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Right to Be a Witness and the Fourteenth Amendment, The

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THE RIGHT TO BE A WITNESS AND THE FOURTEENTH AMENDMENT

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I. INTRODUCTION

The average man in the street, if told that he had a constitutional right to be a witness, would probably not place this among his more important rights. In fact, he would probably be much happier if told that he had a right not to be a witness. The Fifth Amendment's privilege against self-incrimination has tended to illuminate the right of the individual not to be a witness and to overshadow his equally important right to give evidence in court. Most citizens consider coming to court and giving testimony a burdensome chore at best, and they are only too glad to find ways of avoiding it. For those with something to conceal from society or law enforcement agencies, the right to give evidence is of even less interest.

Although the right to give evidence has been all but obliterated from current legal thinking, to confer this right was a major factor in the insertion of the Equal Protection Clause into the Fourteenth Amendment of the United States Constitution. Indeed, it is this type of right which the framers conceived of as conferring "protection" equally to all persons within the jurisdiction of the state. Because the right to testify so largely shaped the original conception of the Equal Protection Clause, it is still worthy of attention.

This article will explore the legal rules which gave rise to federal action to extend the right to testify, the nature of the right conferred by the Fourteenth Amendment, and the gloss which this right places on the original understanding of the meaning of the word "protection" in the Equal Protection Clause. Thus, through an examination of the nature of the constitutional right to give evidence, a clearer idea can be found of the intent of the framers in drawing the Equal Protection Clause.

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II. Exclusion of Negro Witnesses Before the Civil War

A. *Generally*

Before the Civil War, the American courts had largely outgrown English common-law restrictions on the competency of witnesses and had generally adopted a fairly liberal attitude in admitting testimony. The general rule was that all persons not expressly disqualified could testify in both civil and criminal cases.[1] Thus, testimony was received from even a child of tender years if he knew the nature and obligation of an oath.[2] Likewise, it was held that it was no objection to the competency of a witness that he was subject to fits of mental derangement, if he was sane at the time his testimony was to be taken.[3] It was even held that an insane person could be permitted to testify if he understood the nature of an oath and was capable of relating facts.[4] A court had discretion to receive the testimony of an intoxicated witness,[5] and the fact that he was a habitual drunkard was not deemed to be a valid objection to receiving his evidence.[6] Even deaf and dumb persons could be witnesses if they could communicate by writing or sign language.[7]

However, a number of the old common-law disabilities still persisted. For example, a witness could not be sworn unless he believed in God,[8] although in a few jurisdictions this rule had been modified by statute.[9] Conviction of an infamous crime still rendered a witness incompetent in a number of jurisdictions,[10] although this disability, too, had been re-

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1. State v. Levy, 5 La. Ann. 64 (1850); Bernard v. Vignaud, 10 Mart.O.S. 482 (La. 1822).

2. State v. Morea, 2 Ala. 275 (1841); People v. Bernal, 10 Cal. 66 (1858); Johnson v. State, 61 Ga. 35 (1878); State v. Whittier, 21 Me. 341, 38 Am. Dec. 272 (1842); Commonwealth v. Hutcheson, 10 Mass. 225 (1813); Washburn v. People, 10 Mich. 372 (1862); Den v. Vancleve, 5 N.J.L. 589 (1819).

3. Campbell v. State, 23 Ala. 44 (1853). *But cf.* James v. Stonebanks, 1 N.J.L. 227 (1794).

4. Kendall v. May, 92 Mass. (10 Allen) 59 (1865).

5. Hartford v. Palmer, 16 Johns. R. 143 (N.Y. Sup. Ct. 1819); Gould v. Crawford, 2 Pa. 89 (1845).

6. Gebhart v. Shindle, 15 S. & R. 235 (Pa. 1824).

7. Snyder v. Nations, 5 Blackf. 295 (Ind. 1840); 1 Greenleaf, Evidence § 366 (11th ed. 1863).

8. *Id.* at §§ 368-70; United States v. Lee, 26 Fed. Cas. 908 (No. 15586) (C.C.D.C. 1834).

9. Fuller v. Fuller, 17 Cal. 605 (1861); Snyder v. Nations, *supra* note 7; Commonwealth v. Burke, 82 Mass. (16 Gray) 33 (1860); People v. Jenness, 5 Mich. 305 (1858).

10. United States v. Brockius, 24 Fed. Cas. 1242 (No. 14652) (C.C.D. Pa. 1811); State v. Benoit, 16 La. Ann. 273 (1861); Le Baron v. Crombie, 14 Mass. 234 (1817); Poage v. State, 3 Ohio St. 229 (1854).

moved in other states by statute.[11] A party in interest in the suit was deemed incompetent;[12] but even at that time there were a variety of exceptions to this rule,[13] and in several of the states the rule had been abolished by statute.[14] Also, the common-law rule that husband and wife were incompetent witnesses for or against one another was still the prevailing rule,[15] but it too was beginning to be modified by statute.[16]

However, the rule was well established in the slave states, and in several of the free states, that no Negro or mulatto could testify in cases in which white persons were parties. Variations of this rule existed from state to state. In most states, the rule was a statutory one,[17] although in South Carolina it seems to have been a product of judicial declaration alone.[18]

In some northern states, the early restrictions on Negro testimony seem to have been a product of slavery and not color. In New York it was held that a slave could not be a witness but that a free Negro might,[19] and that an emancipated slave was competent to testify to facts which occurred before he obtained his freedom.[20] The Supreme Court of New Jersey made the same ruling,[21] but restricted it by a subsequent de-

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11. Keither v. State, 18 Miss. (10 S. & M.) 192 (1848); 1 GREENLEAF, EVIDENCE § 372 (11th ed. 1863).
12. *Id.* §§ 329-33.
13. *Id.* §§ 348-54.
14. *Id.* § 329.
15. *Id.* § 334-46; Tulley v. Alexander, 11 La. Ann. 628 (1856); Hasbrouck v. Vandervoort, 6 N.Y. Super. Ct. 596 (1851), *aff'd*, 9 N.Y. 153 (1853).
16. Merriam v. Hartford & N.H.R.R., 20 Conn. 354, 52 Am. Dec. 344 (1850); Drew v. Roberts, 48 Me. 35 (1860); Fowle v. Tidd, 81 Mass. (15 Gray) 94 (1860); Burlen v. Shannon, 80 Mass. (14 Gray) 433 (1860); State v. Armstrong, 4 Minn. 335 (1860).
17. The statutes are collected in Senator Sumner's report entitled *To Secure Equality Before the Law in the Courts of the United States*, S. REP. No. 25, 38th Cong., 1st Sess. 2-6 (1864).
18. In White v. Helmes, 1 McCord 430, 435-36 (S.C. 1821), the court said:
> There is no instance in which a Negro has been permitted to give evidence, except in cases of absolute and indispensible necessity, nor indeed has this court ever recognized the propriety of admitting them in any case where the rights of white persons were concerned. When we consider the degraded state in which they are placed by the laws of the state, and the ignorance in which most of them are reared, it would be unreasonable as well as impolitic to lay it down as a general rule that they were competent witnesses.

19. Rogers' Ex'rs v. Berry, 10 Johns. R. 132 (N.Y. Sup. Ct. 1813). See also Thompson's Case, 1 N.Y. City Hall Rec. 69 (N.Y. 1816), holding that a slave is an incompetent witness against a free Negro.
20. Gurnee v. Dessies, 1 Johns. R. 508 (N.Y. Sup. Ct. 1806).
21. Potts v. Harper, 3 N.J.L. 1030 (1813).

cision that being a Negro created a presumption of slavery and incompetency which had to be overcome.[22]

Several western states based their rule of exclusion on race or color alone, even though no slavery ever existed in those states. Thus it was held in California,[23] Indiana,[24] Iowa,[25] and Ohio[26] that no Negro or mulatto could be a witness in any case in which a white person was a party. The Supreme Court of Ohio held that the local statute, which it was executing "with reluctance," made a Negro incompetent to testify against a quarteroon.[27] In Indiana and Missouri it was held that a Negro could testify on behalf of a colored defendant in a criminal prosecution, even though the victim was white, since he was not a formal party to the record and hence the exclusionary statute did not apply.[28] But the contrary rule was established in Tennessee.[29]

The rule as to incompetency of Negro testimony could not be waived by a white party. Accordingly, it was held in Indiana and Iowa that a white defendant who was sued by a colored plaintiff could not use colored witnesses on his behalf.[30] Likewise, in Virginia it was held that a white plaintiff could not use the testimony of a colored person against a colored defendant.[31] In accordance with the rule barring the testimony of a slave where a free white person was a party,[32] it was held in South Carolina that a slave could not give evidence against a white person that the person was the customer of his master's shop.[33] But in Delaware, by statute, a white party in a suit against a colored party could use the testimony of colored witnesses in his favor. This was a decided advantage since the

22. Fox v. Lambson, 8 N.J.L. 275 (1826).
23. People v. Howard, 17 Cal. 63 (1860).
24. Graham v. Crockett, 18 Ind. 119 (1862).
25. Motts v. Usher, 2 Iowa 82 (1856).
26. Gray v. State, 4 Ohio 353 (1831).
27. *Ibid.*
28. Weaver v. State, 8 Ind. 410 (1857); Woodward v. State, 6 Ind. 492 (1857); Coleman v. State, 14 Mo. 157 (1851).
29. Jones v. State, 19 Tenn. 120 (1838).
30. Graham v. Crockett, 18 Ind. 119 (1862); Motts v. Usher, 2 Iowa 82, 83-84 (1856), where the court said:
> It is said that the reason he is incompetent for the black against the white person, is that the blacks are clannish and might confederate to the great injury and prejudice of white suitors. But, on the other hand, it is not to be disguised, that from the dependent position of this unfortunate portion of our population upon white persons, they might be used as instruments by them, to injure and prejudice black suitors.

31. Winn v. Jones, 33 Va. (6 Leigh) 74 (1835).
32. Thomas v. Jamesson, 23 Fed. Cas. 952 (No. 13900) (C.C.D.C. 1802).
33. Gage v. McIlwain, 1 Strob. 135 (S.C. 1846).

colored party could not use the testimony of colored witnesses against the white person.[34]

Maryland had a rule that a free mulatto born of a white woman could testify against a white person, which rule was applied in Washington County in the District of Columbia.[35] Moreover, it was held in Maryland that a free mulatto descended from a free mulatto mother who was descended from a free white woman was a competent witness for a Negro petitioning for his freedom against a white person.[36] Several District of Columbia cases construed the Maryland law to mean that any colored person born free could be a witness against a white person,[37] although this was questioned.[38] But so significant did the color of one's mother become in Washington County as to the competency of witnesses that the Circuit Court for the District of Columbia held that free Negroes and mulattoes born of a colored mother could not testify against free mulattoes born of a white mother.[39] However, that same court decided that in cases arising across the Potomac River in Alexandria a colored man born of a white woman was not a competent witness against a colored man indicted jointly with a white man for riot. There the Virginia statutes had to be used, and they disqualified all colored witnesses except where colored persons alone were defendants or parties.[40] South Carolina at first allowed a mulatto born of a free white woman to be admitted as a witness,[41] but then reversed itself.[42] This exception only applied where the mother was white. Thus, it was held that a mulatto whose father, maternal grandfather, and great grandfather were white could not testify against a white person because his great grandmother was the daughter of a mulatto.[43]

The general rule was that a colored person could be a witness where only colored persons were parties.[44] Thus, free Negroes could be witnesses

34. Burton v. Roe, 7 Del. (2 Houst.) 49 (1859).
35. United States v. Davis, 25 Fed. Cas. 775 (No. 14975) (C.C.D.C. 1835); Minchin v. Docker, 17 Fed. Cas. 437 (No. 9628) (C.C.D.C. 1806).
36. Sprigg v. Mary, 3 Har. & John. 491 (Md. App. 1814).
37. United States v. Douglass, 25 Fed. Cas. 896 (No. 14988) (C.C.D.C. 1813); United States v. Mullany, 27 Fed. Cas. 20 (No. 15832) (C.C.D.C. 1808); United States v. Fisher, 25 Fed. Cas. 1086 (No. 15101) (C.C.D.C. 1805).
38. O'Neale v. Willis, 18 Fed. Cas. 698 (No. 10516) (C.C.D.C. 1809).
39. United States v. Beddo, 24 Fed. Cas. 1061 (No. 14556) (C.C.D.C. 1835).
40. United States v. Birch, 24 Fed. Cas. 1148 (No. 14596) (C.C.D.C. 1827).
41. State v. M'Dowell, 2 Brev. 145 (S.C. 1807).
42. State v. Hayes, 1 Bailey 275 (S.C. 1829).
43. Dupree v. State, 33 Ala. 380, 73 Am. Dec. 422 (1859).
44. See, *e.g.*, Elliott v. Morgan, 3 Del. (3 Harr.) 316 (1841).

for or against other free Negroes.[45] Some cases also held that slaves were competent witnesses for or against free Negroes.[46] However, there is contrary authority;[47] one case even held that a slave was not a competent witness against her mother because the latter was free.[48] One South Carolina case held that a free Negro was not a competent witness in any court in any case, although both parties were free Negroes, nor could book entries made by him be received in evidence, even on the oath of a white person attesting to his handwriting.[49] The reason for this exclusion was stated by Chief Justice Taney to be as follows:

> The policy of this section . . . arose from the barbarous and brutal ignorance of the two excluded classes, and their crude and monstrous superstitions, which rendered them incapable of feeling or appreciating the obligation of an oath, as felt and appreciated in a Christian community; and it was not, therefore, deemed safe to receive them as witnesses, even against one another, in the more serious or grave offences, lest they should avail themselves of the privilege in order to obtain revenge for real or supposed injuries.[50]

But it was held that, although colored persons were not competent witnesses where a white Christian person was a party, they could be examined against a Malay Christian.[51] Likewise, it was held that in Mississippi some Indians were competent witnesses against white persons.[52] Indeed, it was even held that slaves could testify against other slaves.[53] In one case, the High Court of Errors and Appeals of Mississippi declared:

> It is also objected that there ought, in the case of slaves, to be some evidence of a sense of religious accountability, upon which

45. United States v. Neale, 27 Fed. Cas. 79 (No. 15859) (C.C.D.C. 1821); United States v. Butler, 25 Fed. Cas. 213 (No. 14699) (C.C.D.C. 1812); United States v. Barton, 24 Fed. Cas. 1024 (No. 14533) (C.C.D.C. 1803). *Cf.* Queen v. Hepburn, 20 Fed. Cas. 130 (No. 11503) (C.C.D.C. 1810), *aff'd,* 11 U.S. (7 Cranch) 290 (1819).

46. United States v. Farrell, 25 Fed. Cas. 1051 (No. 15074) (C.C.D.C. 1837); United States v. Terry, 28 Fed. Cas. 41 (No. 16454) (C.C.D.C. 1806); United States v. Shorter, 27 Fed. Cas. 1072 (No. 16284) (C.C.D.C. 1806); United States v. Bell, 24 Fed. Cas. 1081 (No. 14564) (C.C.D.C. 1802).

47. United States v. Butler, *supra* note 45; United States v. Hill, 26 Fed. Cas. 318 (No. 15365) (C.C.D.C. 1808); United States v. Swann, 27 Fed. Cas. 1379 (No. 16425) (C.C.D.C. 1803); Cox v. Dove, 1 N.C. 43 (1796).

48. United States v. Gray, 25 Fed. Cas. 17 (No. 15252) (C.C.D.C. 1829).

49. Groning v. Devana, 2 Bailey 192 (S.C. 1831).

50. United States v. Dow, 25 Fed. Cas. 901, 904 (No. 14990) (C.C.D. Md. 1840).

51. *Ibid.*

52. Coleman v. Doe, 12 Miss. (4 S. & M.) 40 (1844); Doe v. Newman, 11 Miss. (3 S. & M.) 565 (1844).

53. Ned v. State, 33 Miss. 364 (1857); State v. Samuel, 19 N.C. 177 (1836); State v. Ben, 8 N.C. 434 (1821).

the validity of all testimony rests; and that the same presumption of such religious belief cannot be indulged in reference to them, as in regard to white persons. As to the latter it is said, the presumption is in favor of their proper religious culture, and belief in revelation, and a future state of rewards and punishments; as to slaves, it is contended, the presumption does not arise, because of a defect of religious education. It is true that if the declarant had no sense of future responsibility, his declarations would not be admissible. But the absence of such belief must be shown. The simple, elementary truths of christianity, the immortality of the soul, and a future accountability, are generally received and believed by this portion of our population. From the pulpit many, perhaps all who attain maturity, hear these doctrines announced and enforced, and embrace them as articles of faith. We are not inclined to adopt the distinction.[54]

B. *Exceptions and Qualifications*

There were a number of exceptions and qualifications to the ante-bellum rule barring Negro witnesses. In Virginia, for example, it was held that a mulatto with less than one-quarter of Negro blood could testify against a white person.[55] It was also held that a free Negro convict in the penitentiary was by statute a competent witness against a white convict,[56] thereby in effect reversing the normal rule that a criminal was less to be believed than an honest man.

Among the decisions qualifying the exclusionary rule was one which concluded that although a Negro was an incompetent witness against white persons, a third person might testify to what a Negro said and the reply given by a defendant.[57] Accordingly, it was held that an uncontradicted declaration made by a slave in the hearing of a white person, from whom it would naturally call forth a response, was admissible against the white person as showing his acquiescence in the truth of the statement.[58]

54. Lewis v. State, 17 Miss. (9 S. & M.) 115, 120 (1847). In State v. Whitaker, 3 Del. (3 Harr.) 549, 550 (1840), the court said:

> Slaves were competent witnesses, both by the civil and the common law. But on the introduction of negro slavery into this country, it became a settled rule of law, that slaves should not be suffered to give evidence in any matter, civil or criminal, affecting the rights of a white man. As the condition, or status, of slavery could be predicated only of the negro and mulatto, their color became the badge of that status, and the rule of evidence referred to was extended to embrace all who bore that badge, whether they were slaves or free.

55. Dean v. Commonwealth, 45 Va. (4 Gratt.) 541 (1847).
56. Johnson v. Commonwealth, 43 Va. (2 Gratt.) 581 (1845).
57. Hawkins v. State, 7 Mo. 190 (1841).
58. Spencer v. State, 20 Ala. 24 (1852).

A colored person could also be a witness in cases involving only colored people, although incidentally affecting white men.[59] Thus, the Supreme Court of North Carolina held that on the trial of a white man charged as an accessory, the principal felon being a Negro slave, the testimony of Negroes was admissible upon the question of the principal's guilt, even though the record of conviction procured by such testimony was admissible and prima facie evidence of the principal's guilt in the trial of the accessory.[60]

It was also decided that declarations of a slave as to his state of health or mind, although not under oath and made out of court, were admissible as *res gestae* and not as testimony.[61] Such declarations had to be related by white persons and were not subject to cross examination as to their accuracy or truthfulness. The Supreme Court of North Carolina justified this distinction by drawing an analogy to noises made by sick animals, although it admitted that slaves had the intelligence to feign illness.[62] But a buyer of a slave did not have to believe the slave's statements that she was ill, and these were not deemed notice to him.[63]

It was also held that hearsay evidence from slaves as to their pedigree or ancestry was admissible. This decision came from South Carolina, which had the most stringent rules against the admission of the testimony of colored persons.[64]

Another exception developed in several cases was that, although a free Negro was an incompetent witness against a white person, he could make preliminary affidavits for habeas corpus, injunction, continuance,

59. Ragland v. Huntingdon, 23 N.C. 561 (1841).
60. State v. Chittem, 13 N.C. 49 (1828).
61. Roulhac v. White, 31 N.C. 63 (1848); Clancy v. Overman, 18 N.C. 402 (1835); Yeatman v. Hart, 25 Tenn. 375 (1845).
62. Biles v. Holmes, 33 N.C. 16, 21 (1850), where the court said:

> The statute, excluding the testimony of a slave or free person of color against a white man, has no application. The distinction between natural evidence and personal evidence or the testimony of witnesses, is clear and palpable. The actions, looks and barking of a dog are admissible as material evidence, upon a question as to his madness. So the squealing and grunts or other expressions of pain, made by a hog, are admissible upon a question as to the extent of an injury inflicted on him. This can in no sense be called the testimony of the dog or the hog. The only advantage of this natural evidence, when furnished by brutes, over the same kind of evidence, when furnished by human beings, whether white or black, is that the latter having intelligence, may possibly have a motive for dissimulation, whereas brutes have not; but the character of the evidence is the same and the jury must pass upon its credit.

63. Brownston v. Cropper, 11 Ky. (1 Littell) 175 (1822).
64. Horry v. Glover, 2 Hill Eq. 515, (S.C. 1837).

and in other cases necessary to commence judicial proceedings. Thus, it was ruled in Kentucky that a free Negro might by his own oath require a white man to give security to keep the peace, notwithstanding his incompetency as a witness.[65] It was also decided that a free colored woman was authorized to make a complaint and take out a warrant against the white father of her bastard child, although she was an incompetent witness on the trial of the action.[66] Thus, a Virginia court held:

> To suppose that a free negro, in possession of regular 'free papers,' may be falsely imprisoned at the pleasure of any individual, without redress, is indeed to attribute a gross and lamentable omission to the law. To confine that redress to a suit *in forma pauperis* to establish his freedom, when he already has the conclusive evidence of it in his hands, would be a mockery. *Cui bono* establish it, if when established, it is disregarded, and affords no protection against the most wanton violation of his rights and liberty? It cannot be. A free negro, as well as a free white man, must be entitled to the benefit of the *habeas corpus* act, both according to its language, which is broad and general, and still more according to its spirit, which is yet more liberal and beneficient. If it were otherwise, that wretched class would be altogether without protection from the grossest outrages, and their personal liberty would be an unsubstantial shadow.[67]

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65. Commonwealth v. Oldham, 31 Ky. (1 Dana) 466 (1833).

66. Williams v. Blincoe, 15 Ky. (Littell) 171, 173-74 (1824), where the court declared:

> Can it be admitted . . . that the acts in question preclude these disqualified creatures from taking an oath for such a purpose? We conceive not. Such a construction would carry these acts beyond their meaning, and would, in many cases, produce great injustice. . . . A creditor, who was a person of color, could not, by any oath, stop the progress of an absconding debtor, by obtaining bail, or a *ne exeat*. He could obtain no *habeas corpus*, where his petition must be sworn to, nor procure a continuance, however just his grounds might be. He could obtain no injunction, however his equity might be, against an unrighteous and fraudulent judgment, because his bill must be sworn to, and he could not take the oath; and on the contrary, a bill enjoining his just judgment, on a pretended equity, wholly untrue, because he could not answer without oath, and he could not make the oath necessary to admit his answer, of course, must be confessed. Although the right of such a being to sue and be sued, might be tolerated by law; yet he often could not sue or defend, especially in a court of equity. We therefore, conceive that the acts in question impose no such disqualification to take any oath, or make any affidavit which may be necessary, as in this case, to commence the controversy, or to forward an accusation or support a defense incidental and preparatory to the trial in chief. We shall barely add to the evils of a different construction, that creatures of this character, must forever be the victims of forgery without redress. It will be easy to sue them on a forged instrument and

C. *Denial of Protection*

A slave was not deemed to have protection against assaults by his master,[68] which perhaps explains the rule barring his testimony[69] as being unnecessary for his protection. Thus, in one case it was held that a slave could not testify against a white defendant, even though he was the victim of the crime.[70] However, a free Negro was deemed to be protected in his person and property in all of the slave states, even in South Carolina where a free Negro could not testify at all.[71] As one case from that state remarked: "It is true it turned out in evidence, that this was a Negro of bad character; but still he was entitled to the protection of the law. . . ."[72]

The rule that a free colored person could not testify against a white person[73] withdrew the substance of the protection of the laws in many cases and left only the shadow.[74] In *Jordan v. Smith*,[75] the Supreme Court of Ohio observed:

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they could not plead *non est factum* without oath, or make the oath necessary to admit the plea; of course, judgment must be unrighteously rendered.

67. De Lacy v. Antoine, 32 Va. (7 Leigh) 438, 443-44 (1836).
68. State v. Mann, 13 N.C. 263 (1829).
69. Tumey v. Knox, 23 Ky. (7 T.B. Mon.) 88 (1828).
70. State v. Turner, 5 Del. (5 Harr.) 501 (1854).
71. Blakely v. Tisdale, 14 Rich. Eq. 90, 100 (S.C. 1868).
72. Richardson v. Dukes, 4 McCord Ch. 156, 157 (S.C. 1827).
73. United States v. Minifie, 26 Fed. Cas. 1272 (No. 15782) (C.C.D.C. 1814); Smyth v. Oliver, 31 Ala. 39 (1857); Grady v. State, 11 Ga. 253 (1852); Potts v. House, 6 Ga. 324 (1849); Rusk v. Sowerwine, 3 Har. & John. 97 (Md. App. 1810); State v. Fisher, 1 Harr. & J. 750 (Md. 1805).
74. In State v. Levy, 5 La. Ann. 64 (1850), the court observed:

> We have been referred to decisions of the courts of South Carolina and Maryland, in which it has been held, that free persons of color are incompetent to testify in cases in which the rights of white persons are concerned. It is urged that the rule is founded on the degraded condition of the African in the States where slavery exists, and should equally prevail in this. The decisions to which we have been referred cannot be considered as authority in our courts. They appear to be based upon statutes which expressly prohibit free persons of color from testifying, not only in criminal, but also in civil cases, in which white persons are parties. No such prohibition exists here. In South Carolina the principle of exclusion has been carried still further. It has been there held, that free persons of color are incompetent witnesses in any case, in a court of record of that State; although both the parties to the suit be of the same class with themselves. . . . Our legislation and jurisprudence upon this subject differ materially from those of the slave States generally, in which the rule contended for prevails. This difference of public policy has no doubt arisen from the different condition of that class of persons in this State. At the date of our earliest legislation as a territory, as well as at the present day, free persons of color constituted a numerous class. In some districts they are respectable from their intelligence, industry and habits of good order. Many of them are enlightened by education, and the instances are by no

> It would more completely put the black man in the power of the white. The white man may now plunder the negro of his property; he may abuse his person; he may take his life. He may do this in open daylight, in the presence of multitudes who witness the transaction, and he must go acquitted, unless perchance there happens to be some white man present. But, so construe this statute as that a black man can not, when sued upon a written instrument, swear to the truth of his plea, and you call in the courts of justice to aid and assist in carrying out a system of oppression. A white man would have nothing to do but to forge the note and commence his suit. The law says he shall not be bound to prove it, unless the plea be sworn to. But the plea can not be sworn to, because the defendant is a black man, and no other but the defendant himself can swear to the plea. The consequence is, the forger, through the instrumentality of a court of justice, reaps the fruits of his villainy, not in punishment, but in a judgment which enables him to deprive his neighbor of his property.[76]

Several illustrations of how the exclusionary rule worked in practice will demonstrate why it in fact denied Negroes the same protection of the law given to white persons similarly situated. Since a free Negro plaintiff suing a white defendant could not call a colored witness to testify for him,[77] it was held that a colored woman was incompetent to prove that a white man was the father of her bastard child.[78]

The denial of protection in criminal cases was equally clear. The Supreme Court of Alabama held that a mulatto assaulted by a white man

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means rare in which they are large property holders. So far from being in that degraded state which renders them unworthy of belief, they are such persons as courts and juries would not hesitate to believe under oath. Moreover, this numerous class is entitled to the protection of our laws; but that protection in many instances would be illusory, and the gravest offences against their persons and property might be committted with impunity, by white persons, if the rule of exclusion contended for were recognized.

75. 14 Ohio 199 (1846).

76. *Id.* at 201-02. See also Ivey v. Hardy, 6 Ala. 548, 550 (1835): "To give the plaintiff the benefit of the statute and exclude the defendant from it . . . would open a door to very great frauds, and would be subversive of every principle of justice." The "Black Laws" of Ohio, including the bar of Negro witnesses, was known even to English travelers. DAVIS, AMERICAN SCENES AND CHRISTIAN SLAVERY 130 (1849) says: "Under such a law a white man with perfect impunity can defraud or abuse a negro to any extent, provided that he is careful to avoid the presence of any of his own caste at the execution of his contract, or the commission of his crime."

77. Page v. Carter, 47 Ky. (8 B. Mon.) 192 (1848).

78. State v. Patton, 27 N.C. 180 (1844).

could not testify to the assault in a criminal prosecution against the latter.[79] The United States Circuit Court for the District of Columbia likewise held that, if colored victims were the only witnesses to a crime, the defendants could not be prosecuted. Thus, in one case defendants were convicted of a cheat in passing off a paper having the appearance of a bank note upon a free Negro. The only witnesses were free Negroes and mulattoes, and the court held that the conviction would have to be reversed and the prosecution dropped.[80] It was even held that a Negro might not testify as to his freedom against a white defendant charged with kidnapping him.[81]

In one case a white defendant who stole a watch from a mulatto was freed because the statute prohibited the victim from testifying against a white man. Chief Justice Field, later of the United States Supreme Court, said for the Supreme Court of California:

> It is possible, as suggested by the District Attorney, that instances may arise where, upon this construction, crime may go unpunished. If this be so, it is only matter for the consideration of the Legislature. With the policy, wisdom, or consequences of legislation, when constitutional, we have nothing to do.[82]

In Delaware, a border state with a relatively small colored population, an exception was engrafted onto the exclusionary rule which permitted a Negro victim of a crime to be a witness against a white criminal when no one else was present. The reason is illuminating. As early as 1793 it was held:

> Negroes are allowed the same redress for injuries to their persons as whites. Indictment is one mode of redress for an injury to the person, principally useful where the party injured is the only witness of the fact necessary to be proved.
>
> The act giving to negroes this right of redress must be construed to allow the means absolutely necessary to obtain redress.[83]

The rule was thereafter extended to allow a kidnapped free Negro to testify against white defendants, who were the kidnappers, although a white accomplice was present.[84] But the following year the more liberal

79. Heath v. State, 34 Ala. 250 (1859).
80. United States v. Beddo, 24 Fed. Cas. 1061 (No. 14556) (C.C.D.C. 1835).
81. State v. Jeans, 4 Del. (4 Harr.) 570 (1845).
82. People v. Howard, 17 Cal. 63, 64 (1860).
83. State v. Bender, 3 Del. (3 Harr.) 572, 573, & n. (1793).
84. State v. Griffin, 3 Del. (3 Harr.) 560 (1841); State v. Whitaker, 3 Del. (3 Harr.) 549, 551, (1840), where the court said: "But the injustice of such a

exception was strictly limited to cases where the exclusionary rule would result in the criminals escaping punishment. Thus, it was held that a free Negro victim could only be a witness against a white defendant if no white witness saw the whole crime.[85] But if the Negro was not the victim, he still could not testify.[86]

On the foregoing theory, it was also held in Delaware that a free colored person was competent to prove his book of original entries in a contract suit for the value of goods sold and delivered to a white customer. The court said:

> The act of assembly . . . recognizes in colored persons the right to hold property, and to obtain redress in law and equity for any injury to person or property. . . . It would be idle to recognize in persons of color the right to hold property; and to obtain redress in law and equity for injuries to person or property; if the means of this redress be denied them. They could not file a bill in equity to obtain an injunction against a white man to stay any fraud or wrong; and, in cases of mutual dealings, though sanctioned by the law, the white man's book would be evidence, and the black man's good for nothing.[87]

III. The Removal of Negro Disqualification in Federal Courts

The first congressional attack on the exclusionary rule came from Senator Henry Wilson, the Radical Republican from Massachusetts. Wilson observed that the 1717 Maryland statute, which made Negroes and mulattoes incompetent as witnesses where white persons were parties, was still in force in the District of Columbia in 1862. He asserted:

> This law places the property, the liberties, the lives of twelve thousand free persons of color in the District of Columbia at the mercy of the avaricious, the violent, and the abandoned. It puts in peril the rights of property and of person of every free colored

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[contrary] construction as is contended for, is still more apparent when the negro is himself the subject of the crime, as in the present instance."

85. State v. Cooper, 3 Del. (3 Harr.) 571, 575-76 (1842), where the court declared:

> [W]e now go so far . . . as to hold that even though white persons were present at the commission of a crime, if they were not in a situation or position to see the act, and did not in fact observe all that happened at the time when the fact charged is alleged to have been committed, the person upon whom the crime was committed, though a negro, is a competent witness to prove it. Otherwise, there will often be a failure of justice, and wrongs may be committed with impunity.

86. State v. Rash, Houst. Cr. Cas. 271 (Del. 1867).

87. Webb v. Pindergrass, 4 Del. (4 Harr.) 439 (1846).

> man whose feet shall press the soil of the District of Columbia. Here the oath of the black man affords no protection whatever to his property, to the fruits of his toil, to the personal rights of himself, his wife, his children, or his race. Greedy avarice may withhold from him the fruits of his toil, or clutch from him his little acquisitions; the brutal may visit upon him, his wife, his children, insults, indignities, blows; the kidnapper may enter his dwelling and steal from his hearthstone his loved ones; the assassin may hover on his track, imperiling his household; every outrage that the depravity of man can visit upon his brother man may be perpetrated upon him, upon his family, his race; but his oath . . . neither protects him from wrong nor punishes the wrong-doer. This Christian nation, in solemn mockery, enacts that the free black man of America shall not bear testimony in the judicial tribunals of the District of Columbia.[88]

By the Act of July 12, 1862,[89] amending the District of Columbia emancipation bill, Congress prohibited the exclusion of witnesses on account of color in the District of Columbia.

The next Senate attack came from Wilson's colleague, Senator Charles Sumner, the equalitarian Radical. On February 29, 1864, he made a lengthy report for the Committee on Slavery and the Treatment of Freedmen, proposing to abolish the exclusionary rule in all federal courts. Sumner commenced by pointing out that there was no direct federal statute excluding colored witnesses, but that it had been the uniform practice of federal courts to follow rules of evidence of state courts in the state in which they sat.[90] After discussing in detail the various statutes and cases on exclusion, Sumner concluded that even though in theory Negroes were protected by the criminal law, in actuality it left them, whether slave or free, without remedy for crimes committed against them by white persons when no other white person was present. Sumner declared:

> So long as the slave himself is not allowed to testify to his wrongs, so long the laws will be justly obnoxious to the charge of actually authorizing a white person to inflict any outrage upon a slave, even to the extent of taking his life with impunity. Every white person, with only slaves about him, or it may be with only colored

88. CONG. GLOBE, 37th Cong., 2d Sess. 1351 (1862). Congressional Globes hereinafter will be cited by Congress, session, page and year, viz.: 37(2) Globe 1351 (1862).
89. Sec. 5, 12 Stat. 539 (1862).
90. S. REP. No. 25, 38th Cong., 1st Sess. 1 (1864).

> persons, slave or free, has a *letter of license* to commit any outrage which passion or wickedness may prompt.[91]

Sumner also quoted Jeremy Bentham to the effect that exclusion of witnesses *"includes a license to commit,* in the presence of any number of persons of that description, *all imaginable crimes."*[92] He added that the exclusionary rule left colored persons "absolutely without legal protection of any kind, the victim of lawless outrage. . . ."[93] Sumner appended a letter from Chief Justice John Appleton of Maine, who argued that if federal rules of evidence were not uniform throughout the country, the results in similar cases would be different depending on where they were tried.[94] He argued that admitting all witnesses would be better adapted to the finding of truth[95] and discussed at length the fact that it would be no more difficult to sift out false testimony from colored persons than from white persons.[96] He also observed that the rule of exclusion denied protection to colored victims when no white person was present and in other cases caused a failure of justice when the truth could only be established by colored witnesses.[97]

This was not the first time that an attempt was made to abolish the rule that colored witnesses were incompetent in federal court. While the Act of July 16, 1862, which provided that "the laws of the State in which the [federal] court shall be held shall be the rule of decision as to the competency of witnesses in the courts of the United States,"[98] was upon its passage, Representative Owen Lovejoy, the Illinois Radical Republican and prominent abolitionist, urged that the rule as to incompetency be removed.[99] Sumner likewise moved an amendment to this effect in the Senate. This provoked a spirited debate between Senator Morton S. Wilkinson, a Minnesota Republican who advocated letting anybody testify, and Senator Lafayette S. Foster, a Connecticut Republican who recoiled in horror at the Minnesota rule allowing even atheists to testify and

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91. *Id.* at 10 (emphasis in original).
92. *Id.* at 11 (emphasis in original). Sumner added that the exclusion "operates as a privilege to all white persons . . . who are at liberty to do as they please, and commit any crime in the decalogue 'unwhipt of justice,' if nobody but a colored person is present." *Id.* at 16.
93. *Id.* at 17.
94. *Id.* at 19-20.
95. *Id.* at 20-22.
96. *Id.* at 22-25.
97. *Id.* at 26-27.
98. 12 Stat. 588 (1862).
99. 37(2) Globe 3261 (1862).

said that the whole matter of competency of witnesses should be left to the states. Foster noted that some states did not allow parties to testify and that the divergent rules should be followed by local federal courts.[100]

In reply, Sumner admitted that the Congress had no power to interfere with the rules of evidence in state courts, but advocated abolishing the rule of incompetency for federal courts.[101] Sumner added that if only black men witnessed a crime, it would go unpunished under the exclusionary rule. Senator Jacob M. Howard, a Michigan Republican lawyer, concurred and said that Negroes should stand on the same footing in regard to credibility as other witnesses. But Senator Lyman Trumbull, the Illinois Republican and a former state supreme court justice, advocated conforming federal courts to state rules, although he personally favored allowing anyone to testify.[102] The Sumner amendment lost by a vote of 14 in favor to 23 against.[103]

In the Thirty-Eighth Congress, debate on the exclusion of Negro witnesses came up in a curious way. A bill was called up to repeal the law which disqualified Negroes as letter carriers. Two years earlier Shuyler Colfax of Indiana, later Speaker of the House and Vice-President under President Grant, had opposed such a bill on the grounds that in a number of states Negroes were incompetent to testify against white persons and hence there would be no competent witnesses against mail robbers.[104] Accord-

100. *Id.* at 3354-56.
101. *Id.* at 3356. The following colloquy occurred:
MR. SUMNER. . . . He said each State is entitled within its own jurisdiction to have its rules of evidence. Granted . . . .
MR. FOSTER. Why allow them barbarism?
MR. SUMNER. Because I have no right to interfere with them.
MR. FOSTER. That answers the two questions.
MR. SUMNER. There is the mistake of the Senator. He confounds our duties with regard to the national courts, where we are responsible with regard to the State courts, where we have no responsibility and no right to interfere. Again, in his remarks, he said, 'it is competent for each State to make these rules for itself.' Granted again—within its own jurisdiction. Then again, he said he would allow each State its sovereign will on this question. Sir, where I cannot constitutionally interfere to check a barbarism, of course I do not interfere . . . but when a barbarism seeks shelter directly under the jurisdiction of Congress, when it falls under the responsibility of my vote, I cannot be silent . . . . Let the State courts have their rules of evidence; they are beyond our control; but let the United States courts which are within our control be brought at last within the pale of civilization.
102. *Id.* at 3357.
103. *Id.* at 3358.
104. *Id.* at 2231-32. He said:
In some of the States Indians and negroes, and in California and Oregon the Chinese also, are not allowed by the statutes of the State to give

ingly, Senator Jacob Collamer, a Vermont Republican ex-state judge and former Postmaster-General, added an amendment to the bill for the Senate Post Office Committee lifting the exclusion of colored witnesses in federal courts. He said that Congress had the power to determine the competency of witnesses in federal courts and that the prevailing tendency was to sweep away rules of competency, leaving the trier of fact to decide on credibility. Senator Henry S. Lane, a more conservative Indiana Republican lawyer, pointed out that his state's courts excluded Negro witnesses, but said that the committee amendment was proper if the bill, which he opposed, were to pass. But Senator James H. Lane, a Kansas Republican lawyer who had been a Democratic Representative and Lieutenant Governor of Indiana before the war, congratulated the state of his adoption for receiving all testimony and advocated passage of the bill.[105]

Senator Lazarus W. Powell, a Kentucky Democratic lawyer, opposed the committee amendment as well as the bill. He adverted to the fact that in his state Negroes were incompetent to testify and asserted that confusion would be caused if federal courts followed different rules of evidence from the state in which they sat.[106] Senator Thomas H. Hendricks, an Indiana Democratic lawyer, also noted that Negroes were not permitted to testify in his state where white persons were concerned. He argued that they were too unreliable as witnesses and were not the equals of white men.[107] Senator James Harlan, an Iowa Republican lawyer, answered him by pointing out that being a witness had nothing to do with political or social equality. He noted that women and young children might be witnesses and that it could be as important to a white man to call a colored witness to prove a fact as it could be to a colored litigant. He added that if a colored witness were ignorant or degraded it would militate against his credibility.[108]

Senator Willard Saulsbury, a Delaware Democratic lawyer, protested that under the guise of letting Negroes testify to mail robbery the com-

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testimony in the courts against white persons. Gentlemen may say that such laws are unjust and improper, but the Congress of the United States cannot change them if we would. They are upon the statute-books of the States; and in the United States courts, sitting in the various States, the rules of evidence of these States are regarded as the rules of evidence for the courts. *Id.* at 2232.

105. 38(1) Globe 837 (1864).
106. *Id.* at 838.
107. *Id.* at 839.
108. *Id.* at 840.

mittee amendment proposed to allow them to testify in all cases. He asserted that there could be no difficulty in obtaining colored perjurers to swear away a white man's life.[109] Senator John Conness, a California Republican, approved of opening the federal courts to colored witnesses in all cases. He attacked the exclusionary rule of his state as having shielded murderers and highway robbers from justice.[110]

Senator Reverdy Johnson, the highly respected Maryland Democrat and one of the leading constitutional lawyers of the country, who previously had been Attorney-General of the United States, spoke in favor of making free Negroes competent witnesses. He declared that the condition of people should go to their credibility and not their competency. He related that England had recently abolished the rule disqualifying parties as witnesses. In 1854 on a visit to England the judges had told him that they had originally opposed the change but were now satisfied with it, as it promoted the discovery of truth. Johnson feared, however, that permitting slaves in the border states to be witnesses might cause anti-union sentiment.[111]

The federal courts ultimately were opened to colored witnesses in an amendment to the Civil Appropriation Bill of 1864. In light of Johnson's observations, it is interesting to note that this same amendment abolished the rule making parties incompetent as witnesses in federal courts.[112]

IV. The Civil Rights Act of 1866

At the opening of the first session of the Thirty-Ninth Congress, held in December 1865, the first Congress after the end of the Civil War, the Schurz Report inflamed the Radicals against the conquered South by asserting that while some of the southern States had repealed or were disposed to repeal laws barring colored testimony in order to conform to military orders and eliminate the Freedmen's Bureau, the local politicians advised the people that judges and juries did not have to believe such testimony.[113] Senator Edgar Cowan, a conservative Pennsylvania Republican lawyer, said he was in favor of letting colored people be witnesses, but that Congress had no power to so provide in the states and a constitutional amendment would be needed.[114] But Senator John Sherman, the Ohio Republican

109. *Ibid.*
110. *Id.* at 841.
111. *Id.* at 841-42.
112. Act of July 2, 1864, § 3, 13 Stat. 351.
113. S. Exec. Doc. No. 2, 39th Cong., 1st Sess. 34-35 (1865).
114. 39(1) Globe 40-41 (1865).

lawyer, asserted that, as soon as the Thirteenth Amendment was ratified, Congress would be able to open all of the state courts to testimony by colored people.[115]

On January 12, 1866, Trumbull, Chairman of the Senate Judiciary Committee, moved to take up two bills, each giving Negroes the same right to testify as white persons. The Freedmen's Bureau Bill applied only to occupied districts of the South, while the Civil Rights Bill was general in operation.[116] Hendricks attacked the Freedmen's Bureau Bill as unauthorized by the Thirteenth Amendment and noted that Negroes in Indiana were deprived of many civil rights by state law.[117] Trumbull replied that the black codes barring Negroes from courts were in aid of slavery and would never have been thought of but for slavery; therefore, they fell with the Thirteenth Amendment. He added that if Congress believed it necessary to prevent slavery and to let Negroes testify, it could do so.[118] The following exchange then occurred between Senator Samuel C. Pomeroy, a Kansas Republican, and Senator James Guthrie, a Kentucky Democratic lawyer:

> Mr. POMEROY. . . . [I]t is held by the Senator . . . that in the State of Kentucky there is no essential difference between persons of color and white persons in their civil rights. That is entirely new to me, because I have never known a State that held slaves which admitted colored testimony against white men.
> Mr. GUTHRIE. We do not do that; but that is what we are working for now in the Legislature.
> Mr. POMEROY. Then it cannot be true that the civil rights of persons of color in Kentucky are the same as the rights of white men.[119]

Wilson, however, applauded Guthrie's concession that the slave codes fell with the Thirteenth Amendment and declared that Congress could enact legislation to insure this.[120]

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115. *Id.* at 41. He declared: "No man can be said to be free . . . [without] the right to testify, an incident, an inevitable incident to liberty, without which liberty would be but a name." *Id.* at 42.

116. *Id.* at 209-211. For a general history of these bills see Tansill, Avins, Crutchfield & Colegrove, "The Fourteenth Amendment and Real Property Rights" in *Open Occupancy* vs. *Forced Housing Under the Fourteenth Amendment* 68 (Avins Ed. 1963); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

117. 39(1) Globe 318 (1866).

118. *Id.* at 322.

119. *Id.* at 337.

120. *Id.* at 335, 340.

Several days later Trumbull opened a general defense of the constitutionality of the Civil Rights Bill by declaring that when slavery was abolished the old slave codes fell too. He said that Congress had authority to declare Negroes citizens and confer on them the civil rights of citizens named in the bill.[121] Saulsbury replied that the Thirteenth Amendment did no more than free the slaves, and since free colored persons before the war could not testify in some states, Congress had no power to confer on them this right as a result of the amendment. He added that if Congress could prescribe who might testify, it could prescribe who might not testify, and the reserved powers of the states would be nullified.[122] Saulsbury denied that Congress had the power under Article III of the Constitution to permit the removal to federal courts of cases not falling within the judicial power of the United States, merely because a Negro witness was not allowed to testify. Moreover, he decried the delay which the law might cause if a white defendant decided to call a colored witness, who might know nothing about the case, solely to obtain removal to federal court. He concluded that many civil and criminal cases, including most cases against Negroes, would be subject to removal. This would hinder Delaware and Kentucky, which still had the exclusionary rule, in the administration of criminal justice.[123]

Meanwhile, in the House, a Kentucky Unionist spoke in favor of allowing colored people to be witnesses, although he was against giving them political rights.[124] Representative John A. Kasson, an Iowa Republican lawyer, suggested that the Joint Committee on Reconstruction propose a constitutional amendment, *inter alia,* giving Negroes the right to testify.[125] When the Freedmen's Bureau Bill came up for consideration in the House, several Democrats asserted that the Thirteenth Amendment did not authorize it because a man could still be free and yet lack civil rights, as

121. *Id.* at 474-76.
122. *Id.* at 476, 478.
123. *Id.* at 479.
124. *Appendix* to CONG. GLOBE, 39th Cong., 1st Sess. at 53 (1866). Rep. Green C. Smith, a lawyer, declared: "I do not believe in the doctrine that negroes should be witnesses only in cases where they alone are interested. I believe that the negro should be permitted to go into the courts to vindicate his honor, his integrity, his rights of property."
Appendices to Congressional Globes hereinafter will be cited as follows: 39(1) Globe App. at 53 (1866).
125. *Id.* at 508. Representative Ignatius Donnelly, a Minnesota Republican lawyer, asserted that the newly enacted "black code of Mississippi" prevented colored persons from testifying against white persons. *Id.* at 588.

some Negroes did in ante-bellum days.[126] But Representative John H. Hubbard, a Connecticut Republican lawyer, observed that in some states Negroes were not allowed to testify against white men, and he approved the bill because it was "intended to cast the shield of protection" over them.[127] An Iowa Republican attacked Kentucky for not making Negroes competent witnesses against white persons.[128] Similarly, Representative Samuel McKee, a Kentucky Republican lawyer, declared:

> In none of those States has the black man a law to protect him in his rights, either of person or property. He can sue in a court of justice in my State, but he can command no testimony in his prosecution or defense unless the witness be a white man. We have one code for the white man, another for the black. Is this justice? Where is your court of justice in any southern State where the black man can secure protection? . . .
>
> . . . As freedmen they must have the civil rights of freemen. Let the States in which they live pass such laws for their protection as will give them the same rights in their courts of justice that other men have. Give to them the right to protect themselves and there will no longer be any need of such a law as this.[129]

Senator Daniel Clark, a New Hampshire Republican lawyer, likewise observed:

> Has he not the same right to defend his person and his property? Should not the tribunals of justice be equally open to him, and should he not be permitted to tell his story? . . . You admit the courts should be open to the black man, and that he should have the protection of the laws as fully as the white man.[130]

In defending the Freedmen's Bureau Bill against the veto message of President Andrew Johnson, Trumbull asserted that Negroes could not get justice in southern courts. He declared that a recently passed law in Mississippi "excludes freedmen from testifying in cases all white." He quoted a Union general in Kentucky to the effect that "negroes have

126. *Id.* at 623, 1268 (Rep. Michael C. Kerr, D.-Ind.); *id.* at 628 (Rep. Samuel S. Marshall, D.-Ill.).

127. *Id.* at 630. Representative Samuel W. Moulton of Illinois said that the Freedmen's Bureau Bill could not operate there because Negroes were permitted to testify. *Id.* at 633.

128. *Id.* at 651. (Rep. Josiah B. Grinnell). He said: "The white man in Kentucky can testify in the courts; the black man can testify against himself."

129. *Id.* at 653-54.

130. *Id.* at 833. See also *id.* at 1160.

been murdered and their murderers have escaped because of the legal incompetency of negroes to testify against them. . . ."[131]

Representative Martin R. Thayer, a Pennsylvania Republican lawyer, warmly supported the Civil Rights Bill for giving Negroes the fundamental rights of citizenship, including the right to testify. He said that they would not have freedom if "deprived of the right to be a . . . witness in a court of justice. . . ."[132] He affirmed that Negroes were in need of protection and were entitled to it.[133] But Representative Anthony Thornton, an Illinois Democrat, said that the Thirteenth Amendment only abolished the status of slavery and did not give Congress the power to confer civil rights on Negroes, since a man could be free without such rights. He added:

> Is it necessary . . . for this protection, to confer upon him the right to give evidence between parties in all the States as this bill does? . . .
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> . . . Reflect upon the relations between the late master and his late slave. These relations have been such for a long series of years as to engender a state of feeling which will prevent the negro from being an impartial and unbiased witness in controversies between white men. This bill gives this right to the late slave of being a witness in all cases without regard to the feeling which may exist between him and the white population.[134]

Not all Republicans were convinced that Congress had the power to make Negroes competent witnesses in state courts under the Thirteenth Amendment. Representative Columbus Delano, an Ohio Republican lawyer, observed that his state until recently had a law excluding colored witnesses. Representative William Niblack, an Indiana Democratic lawyer, interrupted to observe that his state had only partially repealed its exclusionary law during the previous year, making Negroes in the state since 1851 competent witnesses in all cases, but leaving recent colored immigrants competent to testify only where colored people were parties. Delano then urged that it was always one of the reserved powers of the states to determine who should be competent witnesses in its courts, and if Congress

131. *Id.* at 941. See also his attack on the veto of the Civil Rights Bill. *Id.* at 1759.

132. *Id.* at 1152. Rep. Henry J. Raymond, Republican editor of the New York Times, thought that giving Negroes citizenship would give them the right to testify. *Id.* at 1266.

133. *Id.* at 1153.

134. *Id.* at 1156-57.

could override state legislation in one respect it could do so in every respect. He said that the right to testify was not a necessary incident of freedom.[135]

Representative James F. Wilson of Iowa, Republican Chairman of the House Judiciary Committee in charge of the Civil Rights Bill, defended it as necessary to secure protection of the Negroes.[136] He asserted:

> Suppose that the only person witnessing a state of facts necessary to be given in court for the protection of life, liberty, and property should be a black man, has the State the right to say that that man, the only person living who has a knowledge of the facts to protect a citizen, should have no right to testify?[137]

Niblack interrupted to point out that under the laws of most states the husband and wife could not testify against each other, so the argument would apply to this situation also. Likewise, Delano added that if the only witness available was incompetent under state law because, although white, he lacked religious belief, the litigant would be denied his testimony just as if he were a colored person. Delano therefore concluded that since numerous free people historically could not be witnesses, the right to testify was not incidental to freedom, and Congress had no power to confer it under the Thirteenth Amendment. He added that, rather than passing laws which infringed on the powers of the states, he favored either a constitutional amendment requiring states to protect life, liberty, and property, or the original Bingham amendment.[138] Representative Michael C. Kerr, an Indiana Democratic lawyer, also observed that

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135. *Id.*, App. at 158.

136. The following colloquy occurred between Delano and Wilson:

> MR. DELANO. . . . Now I desire to ask the honorable chairman of the Committee on the Judiciary under what clause of the Constitution he claims Congress to have power to declare who shall be competent to give evidence in the State courts? Here is an express right to be witnesses in the State courts, secured by penalties, to this race. . . . [W]here is the authority in the fundamental law of this land for this Congress to declare who shall be witnesses in a State court? . . . .
>
> MR. WILSON of Iowa. I place the power of Congress to secure to these citizens the right to testify in the courts upon the same basis exactly that I place the power of Congress to provide protection for the fundamental rights of the citizen commonly called civil rights, so that if the presence of a citizen in the witness-box of a court is necessary to protect his personal liberty, his personal security, his right to property, he shall not be deprived of that protection by a State law declaring that his mouth shall be sealed and that he shall not be a witness in that court. That is one of the protective remedies which must run with these great civil rights belonging to every citizen. *Id.*, App. at 157.

137. *Id.*, App. at 158.

138. *Id.*, App. at 158-59.

denial of the right to testify, as in Indiana, did not constitute a state of slavery,[139] and hence Congress could not interfere under the Thirteenth Amendment.[140]

Representative John A. Bingham, the Ohio Republican lawyer who drafted the first section of the Fourteenth Amendment, said that while he favored letting all persons conscious of an oath testify, Congress had no power to so provide by ordinary statute.[141] Representative Leonard Myers, a Pennsylvania Republican lawyer, complained that, "Not one of the rebel States allows a negro to give testimony against a white man. . . . [But the] second clause of the [Thirteenth] Amendment asserts no power to remedy this . . . ."[142] Senator Reverdy Johnson, too, supported the President's veto of the Civil Rights Bill, because *inter alia,* Congress could not constitutionally provide rules of evidence for state courts.[143]

Senator William M. Stewart, a Nevada Republican lawyer who supported the bill, said that it would have no application to any southern state which was willing to grant Negroes their civil rights. He referred to a Georgia statute of March 17, 1866, as an example.[144] This statute made Negroes competent witnesses in all cases.[145] But Senator Garrett Davis, a Kentucky Democratic lawyer, attacked the bill for attempting to punish state judges there for conforming with state law in excluding colored witnesses.[146] Senator Saulsbury of Delaware predicted that the judges of his state would refuse to obey the bill.[147] However, Representative William Lawrence, an Ohio Republican and himself a former state judge, rebutted

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139. *Id.* at 1268. See also *id.* at 3214-15 (Rep. Niblack).

140. *Id.* at 1270, where he observed: "If it can determine who may testify and sue in the courts of a State, it may equally determine who shall not." He added: "[I]f a State court or officer refused . . . to receive the testimony of any negro, where he was forbidden by the state law to receive it, he too would incur the penalties of this bill." *Id.* at 1271.

141. *Id.* at 1293.

142. *Id.* at 1622.

143. *Id.* at 1777. See also the remarks of Sen. Edgar Cowan, R.-Pa., *id.* at 1783.

144. *Id.* at 1755, 1785.

145. Clarke v. State, 35 Ga. 75 (1866).

146. 39(1) Globe App. at 182 (1866).

147. *Id.* at 1809. He said:

> [D]oes this Senate suppose . . . that if an honest judiciary of a State shall decide that a free negro shall not testify in the courts of that State, when his right to testify is prohibited by the statute law of the State, the people of such State will allow the agents of your commissioners to arrest those judges and drag them from the bench?

Saulsbury's prediction that the Delaware courts would ignore the Civil Rights Bill proved accurate. See State v. Rash, Houst. Cri. Cas. 271 (Del. 1867).

the assertion in President Johnson's veto message that state judges might be subject to fine and imprisonment for not letting Negroes testify.[148] He maintained that it would be better to invade state judicial power than to let the civil rights of citizens be invaded.[149] He added, excepting only Georgia:

> The fact that no single southern Legislature has yet recognized the right of blacks to the civil rights accorded to every white alien, suffices to prove the need of such legislation by Congress. We believe no single southern State has yet enabled blacks to sue and be sued, to give testimony and rebut testimony on equal terms with whites. All that they do, under the pressure of necessity, is meanly, grudgingly, shabbily done. What can be more absurd than to provide that a black may testify in cases between blacks and whites, but not when the parties are both white? If he would even swear falsely, would he not be likely to do so in a case between a white and a black? And if his oath can be taken in cases where he will naturally have a bias, why not in cases where he is likely to have none?
>
> Consider the case of a riotous white attack on a colored school kept by a white woman. A black who witnesses the outrage is called to tell what he knows, and turned off because the schoolma'am was white, like the rowdies; so he is not a competent witness, unless he can swear that the roughs assaulted also a pupil; then he may be. Why is the distinction made but to insult and degrade the blacks?[150]

When the Civil Rights Act of 1866[151] came under judicial scrutiny, the courts split, to some extent along political lines. The state courts of Delaware and Kentucky held the statute in excess of Congress' power, as it affected exclusion of colored witnesses,[152] although the Delaware court suggested that the rule should be abolished by the state.[153] The

148. 39(1) Globe 1680 (1866).
149. *Id.* at 1837.
150. *Id.* at 1833.
151. 14 Stat. 27 (1866).
152. State v. Rash, *supra* note 147 (2 to 1 decision); Bowlin v. Commonwealth, 65 Ky. (2 Bush) 5, 92 Am. Dec. 468 (1867).
153. In State v. Rash, *supra* note 147, at 274-75, the court observed:

> I think it is a mistake to assign as the ground of their incompetency, the want of sufficient mental capacity or intelligence to speak the truth. It seems to me rather, that the theory or ground upon which they were excluded was an assumed defect of moral character on their part, superinduced by their ignorant, degraded and servile condition. They were slaves. They were subject, body and mind, to the absolute control of their masters, and were bound to obey their master's will in all things. In course

reconstructed State Supreme Court of Arkansas held the act constitutional under the Guarantee Clause of the original Constitution,[154] while the Supreme Court of Texas intimated that it was constitutional under the war power.[155] The Supreme Court of North Carolina avoided the question by holding that the ante-bellum statute making Negroes incompetent as witnesses was overturned by implication in the new state constitution giving them the right to vote and hold office.[156] The Supreme Court of Indiana indicated that the act was constitutional under the Privileges and Immunities Clause of Article IV, Section 2, although a state statute had repealed the exclusionary rule by that time insofar as it applied to resident Negroes.[157] Mr. Justice Swayne, on circuit, held the act constitutional on something of a hodge-podge theory, giving the Thirteenth Amendment as the principal source of power.[158]

The California development was unusual. In *People v. Washington*[159] a native born mulatto was indicted for robbing a Chinese. The indictment was founded exclusively upon the testimony of Chinese witnesses, none other being available for trial. It was held that the indictment would have to be discharged. By a three-to-two vote, the court held that the Civil Rights Act of 1866 was constitutional as regards the right to give

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of time some of them were set free, and were recognized by the law as free. But the rule of unqualified exclusion remained in full force until the legislature, by the acts of 1787 and 1799, recognized free negroes as possessing certain civil rights, to wit: the right to hold property, and to obtain redress in law and equity, for any injury to person or property, and allowed them, under certain circumstances, to give evidence against white persons. Now I do not intend that my opinions, in regard to the law which excludes negro testimony, shall be misunderstood. I hold the law to be wrong and indefensible. The condition of things has changed. The reason for the rule of exclusion has ceased to exist. The negroes are now all free, and there no longer remains any good reason why they should not be allowed to testify. I speak for myself on this point. I think the continuance of the law inexpedient and unwise, and that it should be repealed, and that negroes should be made competent to testify in all cases in which white persons, under like circumstances, are held to be competent. Their credibility would still be left to a white jury. Moreover, their evidence is becoming every day more and more important to the white race, to say nothing of its importance to the black race.

154. Kelley v. State, 25 Ark. 392 (1869).

155. *Ex parte* Warren, 31 Tex. 143 (1868).

156. State v. Underwood, 63 N.C. 98, 99 (1869), where the court remarked: "The greater includes the less—and the effect is to take away the mark of degradation imposed by the statute under consideration."

157. Turner v. Parry, 27 Ind. 163 (1866), following Smith v. Moody, 26 Ind. 299 (1866).

158. United States v. Rhodes, 27 Fed. Cas. 785 (No. 16151) (C.C.D. Ky. 1866).

159. 36 Cal. 658 (1869).

evidence.[160] The majority therefore reasoned that since the law made Negroes citizens and placed them on the same footing as white people in regard to their civil rights, they would have to be given the benefit of a California statute preventing Chinese from testifying against white persons. The dissenters denied that under the Thirteenth Amendment Congress had the power to make Negroes competent witnesses in all cases.[161]

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160. *Id.* at 665-67, where the court said:

In the administration of justice the subject of evidence occupies a large space. It is the means by which the judicial branch of the Government is informed of the violation of that personal liberty which this amendment of the Constitution guarantees to all persons within the jurisdiction of the Federal Government, and whereby it is enabled to perceive the wrong and apply the proper remedy for enforcing the right . . . . [T]he establishment of different rules as to the competency of evidence applicable to different classes of persons may tend to the advantage of one class and to the oppression and encroachment upon the personal liberty of another. For example, it is not difficult to perceive, if the individuals of the entire class likely to be reduced to the condition of involuntary servitude are excluded from testifying against the class likely to attempt to deprive them of their liberty, or in any matter arising between the two classes, while the other class is at full liberty to testify in such cases, that the strong tendency of such a rule of evidence would be to obstruct the operation of the amendment in question, and overthrow that personal liberty guaranteed by it; and it would seem to be self-evident that a law providing that the same rule of evidence should apply to both parties, placing the class likely to be reduced to servitude upon an equal footing with the other in respect to the right to testify as to the encroachment upon their personal liberty, would strongly conduce to the enforcement of this constitutional provision . . . . This being so, it seems clear to us that under the provision in question Congress is fully authorized to judge of the necessity of legislation upon the subject, and, if found necessary, to prescribe that all alike, black and white, shall be entitled to 'give evidence;' and further, that the rules of evidence shall apply equally to all alike, in order that all may, in the language of the Civil Rights Act, have the 'full and equal benefit of all the laws and proceedings for the security of person,' etc. This provision prescribing a uniform rule of evidence with reference to all classes embraced in the broad terms of the amendment, necessarily bears directly upon the great right of personal liberty which its adoption was expressly designed to secure.

161. *Id.* at 680-81, where Crockett, J., observed:

The argument is, that if a certain character of evidence be admissible for or against a certain class of citizens, and not admissible for or against a certain other class, the excepted class may thereby be endangered in the enjoyment of their personal freedom, and that, to avoid this peril, it was 'appropriate legislation' for Congress to abolish the discrimination, and place both classes on the same footing.

There would be some force in the argument if the principle was confined only to cases wherein an attempt was made to reduce a citizen or class of citizens to slavery or involuntary servitude. If Congress had declared that in such cases (which is clearly the only class of cases contemplated by the first section of the amendment) there should be no discrimination between one citizen or class of citizens and any other citi-

A year later, with two of the majority justices replaced by new justices, *People v. Washington* was overruled by *People v. Brady*,[162] which held by a four-to-one vote that not only was the Civil Rights Act of 1866 unconstitutional, but also that the Fourteenth Amendment did not give Chinese the right to testify. The latter decision does not seem correct, as will be noted further on.

V. The Effect of the Fourteenth Amendment

Representative Bingham of Ohio, the framer of the second sentence of the first section of the Fourteenth Amendment, had once denounced southern statutes which did not allow Negroes to testify.[163] He agreed with the aim, although not the constitutionality, of the Civil Rights Bill.[164] But he opposed the bill, in addition, because it protected the life, liberty,

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zen or class of citizens in the rules of evidence, such legislation might have been 'appropriate,' as having a tendency to maintain the provision of the first section of the amendment. But the Civil Rights Bill goes far beyond this . . . . Whilst I can comprehend how it might be important to a person threatened with bondage to be entitled, in the vindication of his rights in that regard, to the benefit of the most liberal rules of evidence, I do not perceive on what reasonable ground it can be claimed that his freedom may be endangered if he is denied the same latitude in the rules of evidence in respect to matters which in no degree touch the question of his freedom. The case we are considering affords a striking illustration of this distinction. If the defendant was in danger of being reduced to bondage, he might justly claim that he was entitled to the benefit of the most liberal rules of evidence, in order to secure the freedom which is guaranteed to him by the Thirteenth Amendment. But inasmuch as he is accused of a crime against the law, and the question of his freedom, in the sense contemplated by the Thirteenth Amendment, is in no manner involved, what authority has Congress to prescribe the rule of evidence which shall govern his trial? Or if it were an action of debt or assumpsit on a promissory note, how would the question of his freedom be affected, one way or the other, by the rule of evidence at the trial? To my mind nothing could be plainer than that Congress, under the second section of the amendment, has no power whatever to interfere in such a case.

162. 40 Cal. 198, 6 Am. Rep. 604 (1870).

163. 36(2) Globe App. at 83 (1861):

That this statute might want no feature of atrocity, it is further provided that the man thus wronged and sold like a beast shall never testify against a white man in courts of justice. The statute first robs the man of his liberty, and then seals his lips in perpetual silence. Let these infamous statutes be repealed . . . .

164. 39(1) Globe 1291 (1866), where he declared: "I say, with all my heart, that that should be the law of every State, by the voluntary act of every State." He also declared:

You further say that in the courts of justice of the several States there shall, as to the qualifications of witnesses, be no discrimination on account of race or color. I agree that, as to persons who appreciate the obligation of an oath—and no others should be permitted to testify—there should be no such discrimination." *Id.* at 1293.

and property only of citizens, and not of aliens or strangers.[165] To insure the equal protection of all persons by the states he introduced an amendment giving Congress the power to make this duty mandatory on them.[166] Even Representative Andrew J. Rogers, the windy minority Democratic lawyer on the Joint Committee on Reconstruction, approved of letting Negroes be witnesses and protecting them in life, liberty, and property.[167] Bingham's first draft failed of passage because it was believed that this proposal gave Congress too much power.[168]

In reporting the Fourteenth Amendment to the House of Representatives from the Joint Committee on Reconstruction, Representative Thaddeus Stevens of Pennsylvania, leader of the House Radical Republicans and committee chairman on the part of the House, explained the Equal Protection Clause as follows:

> Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same. . . . Now color disqualifies a man from testifying in courts. . . . I need not enumerate these partial and oppressive laws. Unless the Constitution should restrain them those States will all, I fear, keep up this discrimination, and crush to death the hated freedmen. Some answer, 'Your civil rights bill secures the same things.' That is partly true, but a law is repealable by a majority. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed.[169]

Senator John Conness, a California Republican, supported both the Fourteenth Amendment and the Civil Rights Bill because he favored letting Chinese victims of crime testify as a protection to them.[170] Senator

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165. *Id.* at 1292.
166. *Id.* at 1034.
167. *Id.*, App. at 134.
168. Tansill, *et al., op. cit. supra* note 116, at 80, 85.
169. 39(1) Globe 2459 (1866). This was quoted as an authoritative exposition of the meaning of the Equal Protection Clause several years later in the House. See 42(1) Globe App. at 115-16, 151 (1871).
170. 39(1) Globe 2892 (1866). He said:
> Mr. President, let me give an instance here . . . to illustrate the necessity of the civil rights bill in the state of California . . . . By the influence of our 'southern brethren,' . . . who went there in large numbers some years since, and who seized political power in that State and used it, who made our statutes and who expounded our statutes from the bench, negroes were forbidden to testify in the courts of law of that State, and Mongolians were forbidden to testify in the courts; and therefore for many

Timothy O. Howe, a Wisconsin Republican and a former state supreme court justice, supported the Equal Protection Clause to afford Negroes "the right to give testimony in any court . . . ."[171] Senator John B. Henderson, a Missouri Republican lawyer, supported the amendment because the South "excluded him [the Negro] from their courts as a witness. . . ."[172] Representative George W. Julian, a Radical Republican lawyer from Indiana, remarked that southern courts were holding the Civil Rights Act unconstitutional and added: "Although the civil rights bill is now the law, none of the insurgent States allow colored men to testify when white men are parties."[173]

Complaints that Negroes were not permitted to testify continued even after the Fourteenth Amendment was proposed.[174] One senator cited the decision of Mr. Justice Swayne as showing that the Civil Rights Act was constitutional and Negroes should be allowed to testify.[175] The Supreme Court of California held in 1870 that the Fourteenth Amendment did not give the Chinese in that state the right to testify. It therefore decided that a conviction of a white man for robbing a Chinese, based on the victim's testimony, would have to be reversed. In so holding, the court rejected an elaborate and cogent argument by the state attorney-general pointing out that the right of a Chinese victim to testify is necessary to protect him equally with a white victim who can testify, since the chances of convicting the perpetrator of a crime when the victim can testify are

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years, indeed, until 1862, the State of California held officially that a man with a black skin could not tell the truth, could not be trusted to give a relation in a court of law of what he saw and what he knew. In 1862 the State Legislature repealed the law as to negroes, but not as to Chinese. Where white men were parties the statute yet remained, depriving the Mongolian of the right to testify in a court of law. What was the consequence of preserving that statute? I will tell you. During the four years of rebellion a good many of our 'southern brethren' in California took upon themselves the occupation of what is there technically called 'road agents' . . . . They turned out upon the public highways, and became robbers, highway robbers . . . . The Chinese were robbed with impunity, for if a white man was not present no one could testify against the offender. They were robbed and plundered and murdered, and no matter how many of them were present and saw the perpetration of those acts, punishment could not follow, for they were not allowed to testify. Now, sir, I am very glad indeed that we have determined at length that every human being may relate what he heard and saw in a court of law when it is required of him, and that our jurors are regarded as of sufficient intelligence to put the right value and construction upon what is stated.

171. *Id.*, App. at 219.
172. *Id.* at 3034.
173. *Id.* at 3210.
174. H.R. REP. No. 21, 40th Cong., 2d Sess. 5 (1868).
175. 40(2) Globe 1077 (1868) (Sen. James Harlan, R.-Iowa).

greater and hence the intending criminal is more deterred. This greater deterrance is a protection afforded by the law.[176]

The Enforcement Act of 1870,[177] the first law passed to enforce the Fourteenth Amendment, therefore extended the right to testify to all persons[178] and was not limited to citizens as the 1866 statute was.[179] The section making this extension was designed for the benefit and protection of the west coast Chinese,[180] and was referred to as the "Chinese bill."[181] Yet in 1871 Senator Oliver P. Morton, an Indiana Republican lawyer, complained:

> [T]he State of Kentucky to-day nullifies an important provision of the fourteenth amendment, and also of the 'civil rights bill,' by refusing to colored people the right to testify in her courts in any case, civil or criminal, to which a white person is a party. A white man may enter a colored congregation and shoot the minister in the pulpit, and if there are no white witnesses he cannot be prosecuted. No wonder that the press is teeming with crimes committed upon the colored people of that State. And the supreme court of California, in a recent decision, refusing to the Chinese the right to testify in cases to which white persons are parties, while not directly denying the authority of the fourteenth amendment, asserts the existence of State rights, which would subvert it utterly.[182]

Indeed, even Senator Davis of Kentucky conceded that the exclusion of colored witnesses in his state was indefensible.[183] A Republican senator

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176. People v. Brady, 40 Cal. 198, 6 Am. Rep. 604 (1870).
177. 16 Stat. 140 (1870).
178. 41(2) Globe 1536, 3480 (1870).
179. Senator George Vickers, a Maryland Democratic lawyer, listed the right to testify as one of the privileges of citizens. *Id.* at 1559.
180. *Id.* at 3658.
181. *Id.* at 3702.
182. 41(3) Globe 1252-53 (1871). Senator Frederick A. Sawyer, a South Carolina Republican, likewise remarked: "But that same prejudice . . . exhibited itself when you decreed that the testimony of a colored man should be admitted in your courts of justice." *Id.* at 1058.
183. 42(1) Globe 346 (1871), where he observed:

> [T]hey were always excluded from giving evidence in the courts. I admit that this exclusion is a wrong; it is a wrong to the negro; it is a wrong to the white man. This exclusion never would have existed if the negro had not been in a state of slavery. . . . It was because they were slaves, and because the slave was subject to the dominion and will of his master, that as a matter of public policy the negro was excluded from giving testimony. But I concede that so soon as the negro became free the reason for the exclusion ceased, and it is not only a matter of right to him, but it is a matter of right to the white man, to every man who has a controversy in court about which a negro knows anything, that the party

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asserted that the right to be a witness was a privilege of national citizenship.[184] Senator Allen G. Thurman, an Ohio Democrat and chief justice of the state supreme court in ante-bellum days, observed that "in some of the States negroes were not allowed to testify in courts of justice against white men, and that was thought to be a denial of the equal protection of the laws."[185]

The right to testify came up once again in debate on the supplementary civil rights bill offered by Senator Charles Sumner of Massachusetts.[186] Sumner declared that equality before the law included this right,[187] "an important right which had been denied most cruelly even in many of the northern States, making the intervention of the nation necessary . . . ."[188] Morton added:

> It has now been settled I believe . . . that under the fourteenth amendment a man cannot be excluded from testifying in a court of justice because of his color. I think Kentucky has just given way upon that question. I believe a bill has passed one house of the Legislature, and perhaps both, allowing colored men to testify. It was enacted by the civil rights bill of 1866 that no man should be excluded from the witness-box in the State courts because of his color; in other words, it was his privilege, it was an immunity under the Constitution of the United States belonging to the citizen of the United States, that he should be allowed to testify, not only for his own protection, but for the protection of others.[189]

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in court should have the benefit of the negro's knowledge, where he has capacity to give his evidence.

I have no doubt that our Legislature will come to establish that law of evidence. The Legislature have been obstinate, I admit, in refusing it; but the good sense, the sense of justice and of sound policy on the part of our people, will force them to do so.

See also *id.* at 648.

184. *Id.* at 577 (Sen. Matthew H. Carpenter, R. Wis.). See also 42(2) Globe 763 (1872).

185. 42(1) Globe App. at 221 (1871). See also 42(2) Globe 526 (1872): "For instance, in the State of Kentucky, at the time this amendment was passed, a negro man could not testify against a white man; and I am told that the State law on that subject has not been repealed yet."

186. Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873 (1966).

187. 42(2) Globe 381 (1872).

188. *Id.* at 728. See also *id.* at 385, citing Gray v. State, 4 Ohio 353 (1831).

189. 42(2) Globe 820 (1872). See also *id.* at 821, where Senator Matthew H. Carpenter, a Wisconsin Republican lawyer, declared: "The right to testify in court is undoubtedly one of those inherent privileges that belong to a citizen which the State cannot impair . . . ." And note Carpenter's remark that the right to testify is not a political right but a privilege of citizenship. *Id.* at 822. Again, at 827, he said: "[T]o swear in one's own behalf in the proper case is, in my judgment, one of those privileges of a citizen which a State may not, under the fourteenth amendment, abridge."

Senator John Sherman, an Ohio Republican lawyer, also noted:

> Kentucky is coming up. Kentucky is a little slow, but I think she will be all right. She has only within a few days given to negroes the right to testify; and we must remember that twenty or thirty years ago many of the northern States denied negroes that right; even the State of Ohio within thirty years has denied the negro the right to testify in any tribunal. . . . Nearly all the western States, Indiana, Illinois, and nearly all of them.[190]

Trumbull, too, reminded the Senate that the right to testify was the right of every free individual and was therefore a civil right.[191] This was in rebuttal to an argument that if the right to testify was a constitutional right, so was the right to be a juror.[192] By the end of reconstruction the right to be a witness, theretofore denied,[193] was deemed to be conceded.[194]

VI. Summary and Conclusions

The exclusion of colored persons as witnesses in cases where a white person was a party before the Civil War was an outgrowth of slavery and of the corresponding ignorance in which Negroes were kept in order that they might not become dissatisfied with their lot.[195] Even some of the northern states for a time maintained this exclusionary rule. The result of this rule was that many Negroes, free and slave, as well as Chinese on the west coast, were in actual fact denied the same protection of life, liberty, and property as was accorded to white persons. In criminal cases a colored victim, who was sometimes the only witness, was barred from testifying against the wrongdoer, thus permitting him to escape punishment and making it safer to commit a crime against a colored person than a white person. Where the only witnesses to a crime were colored, the law

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190. *Id.* at 845. He also pointed out:
> Why, sir, according to modern ideas and modern science, we gather evidence from everything living and dead. The dead are made to speak by the power of chemistry and by scientific observations. The living are made to speak, young and old. Any exclusion of a man because he is a negro from the right to testify is simply absurd, and in every State it will gradually disappear.

For the statute abolishing the rule in Kentucky see Ky. Gen. Stat. ch. 37, § 28 (1873).

191. *Id.* at 901.

192. *Id.* at 900 (Sen. George F. Edmunds, R.-Vt.).

193. 2 Cong. Rec. 415 (1874) (Rep. Bright); *id.* at 3453 (Sen. Frelinghuysen).

194. 3 Cong. Rec. 1866 (1875) (Sen. Edmunds).

195. Cf. State v. Read, 6 La. Ann. 227 (1851); State v. Worth, 52 N.C. 488 (1860).

was removed from the colored person to that extent. In civil cases, protection of property or personal security was in practical effect reduced because colored witnesses, who were sometimes essential to prove the necessary facts, could not testify. Thus, in both civil and criminal cases, colored persons were not afforded the same, or equal, protection which the law afforded to white persons similarly situated.

This denial of equal protection was assigned as the reason for removing the disqualification of colored witnesses in both the District of Columbia and later in the federal courts generally. Likewise, the provision in the Civil Rights Act of 1866 giving Negroes the same right to testify as white persons was placed on the ground that it was necessary for their protection in the use of the courts. Finally, in advocating the Equal Protection Clause of the Fourteenth Amendment, Representative Thaddeus Stevens declared that it would insure to the new freedmen the equal protection of state laws.

The history of the abolition of the rule against permitting Negroes to testify in cases where white persons were parties throws a strong and clear light on the meaning of the word "protection" in the Equal Protection Clause of the Fourteenth Amendment. The word "protection" is not properly equatible with anything anyone determines to be equal. It means exactly and literally what it says. The word "protection" does not mean benefit, right, privilege, or gratuity; it means defense against unlawful violence or other deprivation. A state is obliged under the Equal Protection Clause to grant to all persons whatsoever, whether citizens or aliens, residents or strangers, and of every class, race, creed, politics, financial status, or other status, the exact same protection of life, liberty, and property as it grants to all others. This is all that this rather modest, although now grossly inflated, clause was intended to mean.

The rule against allowing Negroes to testify was a practical denial of such protection. Hence, it was the motivation and need for the Fourteenth Amendment. Here was the evil to be remedied and the words used to remedy this evil. The nature of the evil clearly sheds light on the original meaning of the words so used. Any attempt to make these words fit situations not comprehended within their original scope cannot be justified by the original meaning of the Fourteenth Amendment.