the Reconstruction period that a definitive statement of the specific rights Congress intended to be protected is impossible.[47] While there was a consensus on certain specific rights, such as the right to acquire and dispose of property, the question of school segregation was relegated to uncertainty. Bickel recognized this when he said: "It will become plain that the right, if any, to an unsegregated public school education resided for most men who spoke at this session in a fringe area, where its companions were, among other less well-defined rights, suffrage, jury service and intermarriage."[48]

At least as much evidence of a far more expansive nature of the Civil Rights Act was omitted by Bickel. This evidence includes Wilson's comments clarifying his conception of civil rights. In the same speech cited by Bickel, Wilson quoted an official opinion on the nature and rights of United States citizenship, issued by Attorney General Edward Bates in 1862. In discussing the rights of United States citizens, Attorney General Bates said: "The word rights is generic, common, embracing whatever may be lawfully claimed." Wilson also cited Bouvier's *Law Dictionary* which defined civil rights equally broadly as "those which have no relation to the establishment, support, or management of government."[49] Having cited these authorities, Wilson concluded with the statement quoted above on page 378, that civil rights are the natural rights of man and these are the rights the Civil Rights Bill is intended to protect.

Bickel also failed to include important clarification of the term "immunities" as used by Wilson, by omitting the important word, "penalties" from Wilson's statement. One of the burdens suffered by the Freedmen was the imposition of harsher penalties for similar crimes committed by whites. By the Civil Rights Bill, Congress was

47. Frank and Munro, *The Original Understanding of "Equal Protection of the Laws"*, 50 COLUM. L. REV. 131 (1950).

48. Bickel, *supra*, note 40, at 7.

49. All quotations from CONG. GLOBE, 39th Cong., 1st Sess. 1117.

attempting to equalize these punishments as well as access to the courts.

To understand legislative intent, the evil meant to be cured by the legislation must be defined. During the period of Reconstruction it was not simply state laws that were discriminatory, but rather the entire legal process; and the discrimination was not simply racial, it was political as well, for white Republicans in the South suffered as well as blacks.[50] Bickel, however, by his editing of Wilson's comments on the concept of "immunities" and by concluding his quotations with a reference to state laws, gave the impression that the Bill was intended to be negative rather than affirmative, and limited only to providing an equality in state laws. As has already been seen, Wilson's reference to state action was not limited to state law; furthermore, it was meant to point out violations of rights and to demonstrate the need for federal action to protect the rights of all United States citizens. The reader should again look at Wilson's lengthy statement reprinted on pages 380-381. Wilson was saying that a citizen of the United States as such is entitled to all the fundamental rights of free men, which he equated with the privileges and immunities of the comity clause; the problem was that citizens' enjoyment of these rights was not being protected by the Southern states. Citizens' rights were being infringed not only by discriminatory laws, but also by denial of police protection and of access to the courts to redress violation of rights from private sources, such as physical harm to person and property. Since individuals possessed these natural rights independent of any government, no government might deny or infringe them through either positive actions or refusal to protect or redress them. Yet, that is precisely what was happening. Since it is the duty of all free governments to protect the rights of their citizens, the national government was obliged to do so in the face of state recalcitrance. It was not simply discriminatory laws or a mere equality with which Wilson was concerned; it was the protection of the natural rights of United States citizens. He made that clear when he said in the same speech:

> If citizens of the United States, as such, are entitled to possess and enjoy the great fundamental civil rights which it is the true office of Government to protect, and to equality in the exemp-

50. *See supra* note 14.

> tions of the law, we must of necessity be clothed with the power to insure to each and every citizen these things which belong to him as a constituent of the great national family.[51]

Wilson did not limit his justification of congressional action to his theory of citizenship. He declared that express authority for the national protection of these natural rights was conferred by the thirteenth amendment:

> Here, certainly, is an express delegation of power. How shall it be exercised? Who shall select the means through which the office of this power shall effect the end designed by the people when they placed this provision in the Constitution? Happily, sir, we are not without light on these questions from the Supreme Court.[52]

Wilson then quoted Chief Justice John Marshall's opinion in the case of *McCulloch v. Maryland* in which the Chief Justice declared that Congress had the discretion to select the means necessary to execute its powers and to perform its duties. The duty imposed by the thirteenth amendment which Congress was attempting to perform, in the words of the Bill's author, Senator Trumbull, was to give "practical effect" to the freedom thus conferred upon all inhabitants of the United States.[53]

Without consideration of the above comments, Bickel said of Wilson's speech:

> Wilson thus presented the Civil Rights Bill to the House as a measure of limited and definite objectives. In this he followed the lead of the majority in the Senate. Indeed, his disclaimers of wider coverage were more specific than those made in the Senate. And the line he laid down was followed by others who spoke for the bill in the House. Again, the Black Codes were referred to, and again the point was made that the term civil rights was defined by section I, which enumerated the rights in question.[54]

Here is Wilson's view of the rights that were incorporated into the Bill:

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51. CONG., GLOBE, 39th Cong., 1st Sess. 1118.
52. *Id.*
53. *Id.* at 474.
54. Bickel, *supra* note 42, at 17.

> What are these rights? Certainly they must be as comprehensive as those which belong to Englishmen. And what are they? Blackstone classifies them under three articles, as follows: 1. The right of personal security . . . 2. The right of personal liberty . . . 3. The right of person property . . . The great fundamental rights are the inalienable possession of both Englishmen and Americans; and I will not admit that the British constitution excels the American Constitution in the amplitude of its provisions for the protection of these rights. Our Constitution is not a mockery; it is the never-failing fountain of power from whence we may draw our justification for the passage of this bill; for there is no right enumerated in it by general terms or by specific designation which is not definitely embodied in one of the rights I have mentioned, or results as an incident necessary to complete defense and enjoyment of the specific right. Now sir, I reassert that the possession of these rights by the citizen raises by necessary implication the power in Congress to protect them.[55]

While Wilson's comments depicted the Bill as definite in objective, it was hardly limited in scope. Wilson asserted that Congress possessed the power to protect the natural rights of free men as well as the discretion to choose whatever means it deemed appropriate to that end. Bickel also used statements of Congressman Bingham to argue that the Civil Rights Act was limited in scope. Bickel said:

> . . . [*C*]*ertainly unlike Wilson* and his supporters (italics added), he read the general term 'civil rights' broadly, or at any rate thought it was of uncertain reach. In the first half of his speech, it is perfectly clear that Bingham, while committing himself to the need for safeguarding by constitutional amendment the specific rights enumerated in the body of section I, was anything but willing to make a similar commitment with respect to 'civil rights' in general.[56]

Yet Bingham, who had abolitionist antecedents, is generally regarded as the "Father of the fourteenth amendment" and stated that he intended "to arm the Congress . . . with the power to enforce the bill of rights as it stands in the constitution today."[57]

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55. CONG. GLOBE, 39th Cong., 1st Sess. 1118-19.
56. Bickel, *supra* note 42, at 24.
57. *See* pp. 381-82 *supra*.

A closer look at Bingham's objection to the Civil Rights Act is warranted, therefore. The speech above to which Bickel referred was made by Bingham in support of his amendments to the Civil Rights Bill, which he believed was unconstitutional. One of these amendments would strike from the Bill a clause which prohibited discrimination in any civil right. Bickel interpreted Bingham's action as narrowing the scope of the Bill to those rights specifically enumerated, and as a sign of his unwillingness to eliminate discrimination generally.

Bingham explained the concern which prompted this amendment.[58] He believed that suffrage was a civil right, and, since the bill as originally proposed prohibited discrimination in any civil right, it seemed to him that Congress was encroaching upon an area that the Constitution had specifically left to the states to regulate. Therefore, when Bingham moved to strike this general civil rights clause, he meant to eliminate the possibility that the Bill would be interpreted to apply to the right to vote. Nevertheless, in this same speech, Bingham declared that his object in offering his proposed constitutional amendment was precisely to apply the Bill of Rights against the states; he identified his purpose with that of the framers of the Civil Rights Bill, to protect the Bill of Rights guarantees; but he maintained that such an object could only be achieved through a constitutional amendment.

Bingham was almost alone among the proponents of civil rights in defining suffrage within that concept.[59] However, to eliminate opponents' objections that the Bill included Negro suffrage, Congressman Wilson proposed an amendment identical to Bingham's striking out the general civil rights clause. In this connection, Wilson said, and Bickel even quoted him to say:

> I find in the bill of rights . . . that 'no person shall be deprived of life, liberty, or property without due process of law.' I understand that these constitute the civil rights belonging to the citizens in connection with those which are necessary for the protection and maintenance and perfect enjoyment of the rights thus specifically named, and these are the rights to which this bill re-

58. CONG. GLOBE, 39th Cong., 1st Sess. 1291-1292.
59. See Kaczorowski, *supra* note 14, at chapter ii.

> lates, having nothing to do with subjects submitted to the control of the States.[60]

Those subjects to which Wilson referred in the last sentence were the rights to vote and hold office. Thus, despite this amendment, Wilson could still say:

> Mr. Speaker, the amendment which has just been read proposes to strike out the general terms relating to civil rights. I do not think it materially changes the bill; but some gentlemen were apprehensive that the words we propose to strike out might give warrant for a latitudinarian construction not intended.[61]

Since Wilson believed that suffrage was not a civil right but a political privilege, and since he believed that all of the fundamental rights of citizens are designated by the rights to life, liberty and property, he could indeed say that striking out this clause did not diminish the Bill's scope or effectiveness in relation to the natural rights he sought to protect, especially since the following clause was left untouched:

> . . . but the inhabitants of every race and color . . . shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property . . .[62]

To the framers, the security of person and property was equivalent to the rights to life, liberty and property.

However, Bickel was satisfied that the Civil Rights Bill was limited by this amendment. Failing to appreciate the distinction in the minds of the framers between civil rights as natural rights and suffrage as political privilege, and having assumed that most Republicans were not sincere or strong civil rights supporters, he perceived this superficial change in the Bill to be a severely limiting one by which Congress withdrew its protection from the broad concept of civil rights. He therefore seized upon the numerous statements of proponents of the fourteenth amendment which equated its first section with the Bill, and argued that the amendment was restricted in scope, as the Bill allegedly was. He made much of the fact that Bingham failed to

60. CONG. GLOBE, 39th Cong., 1st Sess., 1294-1295; quoted in Bickel, *supra* note 40, at 26.

61 *Id.* at 1296; and quoted in Bickel, *supra* note 42, at 28.

62. Act of April 9, 1866, ch. 31, §1, 14 STAT. 27.

use in his amendment the term "civil rights," a term, Bickel noted, that Bingham had defined as all inclusive in terms of rights. Bickel overlooked the fact that Bingham himself made no such distinction between "civil rights" and terms such as "privileges and immunities" and the "rights to life, liberty and property." It is evident from the speeches quoted by Fairman and Bickel and included in this paper that Bingham and the others used these terms interchangeably when referring to the same concept of natural rights. Bickel had himself quoted Wilson as equating the term "civil rights" with the invocation that "no person shall be deprived of life, liberty, or property without due process of law." Fairman had used Bingham's equation of Bill of Rights guarantees with the privileges and immunities of the comity clause and the rights to life, liberty and property to show that Bingham's thinking was "specious."[63] Nevertheless, Bickel concluded that "it is difficult to interpret the deliberate choice against using the term 'civil rights' as anything but a rejection of what were deemed its wider implications."[64] In light of the fact that these terms were used interchangeably, Bickel's distinction would appear to be specious. The studies of Fairman and Bickel stand as notable examples of the inadequacy of "law office history."

These studies[65] have misinterpreted the intent of the framers of the

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63. Fairman, *supra* note 20, at 33; *see also* Senator Howard's statement quoted *supra* at page 383.

64. Bickel, *supra* note 42, at 57.

65. Alfred Avins is another contemporary legal scholar who has investigated the question of the Framers' Intent. *See* Avins, *The Civil Rights Act of 1875*, 66 COLUM. L. REV. 873 (1966); *Fourteenth Amendment Limitations on Banning Racial Discrimination*, 8 ARIZ. L. REV. 236 (1967); *Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Antidiscrimination Legislation*, 49 CORNELL L. Q. 228 (1964); *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS L. J. 331 (1967); *Racial Segregation in Public Accommodations: Some Reflected Light on the Fourteenth Amendment from the Civil Rights Act of 1875*, 18 W. RES. L. REV. 1251 (1967); *Social Equality and the Fourteenth Amendment: The Original Understanding*, 4 HOUSTON L. REV. 640 (1967).

Avins' studies appear designed to reach certain pre-ordained conclusions. For example, he saw the Civil Rights Act of 1964 as challenging the thirteenth amendment's proscription of involuntary servitude, since it forces proprietors of public accommodations to service blacks against the proprietors' will. It has been charged that Avins inaccurately cited, distorted and misrepresented his evidence which still did not establish his case. The following statement from Ratner, *Involuntary Servitude or Inopposite Solicitude*, 49 CORNELL L. Q. 502, 507 (1967) is a good rebuttal to Avins' work generally: "No purpose is served by invoking a constitutional bogeyman to divert attention from real issues, foreclose legitimate areas of argu-

fourteenth amendment for a variety of reasons. Handicapped by the presentism that plagues legal scholars when they attempt to look into the past, these authors were too involved in the problems and issues of their own times to be able to perceive the problems and issues that confronted Americans after the Civil War. These scholars had already formulated definitions of the fourteenth amendment and the legal concepts it incorporates, and they imposed their definitions upon the framers. They therefore could not perceive the way in which the framers themselves defined these legal concepts or the amendment itself. They also too narrowly restricted the sources they used to reach their conclusions. Furthermore, they all assumed that the civil rights program was the product of a group of extremists who were politically motivated and not really concerned with the welfare of the Negro.

Legal scholars, of course, cannot be blamed for the failings or inadequacies of professional historians. But historians have recently been correcting their outmoded analyses of Reconstruction, with some help from non-historians. Jacobus tenBroek's study of the Radicals determined that their legal conceptions were directly linked to those of the antebellum abolitionists.[66] He also noted that many Reconstruction Radicals had been abolitionists before the Civil War, and argued, therefore, that the Radicals were not political schemers who acted out of selfish interests, but were actually trying to continue the abolitionists' program of securing for Negroes the natural rights of man. Under this interpretation, the civil rights program after the Civil War would seem to protect those rights from hostile actions of the states, from failures of the states to protect them, and from actions of private individuals. tenBroek saw the goal of the Radicals as nothing less than defining Freedmen in law as free men actually imbued with all the rights of free men.[67]

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ment, and give a new veneer of plausibility to discarded social and constitutional theories."

66. J. TENBROEK, EQUAL UNDER LAW (1965). The book was originally published in 1951 under the title, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT.

67. *Id.* at 180, 187-188, 208, 211. Howard Jay Graham also examined the antislavery backgrounds of the fourteenth amendment and demonstrated the influence of abolitionist ideas such as due process of law and equal protection of the law on the development of the idea of United States citizenship as incorporating the inalienable rights spoken of in the Declaration of Independence, *The Early Antislavery Backgrounds of the Fourteenth Amendment,* 1950 WIS. L. REV. 479 and 610; after an excellent critique of previous approaches to the fourteenth amendment that he called narrow antiquarianism, Graham related the philosophical assumptions and conceptions of the Radical framers of the amendment which he defined

Alfred H. Kelly also acknowledged the antislavery origins of the fourteenth amendment.[68] Like tenBroek, Kelly concluded that the amendment was largely the product of the Radicals' ideas. However, he raised a fundamental question which he believed was left unresolved by tenBroek's study: "did the pre-war anti-slavery idealists conceive of equality before the law as enjoining all class legislation based upon race?"[69] If they did, he said, then one can safely conclude that they carried their concepts into the post-War era and incorporated them into the fourteenth amendment.

Kelly found that the Radicals did not intend to apply federal protection against all class legislation. While he said they were not afraid to bring about revolutionary changes he did not think they intended to include segregated schools and juries within the scope of federal protection. Like the legal scholars previously discussed, this historian failed to escape a presentism that caused him to measure the intent of the framers in 1866 by the issues and conceptions of the 1950's. He consequently confused the application of the power over civil rights to specific areas with the scope of the power itself, and concluded that the framers did not intend to transfer plenary legislative power over civil rights to the national government.[70] That society in 1866 did not include desegregated schools and juries within its conception of civil rights does not necessarily mean that it stopped short of asserting full national power over whatever rights it did include within that concept.

The Dunning School interpretation of the Reconstruction period is reflected in Kelly's study. He asserted that the large body of moderates in the Republican Party had not committed themselves to the radical position of equal rights by the spring of 1866. He suggested that the Radicals had to be cautious in their plans for the Freedmen

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as incorporating the Abolitionists' idea of United States citizenship; however, he did not deal with the moderate wing of the Republican Party. *See* Graham, *The Fourteenth Amendment and School Segregation*, 3 BUFFALO L. REV. 1 (1953) and *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3 (1954). These and other essays on the fourteenth amendment are reprinted in GRAHAM, EVERYMAN'S CONSTITUTION (1968).

68. Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049 (1956). Professor of constitutional history at Wayne State University, Kelly participated in the preparation of the historical analysis of the fourteenth amendment in the School Desegregation Cases.

69. *Id.* at 1054-1055.

70. *Id.* at 1061, 1069, 1076-77.

and therefore that the precise meaning of the amendment was fluid throughout the Reconstruction period.[71] Like the contemporary legal scholars discussed above, Kelly made the basic assumption that the fourteenth amendment was the product of the Radicals alone whose goal of Negro equality was not shared by the Northern public. Consequently, these scholars concluded that either the various civil rights proposals were not intended to offer any meaningful protection, or that any intended protection had to be tempered in order to make the proposals acceptable to an unwilling public.

Joseph B. James attempted to relate the fourteenth amendment to its broader historical context by investigating extra-congressional sources.[72] He correctly observed that racial segregation was not an issue in 1866, and that Negro Suffrage was the political issue which distinguished the Radicals.[73] However, like Benjamin Kendrick, James overemphasized the suffrage issue, which led him to the erroneous conclusion that Republicans were dissatisfied with the civil rights section of the fourteenth amendment.[74] He nevertheless maintained that the Radicals intended to confer legal equality in the rights incorporated in the Bill of Rights, if only against state action. Yet, he also assumed that the Radicals alone were working for equality, and doing so for political motives. Thus, he minimized any personal concern they may have had for Negro equality, and was left with the unanswered question of why the Radicals would so revolutionize the federal system when that drastic action was unnecessary to their political goal.

The question that arises from the foregoing analysis is if the intent of the framers of the fourteenth amendment has been inaccurately assessed then what was the intent? What were the purposes and objectives of their actions? Other questions are raised too. We now know that the framers received almost universal support.[75] But how could congressional action taken primarily for the protection of the former slaves receive such widespread support from a racist society? That question is particularly important since it must be answered before

71. *Id.* at 1084-1085.

72. J. B. JAMES, FRAMING THE FOURTEENTH AMENDMENT (1956).

73. *Id.* at 3-20, 47, 105, 191, 200-201.

74. This point is discussed in Kaczorowski, *supra* note 14, at chapter ii.

75. See McKitrick, *supra* note 9; W. R. BROCK, AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION, 1865-1867 (1963); and L. and J. H. COX, POLITICS, PRINCIPLE, AND PREJUDICE, 1865-1866: DILEMMA OF RECONSTRUCTION AMERICA (1963).

one can argue that action taken by the framers was not merely a minimal protection of fundamental rights, but a full guarantee. Closely related to that problem is the question of why action was taken at all.

An analysis of these questions is beyond the purview of the present paper.[76] However, this discussion of the literature concerning the intent of the framers of the fourteenth amendment has demonstrated that much evidence exists that is contradictory to the narrow interpretations of the amendment that have been offered previously. Thus, the question is still open. The real meaning of the amendment and the scope of power it was intended to vest in the national government to act in the area of civil rights is yet to be determined. While this paper cannot provide the real meaning of the amendment, it can offer some suggestions that might lead to a more accurate assessment of the intent of the framers.

Any new attempt to assess the intent of the framers of the fourteenth amendment must be mindful of the conceptual and methodological inadequacies of previous studies. Conceptually, such an attempt would have to relate the framers' actions regarding civil rights to the broader issues of their period, not to the issues of our own. It would also have to use the framers' definitions of those issues and consider the alternatives the framers suggested for their resolution and the legal tools they believed were available to them for so doing. Furthermore, those legal tools would have to be conceived and defined as the framers conceived and defined them, not as they are defined today after one hundred years of modification through judicial application. Methodologically, such a study must go beyond congressional sources to ascertain the way in which the framers perceived their predicament and the actions they took to meet it. Contemporary commentary upon the framers' perceptions would be useful either as corroborative or contradictory to what the framers said they were doing. Rich insights into the intent of the framers are also available from the people and agencies that were charged with the duty of enforcing fourteenth amendment concepts of citizenship, the privileges and immunities of United States citizens and the equal protection of the law. Records of the Freedmen's Bureau and the Union Army of occupation in the South have been untouched in relation to this question. Yet, those organizations were among the primary agencies direct-

76. The author is currently concluding a study that attempts to answer these questions using the conceptualizations and methodology suggested in this article.

ed by Congress to enforce its enactments. Scholars have also overlooked state and federal cases involving fourteenth amendment concepts that were adjudicated between 1866 and the *Slaughterhouse Cases* of 1873. These initial judicial interpretations of fourteenth amendment concepts might offer a far more accurate insight into the framers' intent that those Supreme Court decisions of 1870's and 1880's to which legal scholars have restricted their investigations of the judicial response to the fourteenth amendment.[77]

Contrary to former Chief Justice Earl Warren's conclusion in the *School Desegregation Cases,* the evidence surrounding the intent of the framers of the fourteenth amendment is not inconclusive. It simply has not been fully and properly utilized. Resolution of this question is not only vital for the law and civil rights, it also offers a significant opportunity for the professional historian to provide the "modern architectural materials" spoken of by Paul L. Murphy which the courts might use to construct an understanding of the intent of the framers of our laws and constitutional amendments. As for the fourteenth amendment itself, if the Senators and Congressmen cited and quoted above are representative of the rest of Congress, then resolving the question of the framers' intent along the lines suggested by their statements reported herein would have a most profound impact upon the law and upon the very structure of our government. Such an interpretation of the framers' intent could revive the privileges and immunities clause of the fourteenth amendment from the dormant state to which it was consigned by the Supreme Court in 1873. The national authority to protect civil rights would no longer be contingent upon a showing of some form of state action in connection with infringements of those rights. No longer would the national power be forced into legal gymnastics to secure these rights against denials stemming from unofficial sources. The national government would thereby be provided with the authority and obligation, if not the motivation, to establish a truly national standard for the enjoyment of all civil rights which could be applied directly to private as well as state infringements. If the general intent of the framers of the fourteenth amendment was the incorporation of the natural rights of free men into United States citizenship, then they wrought nothing less than a revolution in American federalism.

77. *See, e.g.,* Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights: The Judicial Interpretation,* 2 STAN. L. REV. 140 (1949).