

THE ORIGINAL UNDERSTANDING OF "EQUAL PROTECTION OF THE LAWS"

BY

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*When Adam delved and Eve span,
Who was then the gentleman?**

I. INTRODUCTION¹

It is old learning that the Fourteenth Amendment has been interpreted so that its most important sections have little resemblance to the original plan of its sponsors. Since the equal protection clause is in a setting which includes the many other provisions of the Amendment, we recount their fate.²

* Sullivan, *The Antecedents of the Declaration of Independence*, 1 ANN. REP. AM. HIST. ASS'N. 65, 80, (1902). The author credits this jingle, originating about the time of Wat Tyler's rebellion, as the first popularization of the idea of the equality of man and attributes its popularity to Wycliffe. The same conception was of course current among intellectuals many centuries earlier. See the valuable new work of Wormuth, *The Origins of Modern Constitutionalism*, c. 2 (1949).

1. A part of the work on this Article was done by the Authors in connection with a matter in litigation in which they participated as amici curiae, without compensation.

Bibliographical note: The leading published work on the historical interpretation of the Fourteenth Amendment is Flack, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908), and the outstanding unpublished work with which we are acquainted is JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1939), an unpublished doctor's thesis at the University of Illinois. An outstanding article is Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L. J. 371, 48 YALE L.J. 171 (1938). In addition to aid from these sources, the authors have considered all available works on the reconstruction period, particularly the biographies and memoirs of persons prominent at the time and the correspondence of Stevens, Fessenden, Trumbull, Morrill, Wilson, and Sumner at the Library of Congress for important months in the year 1866. Also examined were the various volumes of MCPHERSON'S SCRAPBOOKS of newspaper clippings on the Civil Rights Act of 1866, the Fourteenth Amendment, and the election of 1866; the legislative journals of the various states for the records of ratification of the Fourteenth Amendment; and the leading historical reviews. The primary source explored has been all discovered debates in Congress as well as committee reports and hearings relating to civil rights from 1860 to 1875. Substantially nothing of significance was found in the personal papers of prominent individuals although a more extended research into them might have richer results. The Sumner Manuscripts at Harvard were not studied as they were covered in the work of James, from which some references have been taken. The curator of manuscripts at the Burton Historical Collection of the Detroit Public Library informed us that there is nothing significant to this topic in their collection of the Howard Manuscripts for the year 1866. Newspaper files outside the McPherson collection have not been extensively studied.

2. The language of the two Sections of the 14th Amendment to which most reference will be made in this paper is as follows:

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

1. It soon became popularly believed that the primary purpose of the entire Amendment was to make the Negroes citizens. As Flack's researches have shown, however, the first sentence of the Amendment which has this effect was added, almost as an afterthought, after the Amendment had already left the Joint Committee on Reconstruction and had passed the House.³

2. Privileges and immunities to be protected from state interference were intended by the two major sponsors of the section to include at least the first eight Amendments of the Constitution, and perhaps a good deal more.⁴ The extreme vagueness of this phrase, however, permitted its quick reduction by interpretation to a virtual nullity.⁵ It has been of no consequence since.

3. The due process clause was almost ignored in the course of adoption.⁶ This clause has, of course, become the most important in the Amendment, and much of what the sponsors of the Amendment intended to be covered by the privileges and immunities clause has been absorbed by interpretation into due process.

4. As Graham has shown, the term "person" was never explicitly said to include corporations. In view of the very limited meaning given due process, there was little reason why anyone would have wanted to include corporations as persons.⁷ If the sponsors of the Amendment had any notion of including corporations within the protection of the section, it was probably as "citizens" under the privileges and immunities clause.⁸

of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

3. FLACK, *op. cit. supra* note 1, *passim*. The admission of a Negro to the bar of the Supreme Court on motion by Senator Sumner was widely regarded as a decision by the Court that Negroes were citizens and that the Dred Scott decision was overruled. For an account of that episode, including Sumner's correspondence with Chief Justice Chase through which the opinion of the Court was informally taken before the motion was made, see 9 WORKS OF CHARLES SUMNER 229-32 (1875).

4. Mr. Justice Black dissenting in *Adamson v. California*, 332 U.S. 46, 68, 92 (1947) (appendix); FLACK, *op. cit. supra* note 1, *passim*. Not only did the legislative leaders make the point categorically, but also it had front page press display. N. Y. Times, May 24, 1866, p. 1. Some evidence that this interpretation was not generally comprehended is offered in Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

5. The Slaughterhouse Cases, 16 Wall. 36 (U.S. 1873). Boutwell, a member of the Joint Committee on Reconstruction, observed in his memoirs: "The part relating to 'privileges and immunities' came from Mr. Bingham of Ohio. Its euphony and indefiniteness of meaning were a charm to him." 2 BOUTWELL, REMINISCENCES OF SIXTY YEARS 41 (1902).

6. No reference to due process was found which gives it more than a procedural connotation.

7. Graham, *supra* note 1, *passim*; Boudin, *Truth & Fiction About the Fourteenth Amendment*, 16 N.Y.U.L.Q. REV. 19 (1938).

8. In 1871 Bingham, principal draftsman of Section One of the Amendment, urged a bill to declare corporations citizens for privileges and immunities purposes. This accords with the position taken by Webster in *Bank of Augusta v. Earle*, 13 Pet. 519, 549 (U.S. 1839), discussed in SWISHER, ROGER B. TANEY c. 18 (1935). For a brief account of the Bingham bill, see McLaughlin, *The Court, the Corporation, and Conkling*, 46 AM. HIST. REV. 45, 51 (1940).

Against this background this Article will explore the original understanding of the equal protection clause.

Before the exploration, warnings must be given. The generalities of the Fourteenth Amendment, as reported from Committee, were voted upon by 218 Congressmen, were discussed in hundreds of speeches and countless editorials in the election of 1866, and were thereafter voted upon by some thousands of state legislators. Even if the times had been calm and conditions static, the general phrases of the Amendment could not have meant even approximately the same thing to all who voted upon them; and in fact, interpretations did diverge widely.

Moreover, the times were not static. In 1860, slavery was solidly entrenched in the United States. In a short five years had come the progression: the freeing of slaves used for military purposes by the Army; the prohibition against returning slaves who crossed Union lines; the termination of slavery in the District of Columbia; the abandonment of fugitive slave laws; the Emancipation Proclamation; the first equal rights laws for the District of Columbia; the establishment of schools for all in the District; the admission of Negroes into the military forces; the elimination of restrictions against Negroes carrying the mails; the prohibitions of exclusion of Negroes from transportation in the District; and the Thirteenth Amendment itself.⁹

The rapidity with which abolition proceeded makes it particularly misleading to point to single examples of extant conditions with the assurance that the Fourteenth Amendment meant either to forbid or to perpetuate them. For example, when the Amendment was drafted, Massachusetts gave completely equal rights to Negroes, including their acceptance without segregation in the common schools. But Indiana barred them from the schools altogether, forbade them to make enforceable contracts, did not let them testify in court, and excluded Negro newcomers from the state.¹⁰

This very variety of policy highlighted the question of the status to be given the freedman. That question was broached, rather than resolved, by the Thirteenth Amendment. Prior to that Amendment there were two principal categories of persons in the United States, the slave and the free.¹¹ Emancipation did not necessarily move the Negroes from the one class to the other. In ancient civilizations, ". . . the world was not a place inhabited solely by free persons and slaves. Between men of these extremes of status

9. The summary is taken from WILSON, HISTORY OF ANTI-SLAVERY MEASURES, 1861-65, 346-352 (1865).

10. Indianans were completely aware that equality meant a total change in their own treatment of Negroes. *E.g.*, Speech, Governor O. P. Morton of Indiana, Sept. 29, 1865 (Lib. Cong. pamphlet), p. 13, 14; *Report of Supt. of Public Instruction*, IND. Doc. J. 337-39 (1865-66).

11. There was of course a small class of free Negroes in the North and South whose status, as is noted in the text, varied from state to state.

stood social classes which lived outside the boundary of slavery but not yet within the circle of those who might rightly be called free."¹² In this respect, antiquity might be reproduced, and a new class might be created by which the ex-slave would be placed in a social limbo, equivalent perhaps to that of the less happy castes of India. If the range of status from slavery to complete freedom may be thought of as a scale, the reconstruction generation had to decide where within that scale the freedman should be placed.

The Fourteenth Amendment was a merger of ideals and politics resulting from the desire to assure the rewards of victory to the various interests represented by the prevailing political factions in the Civil War and to maintain those factions in office. The Civil War precipitated a complete political and economic revolution in both the South and North which has led historians to call it the Second American Revolution. The Thirteenth, Fourteenth, and Fifteenth Amendments must be analyzed in part as the Second American Constitution.

Although the Republican party, taking the nation as a whole, was still a minority group at the close of the Civil War, once the South was made impotent the way was clear for Republican dominance. The party itself was a coalition among three major groups—the Northern manufacturers hungering for high tariffs, the farmers of the Middle West desiring free lands, and the abolitionists.¹³ As is frequently the case, the product of this conglomeration contained elements designed to placate each. Tariffs were raised; free land was made available to the farmers; and the Civil Rights Act of 1866 was passed to satisfy the abolitionists.¹⁴ The Fourteenth Amendment was also a result of the convergence of these divergent interests in the Republican party.

Many felt that a variety of problems would be solved by granting the ballot to Negroes, for it was thought that the concomitant political power would be sufficient to protect their rights.¹⁵ As a further value, Stevens saw the ascendancy of the Union party in the South as a result of such enfranchisement.¹⁶ Moreover, if the Negro were to vote Republican, he deserved Republican protection as much as the industrialists and farmers.¹⁷ Thus, Republicans could unanimously support an equal rights amendment as well as

12. Westermann, *Between Slavery and Freedom*, 50 AM. HIST. REV. 213, 214 (1945).

13. 2 BEARD, *THE RISE OF AMERICAN CIVILIZATION* 31 (1935).

14. 2 MORRISON AND COMMAGER, *THE GROWTH OF THE AMERICAN REPUBLIC* c. 1 (1942). For an account of the economic situation of the South at the close of the war, see HESSELTINE, *THE SOUTH IN AMERICAN HISTORY* 482-489 (1943). For recognition that a new economic order was dependent upon the Republicans, see Address of Representative Boutwell, *Reconstruction and Its Relations to the Business of the Country*, Dec. 27, 1866 (Lib. Cong. pamphlet); CONG. GLOBE, 42nd Cong., 1st Sess. 339 (1871) (speech by Representative Kelly).

15. CARL SCHURZ PAPERS 279 (1913); 2 MCPHERSON'S SCRAPBOOK, ELECTION 1866, at 26.

16. CONG. GLOBE, 39th Cong., 2d Sess. 252 (1867).

17. 1 MCPHERSON'S SCRAPBOOK, ELECTION 1866, at 143, 144.

an amendment for equal suffrage in the Southern states. The climate was not yet ripe for the North to impose equal suffrage upon itself, for few Northern states gave Negroes the ballot and the radicals doubted that such an Amendment would be ratified.¹⁸

Two different proposals were introduced by the Republicans to attain their objectives. One of these was Bingham's equal rights amendment reported out the Reconstruction Committee in February 1866. This proposal was soon postponed on the floor of the House because of the adverse sentiment it provoked.¹⁹

On the political problem of suffrage, Blaine introduced an amendment which was successfully carried through the House in February 1866 with the aid of Stevens.²⁰ The Blaine amendment was ingenious. Instead of imposing Negro suffrage, it merely reduced a state's representation proportionately to the classes excluded. This would force the Southern states either to enfranchise Negroes or to accept a sharply reduced representation, but would have little or no effect upon the Northern states with their tiny Negro population. The Blaine amendment was defeated in the Senate by Sumner with a provocative two-day speech in which he declared that he would never permit a provision to enter the Constitution which implied that there might be less than complete equality.²¹ Thus, both the equal rights and suffrage proposals initially met defeat.

The problem was solved by redrafting both proposals and combining them as sections one and two of the amendment, while adding a third section to keep prominent Confederates out of office and a fourth section to guarantee payment of the Northern, but not the Southern, war debt. This combination passed both houses as the Fourteenth Amendment, and accompanying legislation made its ratification by Southern states a prerequisite to their readmission to Congress.

Section one of the Fourteenth Amendment as it was thus passed contains the equal protection clause. Before the original meaning of it is discussed, we shall consider the source of the phrase; what men were associated with it; and why this particular language came into the Constitution at all.

18. Cf. Editorial, *Baltimore American*, Jan. 2, 1866. See House, *Northern Congressional Democrats as Defenders of the South during Reconstruction*, 6 J. SOUTHERN HIST. 46 (1940); Simpson, *Political Significance of Slave Representation 1787-1821*, 7 J. SOUTHERN HIST. 315 (1941).

19. For an account of the consideration of the Bingham amendment at this stage, see FLACK, *op. cit. supra* note 1, at 56-65 and JAMES, *op. cit. supra* note 1, at 91-96.

20. For an account of the Blaine amendment, see FLACK, *op. cit. supra* note 1, at 97 *et seq.*

21. The addresses on this topic are included in 10 SUMNER, *op. cit. supra* note 3, at 282, 338. His central theme was "Equal Rights of All, at the ballot box as in the court room." *Id.* at, 124.

II. THE GENESIS OF AN IDEA AND A PHRASE

"All men are created equal" and "equal protection of the Laws" are phrases which, though closely related, have had distinct histories and have served very different purposes in the course of slavery and freedom.

Because of the first phrase, the Declaration of Independence became the rallying cry and the greatest verbal symbol of the abolitionists. With cheerful disregard of the fact that it had been penned by slaveholders, the abolitionists pre-empted the "created equal" slogan so successfully that their adversaries were finally forced into head-on attack on the slogan itself and even on the Declaration.²²

Like most great slogans, "created equal" provided no solution for concrete cases once slavery itself was abolished. For these cases, *e.g.*, whether a freedman had a right to ride a street car, the abolitionists needed an instrument more precise than their historic broadside.

The transition from a slogan to a legal tool originated in a controversy over the admission of Negroes to Massachusetts schools. In 1845, the Massachusetts legislature provided that Negroes should be educated in public schools. The bill was passed under the vigorous leadership of Henry Wilson, prominent industrialist and abolitionist who later became United States Senator and Vice President and who had led the successful fight for repeal of the Massachusetts laws against miscegenation. In the State Senate in 1844 and 1845, he had advocated the admission of Negroes onto railroad cars and had carried the fight for schools. His argument in the State Senate, which constantly reiterated the theme of equality, was that Negroes should have "the full and equal benefits of our public schools."²³

Boston responded to the Wilson bill by establishing public but separate schools for Negro children. The validity of that arrangement came before the Massachusetts Supreme Court in 1849 in *Roberts v. Boston*.²⁴ Counsel for Roberts was Charles Sumner, a follower of Henry Wilson. Sumner's oral argument,²⁵ distributed through Abolitionist ranks as a pamphlet, provided the intellectual material for the transition of "equality" from aphorism to legal tool.

Sumner contended that separate schools were incompatible with both the statutes and Constitution of Massachusetts. Since no word in either source specifically dealt with the problem, he was forced to work from generalizations, and the fundamental generalization which he chose was the passage in the Massachusetts Constitution that "All men are born free and equal."

22. See 2 SUMNER, *op. cit. supra* note 3, at 331, n. 2.

23. NASON, *LIFE OF HENRY WILSON* 48-50 (1876).

24. 5 Cush. 198 (Mass. 1850).

25. For a complete reprint of this argument, see 2 SUMNER, *op. cit. supra* note 3, at 327.

Recognizing the difference between a slogan and a proposition of law, Sumner said:

Of Equality I shall speak, not as a sentiment, but as a principle. . . . Thus it is with all moral and political ideas. First appearing as a sentiment, they awake a noble impulse, filling the soul with generous sympathy, and encouraging to congenial effort. Slowly recognized, they finally pass into a formula, to be acted upon, to be applied, to be defended in the concerns of life, as principles.²⁶

For the purpose of creating the "formula, to be acted upon, to be applied," Sumner made the first known use in English of the phrase "equality before the law."²⁷ He discussed the origins of equality the sentiment, finding its traces in Herodotus, Seneca, and Milton,²⁸ and then took up the transition into formula through the French Revolution and its predecessor philosophers. Diderot and Rousseau, he explained, had acclimated the French to the sentiment, and the Revolutionary Constitution in 1791 took a new step. Its first article declared, "Men are born and continue free and equal in their rights," thus marking the first occasion in which equality of rights was made a legal consequence of "created equal". Sumner traced the rest of the French experience: the Constitution of February 1793, which had declared "The law ought to be equal for all," the Constitution of June 1793, providing "All men are equal by nature and before the law;" and finally the memorable crisp phrase in the Charter of Louis Phillippe, "Frenchmen are equal before the law."

This principle of equality of rights, Sumner declared, was the real meaning of the Massachusetts Constitutional provision which gave equal rights to every human being.²⁹ No distinctions whatsoever could validly be made because of race, and hence separate schools were illegal.

The Massachusetts Court rejected Sumner's argument, but the legislature thereupon overruled the court and explicitly provided that Negroes

26. *Ibid.* This transition did not finally occur until the Fourteenth Amendment was ratified. GUTHRIE, LECTURES ON THE FOURTEENTH AMENDMENT 110 (1898), observed that by it, equality passed from "a mere theory or sentiment" into "organic law."

27. As will be shown, the phrase was already familiar in French as "Égalité devant la loi."

28. BRANNON, THE FOURTEENTH AMENDMENT 317 (1901), would give Cicero a prominence in the development of the idea of equality which Sumner disregarded in this argument. Sumner's primary concentration in developing the origins of equality on classical and French sources is probably due to his own study in France. Trumbull referred to Blackstone as a starting point: ". . . the restraints introduced by the law should be equal to all, or as much so as the nature of things will admit." CONG. GLOBE, 39 Cong., 1st Sess. 474 (1866), quoting 1 BL. COMM.,* 126, 127 (1807 ed.). On equality as an idea in political thought, see *Equality*, 5 ENCYC. SOC. SCI. 574 (1931).

29. "He may be poor, weak, humble, or black—he may be of Caucasian, Jewish, Indian, or Ethiopian race—he may be of French, German, English, or Irish extraction; but before the Constitution of Massachusetts all these distinctions disappear. He is not poor, weak, humble, or black; nor is he Caucasian, Jew, Indian, or Ethiopian; nor is he French, German, English, or Irish; he is a MAN, the equal of all his fellow-men." 2 SUMNER, *op. cit. supra* note 3, at 341-42.

should be admitted without separation into public schools.³⁰ The argument, however, outlasted the case. "Equality before the law," used interchangeably with "equal rights," was a proposition by which particular proposals concerning freedmen could be measured.

Sumner, as the foremost theoretician of the abolitionists, in high office, was the center of the move to write his formula into the Constitution. When the Thirteenth Amendment was before the Senate in 1864, its sponsors chose to use the language of the Northwest Ordinance as the base of their draft.³¹ Sumner expressed no strong objection, since his first object was extinction of slavery by any formula; but he did suggest as a substitute for purposes of consideration a proposal that "All persons are equal before the law, so that no person can hold another as a slave."³² The Sumner phraseology, obviously careful, would write into the Constitution not merely the extinction of slavery but *also* the principle of equal rights, the demand of radicals everywhere.³³

Two proposals were the direct parents of the equal protection clause. On December 6th, 1865, Representative Bingham of Ohio proposed an Amendment authorizing Congress "to secure to all persons in every State of the Union equal protection in their rights, life, liberty, and property."³⁴ It is, so far as we know, the first use of the phrase "equal protection" in a proposed constitutional Amendment.³⁵

30. GEN. LAWS MASS., c. 256, § 1 (1855).

31. Article VI of the Northwest Ordinance provides: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes, whereof the party shall have been duly convicted." 1 U.S.C. xxxv (1946).

32. CONG. GLOBE, 38th Cong., 1st Sess. 1482 (1864).

33. Though the Sumner words were not adopted, the central idea of equality was generally in men's minds in connection with the Thirteenth Amendment. *E.g.*, Representative Marcy opposed the Thirteenth Amendment because his constituents "do not believe that the black man is equal to the white," (*id.* at 2950), while Representative Orth supported it as a practical application of the proposition that "all men are created equal." CONG. GLOBE, 38th Cong., 2d Sess. 142 (1865). Thereafter the idea stayed at the forefront of discussion. A Pennsylvania State Equal Rights League signed its correspondence, "Yours for justice and equality before the law." Letter to Stevens of Nov. 1, 1865, in STEVENS MANUSCRIPTS (Lib. Cong. 1865). One of Sumner's correspondents wrote, let us dictate "no distinction of color or person, all equal before the law." JAMES, *op. cit. supra* note 1, at 31, quoting SUMNER'S MANUSCRIPTS.

Representative Justin Morrill of Vermont scribbled a note to Sumner asking for advice as to the best way to incorporate this sentiment into law: "Then as to apt phrase, can you leave all in a jural phrase. Say—all citizens of U.S. resident (in) said States are equal in their civil rights, immunities & privileges and equally entitled to protection in life, liberty and property. . . ." JAMES, *op. cit. supra* note 1, at 31, quoting SUMNER'S MANUSCRIPTS. There is no doubt that Sumner found this formulation adequate. For example, he proposed that Southerners take an oath that they would "discountenance and resist any laws making any distinction of race or color; and . . . strive to maintain a State government . . . where all men shall enjoy equal protection and equal rights." SUMNER, *op. cit. supra* note 3, at 22.

34. See note 21 *supra*.

35. The Massachusetts Constitution of 1780 contained the phrase in a different context in its Article III: "And every denomination of Christians, demeaning themselves peaceably, and as good subjects of the Commonwealth, shall be equally under the protec-

The other proposal originated in the Senate and was the product of three bills. The first, S. 9, was sponsored by Senator Wilson and invalidated all laws "whereby or wherein any inequality of civil rights and immunities" existed because of "distinctions or differences of color, race or descent."³⁶ By whatever political agreement there may have been between Senator Trumbull and Wilson,³⁷ it developed that within a few days from the introduction of S. 9, Wilson introduced a new bill, S. 55, the first section of which was substantially the same as S. 9, and asked that it be referred to Trumbull's committee.³⁸ S. 55 was never heard of again; but on the first day after the Christmas recess in 1865, Trumbull introduced S. 61 which was a broader bill containing verbatim the vital language of the earlier bill.³⁹ S. 61 was reported back from Trumbull's committee quickly and speedily became the Civil Rights Act of 1866.

As introduced by Trumbull, S. 61 reduced the somewhat lengthy language of Section 1 of S. 55 (né S. 9) to a phrase forbidding "discrimination in civil rights or immunities among the inhabitants of any State . . . on ac-

tion of the law." And see similarly N. H. CONST. ART. VI (1792); ME. CONST. ART. I, § 3 (1819).

Conceptions similar to equal protection also existed in other early state constitutional provisions. Requirements of a uniform system of taxation in effect require equal protection in a narrow field. *Levy v. Smith*, 4 Fla. 154 (1851); *State v. Lathrop*, 10 La. Ann. 398 (1855); *Milwaukee & Miss. R. R. v. Supervisors*, 9 Wis. 431, 449 (1855); *cf. Smith v. Judge 12th District*, 17 Cal. 548, 555 (1861). The common law distinction between general and special legislation was ancient, *Holland's Case*, 4 Co. Rep. 75 (1597); and distinctions in terms of the reasonableness of classifications in interpretations of provisions of this kind were becoming explicit before 1865. *Reed v. State*, 12 Ind. 641 (1859); *Hingle v. State*, 24 Ind. 28 (1865); *cf. Madison & Ind. R. R. v. Whiteneck*, 8 Ind. 217, 240-43 (1856).

The expression "equal protection" had been used by Bingham as early as 1857 in a fashion indicating that he then made no distinction between it and due process. *CONG. GLOBE*, 34th Cong., 3d Sess. 140 (App. 1857). On this and other occasions before the War, Bingham developed extensively a trinitarian theme of "privileges and immunities", "due process", and "equality", *CONG. GLOBE*, 34th Cong., 1st Sess. 124 (App. 1856); *id.*, 34th Cong., 3d Sess. 140 (App. 1857); *id.*, 35th Cong., 2d Sess. 984-985 (1859). We find the actual phrase "equal protection", however, used only on the occasion mentioned.

36. *CONG. GLOBE*, 39th Cong., 1st Sess. 39 (1865).

37. Although this is somewhat of a speculation, Trumbull was facing re-election in Illinois early in 1866 and needed the strength which might come from participating spectacularly in Reconstruction policy. In the campaign, a major issue developed as to whether Trumbull was really the author of the sentence in the Civil Rights Act of 1866 declaring Negroes to be citizens, but Trumbull made no claim to drafting the rest of the Act. See *MCPHERSON'S SCRAPBOOK, ELECTION OF 1866*, at 122-32.

38. *CONG. GLOBE*, 39th Cong., 1st Sess. 108, 111 (1865). Section two of S. 55, in the Library of Congress printed bills collection, provided: "All inhabitants of any State or Territory of the United States, without distinction of color or race, shall be entitled to make and enforce contracts, to sue, be parties, and give evidence in all courts and causes, to lease, purchase, hold, sell, and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person and estate."

39. *CONG. GLOBE*, 39th Cong., 1st Sess. 129, 184 (1866). For general historical surveys of events in Congress during the Thirty-ninth Congress, see *BARNES, THE THIRTY-NINTH CONGRESS* (1867) (amounts to extended summary of the *Globe*); *WILSON, HISTORY OF RECONSTRUCTION MEASURES, 1865-68* (1868); *BEALE, THE CRITICAL YEAR* (1930) (conservative viewpoint); 5 *RHODES, HISTORY OF THE UNITED STATES* c. 30 (1906) (radical); 2 *BLAINE, TWENTY YEARS IN CONGRESS* c. 5 (1884); 2 *FESSENDEN, WILLIAM PITT FESSENDEN* 60 *et seq.* (1907); *MILLER, THADDEUS STEVENS* c. 20 (1939).

count of race, color, or previous condition of slavery." Section two of S. 55, retained virtually intact by Trumbull, named specific rights to be enjoyed "without distinction of color or race," and concluded that all inhabitants should have "full and equal benefit of all laws and proceedings for the security of person and estate." In this form, S. 61 passed the Senate. As Trumbull said, its object was "to break down all discrimination between black men and white men."⁴⁰ Senator Howard of Michigan, one of the drafters of the Thirteenth Amendment and a member of the Joint Committee on Reconstruction shortly to prepare the Fourteenth Amendment, concurred: "In respect to all civil rights, there is to be hereafter no distinction between the white race and the black race."⁴¹

The House eliminated some of the language in S. 61. Members disagreed among themselves as to what the phrase "civil rights or immunities" might mean, and this vagueness caused it to disappear from the Bill,⁴² though the "equal benefits" phrase remained. Bingham opposed the Bill on the floor of the House, being the only Radical to do so, on the ground that it should await a broader Constitutional foundation than the Thirteenth Amendment. He insisted that there must be a new Amendment which would eliminate all "discrimination between citizens on account of race or color in civil rights."⁴³

Immediately after passage of the Civil Rights Act of 1866, the Joint Committee on Reconstruction presented the Fourteenth Amendment. The actual drafting of the first section was done by Bingham. For the equality clause he had before him two precedent phrases, his own "equal protection in their rights" and the Wilson-Trumbull Civil Rights language, "equal benefit of all laws." It seems clear that he combined the two phrases and thus arrived at the formula "equal protection of the laws." More important, he avoided the quandary that he himself had seen in the Civil Rights Bill which in the Senate draft gave equality in vague categories of cases. Bingham dropped the limitations, making the equality co-extensive with the broad claims of Negro rights espoused by his fellow dominant members of the Reconstruction Committee, Stevens and Howard.⁴⁴

When the Fourteenth Amendment reached the floor, and indeed when it was before the country, only general attention was given to the first section,

40. CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866).

41. *Id.* at 504.

42. For various statements of doubt as to meaning, see CONG. GLOBE, 39th Cong., 1st Sess. 1117, 1121, 1268-71, 1290-93 (1866) (remarks of Wilson, Roger, Kerr, Bingham).

43. *Id.* at 1291, 1293.

44. The Stevens proposal had been that all laws should be "equally applicable to every citizen, and no discrimination shall be made on account of race and color." CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865). The Howard view was that "in respect to all civil rights, there is to be hereafter no distinctions between the white race and the black race." *Id.* at 504.

and particularly the equal protection clause. Primary attention of all was on the political sections.⁴⁵

The principal statements made on the floor of Congress concerning the first section were to the effect that it put the Civil Rights Act of 1866 beyond the reach of repeal.⁴⁶ Randall, as a leading Democrat in opposition, protested that "equality in every respect between the two races" should not be ordered by Congress.⁴⁷ The typical House statement on equal protection was so general as to have no particular meaning.⁴⁸ Senator Howe, a prominent Republican, listed as elements of equal protection the right to hold land which has been purchased, the right to collect wages, and the right to appear in Court and give testimony; but he stressed that "these are not the only rights," and added, as an example of a denial of equal rights, Florida's discrimination between the races in educational systems.⁴⁹ Senator Howard, floor leader for the Amendment in the Senate, summarized the meaning of the clause thus: it "abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another." Howard finally reduced the clause to the familiar phrase: "It establishes equality before the law. . . ."⁵⁰

We conclude that the fundamental working legal theory of equality before the law, or equal rights, or equal protection was formulated for American law by Sumner, and popularized under his leadership. The actual language of equal protection found its way into the Constitution from the Sumner draft of the 13th Amendment, to the Wilson draft of the Civil Rights Bill, through Trumbull as public sponsor of the Civil Rights Bill, and certainly through Bingham.

To this group of the four "insiders" must be added the eleven majority members other than Bingham of the Joint Committee on Reconstruction,

45. Republicans were jubilant over the fact that the South would lose 25 of its 75 representatives unless it admitted Negroes to suffrage and that Confederate leaders would be disqualified from office. Only ten of several hundred newspaper clippings related to Section One of the Amendment. MCPHERSON'S SCRAPBOOK, THE FOURTEENTH AMENDMENT.

46. See, e.g., opening statement of Stevens in support of the Amendment, CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

47. *Id.* at 2530.

48. E.g., the observations of Representative Farnsworth which consist largely of elaborate repetition of the phrase. *Id.* at 2539.

49. *Id.* at 217, 219 (App.)

50. *Id.* at 2766. After passage by Congress, the Amendment went to the state legislatures for ratification. What few fragments there are relevant to the interpretation of equal protection have not been very helpful. Typical is the fairly meaningless comment of Governor F. F. Low of California, in recommending ratification to his state legislature: "This section declares 'equality before the law' for all citizens, in the solemn and binding form of a constitutional enactment, to which no reasonable objection can be urged." CALIF. SEN. J. 49 (1867-68). Governor Curtin of Pennsylvania, in his message recommending ratification, thought the meaning of Section One too obvious for serious comment. 1 PA. EXEC. DOCS. (Jan. 2, 1867).

from which the Amendment actually emerged. The total number of "insiders" is thus fifteen, and a central inquiry is the determination of the meaning of equal protection to them.

On the specific problems of equality considered, for example the nature of the equal right to testify, to sue, and to hold property, this group appears to have been a unit in meaning. Their stand on specific questions is outlined in sections following. On the broader question of whether equal protection would, under any circumstances, permit laws making distinctions based on race or color, there is less uniformity and less precise evidence. We conclude that of the 15, Sumner, Wilson, Bingham, Howard, Stevens, Conkling, Boutwell, and Morrill probably accepted an interpretation of equal protection which precluded any use whatsoever of color as a basis of legal distinctions.⁵¹ Trumbull, Fessenden, and Grimes, on some occasions, countenanced some types of segregation, at least as to miscegenation.⁵² The positions of Harris, Williams, Blow, and Washburne are unascertained.⁵³

III. INTERPRETATION OF EQUAL PROTECTION DURING RECONSTRUCTION

The *Slaughterhouse Cases* in 1873 gave this interpretation to the equal protection clause: "We doubt very much whether any action of a State not directed by way of discrimination against the Negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency [the Black Codes], that a strong case would be necessary for its application to

51. Nothing need be added to the text references as to Sumner, Wilson, Howard, and Stevens. Conkling's position is established by his regular support of the Sumner Civil Rights Bill of 1875, discussed at length *infra*, as is Morrill's and Boutwell's; and in addition Boutwell, as a typical Massachusetts abolitionist, held the view that he would positively require intermingling of the races to break down prejudices. CONG. GLOBE, 43d Cong., 1st Sess. 4116 (1874). Morrill consistently opposed any distinctions based on color. *Id.* at 2240. The case as to Bingham is less clear, because his preoccupation with his own Amendment was largely with the privileges and immunities clause. We know that he thought appropriate language should eliminate "all discrimination between citizens on account of race or color in civil rights." CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866). Since Bingham opposed the Civil Rights Act solely because he thought it should await passage of the Fourteenth Amendment, we assume that he thought the Amendment would at least cover that wide area of state discriminatory legislation.

52. These three Senators shortly split off from the radical wing of the Republican party, being among the seven Republicans who supported Johnson on impeachment. Both Fessenden and Trumbull believed that the Civil Rights Act and the Amendment did not affect anti-miscegenation legislation. CONG. GLOBE, 39th Cong., 1st Sess. 322, 505 (1866). Grimes saw no inequality in segregated transportation, CONG. GLOBE, 38th Cong., 1st Sess. 3133 (1864), although Trumbull seems to have had the opposite point of view on this question. *Id.* at 3132. SALTER, LIFE OF J. W. GRIMES 276-322 (1876), covers the years 1865-67 in Grimes' life and reveals no substantial interest in either the Amendment or reconstruction.

53. All four were routine radicals. Harris and Williams each served only one term in the Senate, and Blow served two terms in the House. Harris, Blow, and Washburne came to Congress with strong anti-slavery backgrounds. We have found no statements by any of the four which would give an indication of the breadth of equal protection to them.

any other."⁵⁴ This was narrow construction with a vengeance, and Justice Miller, its author, quickly recanted.⁵⁵ It was obvious from the discussion of the Amendment, its background, and its contemporary interpretation, that the clause reached all racial classifications, including groups other than Negroes.⁵⁶

Miller's observation, however, certainly did not conflict with contemporary understanding as to economic regulatory action unrelated to racial distinctions. Although there is little doubt that Republicans would have approved of restraints upon regulation of business had they thought of it, we have not found anywhere even a single intimation that this possibility did in fact occur to them.⁵⁷ In other words, there was no contemporary understanding of the relation of equal protection to business regulation.

A. *Equality in Courts and Commerce*

Under the pre-rebellion black codes, the free Negro's position differed little from that of the slave, except that a freedman had the right to the fruits of his own labor, usually the right to hold personal property, and in a few states the right to hold real property.⁵⁸ Also, he ranked a step above the slave in the law courts. The slave, of course, could not sue in the courts, since any rights of action arising out of transactions in which he was involved were the property of his master.⁵⁹ The free Negro could own rights of action, but like a minor, could frequently enforce them only by a suit through a guardian or next friend, a white man; and he could be a witness only in actions where only Negroes were involved.⁶⁰

In criminal law, the status of the free Negro was about on a par with that of the slave. Frequently statutes imposing liability on one imposed it on the other as well. Arson, burglary, mayhem (against a white person), rape or attempted rape (against a white person) were typical capital crimes both for slave and for free Negro.⁶¹ Preaching the gospel, using insulting language to white persons, assembling together to learn to read and write: these

54. *The Slaughterhouse Cases*, 16 Wall. 36, 81 (1873).

55. FAIRMAN, MR. JUSTICE MILLER 186, 187 (1939).

56. *Cf.* *Ho Ah Kow v. Nunan*, 12 Fed. Cas. 252, No. 6,546 (C.C. Cal. 1879) (equal protection extended to Chinese); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

57. There is, however, clear evidence that Congressmen were aware that the language was broader than the immediate evil faced. CONG. GLOBE, 39th Cong., 1st Sess. 2766, 1063-64 (1866) (statements of Howard and Stevens).

58. *E.g.*, COBB'S NEW DIG. LAWS GA. 993, 995 (1851).

59. LA. CIVIL CODE, Arts. 174, 175, 177 (1838). One of the rare exceptions to this proposition is *Sally's Guardian v. Beaty*, 1 Bay 260 (S.C. 1792), in which a slave was held to have the right to purchase and emancipate another slave. The leading collection of materials on legal aspects of the slavery system is 4 CATTERALL, JUDICIAL CASES CONCERNING AMERICAN SLAVERY (1936).

60. COBB, *op. cit. supra* note 58, at 973, 985, 988, 999; MISS. REV. CODE, c. 33, Art. 62 (1857).

61. LA. BLACK CODE, CRIMINAL OFFENSES § 7 (1806); COBB, *op. cit. supra* note 58, at 987.

were typical misdemeanors for the Negro, slave or free.⁶² Except in capital cases, the Negro, slave or free, was tried by a jury of slaveholders, who could convict by a majority vote.⁶³

The black codes after the War perpetuated or created many discriminations in the criminal law by applying unequal penalties to Negroes for recognized offenses and by specifying offenses for Negroes only.⁶⁴ Laws which prohibited Negroes from keeping weapons or from selling liquor were typical of the latter. Examples of discriminatory penalties were the laws which made it a capital offense for a Negro to rape a white woman, or to assault a white woman with intent to rape, or the ingenious bit of foresight by which the South Carolina legislature made it a felony without benefit of clergy "for a person of color to have sexual intercourse with a white woman by personating her husband."⁶⁵

In addition to the discriminations of the criminal laws, post-war Black Codes hedged in the Negroes with a series of restraints on their business dealings of even the simplest form. Though in many states the Negro could acquire property, Mississippi put sharp limitations on that right.⁶⁶ But most restrictive were the provisions concerning contracts for personal service. Many statutes called for specific enforcement of labor contracts against freedmen, with provisions to facilitate capture should a freedman try to escape. Vagrancy laws made it a misdemeanor for a Negro to be without a long-term contract of employment; conviction was followed by a fine, payable by a white man who could then set the criminal to work for him until the benefactor had been completely re-imbursed for his generosity. Minors were remembered in compulsory apprenticeship laws which arranged for long-term instruction in the arts of hoeing and cotton-picking. Not infrequently there were provisions that the former owner should have first call upon the labor of an ex-slave.⁶⁷

Congress of necessity had given considerable thought to the problems facing the Southern States. As arbiter of procedure for Federal Courts and

62. MISS. REV. CODE, c. 33, Art. 84 (1857); LA. BLACK CODE § 40 (1806); COBB, *op. cit. supra* note 58, at 1001, 1005.

63. COBB, *op. cit. supra* note 58, at 986; MISS. REV. CODE, c. 33, Art. 68 (1857).

64. For a collection of the black codes, see MCPHERSON, HANDBOOK OF POLITICS FOR 1868 29-44 (1868); 1 FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION c. 4 (1906). These codes were never in effect for a substantial length of time. MCPHERSON, *op. cit. supra*, at 36-38.

For the most valuable contemporary description of the South in the immediate post-Appomattox period, see 2 SEN. DOC. No. 2, 39th Cong., 1st Sess. (1865) (report by Major General Carl Schurz). Although it is frankly partisan in its radical viewpoint, it is nevertheless important for understanding of the Fourteenth Amendment, for it is what the radicals believed and acted upon.

65. 13 S.C. STAT. 277 (1865).

66. LAWS OF MISS. 82 (Reg. Sess. 1865).

67. ALA. ACTS 120 (1865-1866); 13 S.C. STAT. 302 (1865) (employees forbidden to leave master's premises without permission).

as legislator for the District of Columbia, Congress had faced essentially the same problems in converting from a slave system to a free one. In 1862 Congressional action applicable to the District abolished slavery,⁶⁸ repealed the Black Codes,⁶⁹ and prohibited exclusion of witnesses on account of color.⁷⁰ On July 2, 1864, there was passed Senator Sumner's amendment to the Civil Appropriation Bill which provided that witnesses could no longer be excluded on account of color in the Federal courts.⁷¹

Congress began the uprooting of these codes outside the District of Columbia with the Civil Rights Act of 1866. It provided:

. . . citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.⁷²

As can be seen, that Act dealt explicitly with the inequalities of the Black Codes in criminal and commercial law, and its principles passed into the equal protection clause. Indeed, Stevens occasionally defined Negro equality in terms of these obvious discriminations: ". . . the same law which punishes one man shall punish any other for the same offense; . . . the law which gives a verdict to one man shall render the same verdict to another, whether he is Dutch, Irish, or Negro."⁷³ He assured Congress when he presented the Fourteenth Amendment that Negroes would be subject to equal punishments, and would receive equal "means of redress" and equal right to testify.⁷⁴ The Act and the Amendment obliterated the commercial discriminations by giving Negroes equal rights to contract and to be subject to no vagrancy laws which did not apply to whites.

Considerable doubt exists as to whether the equal protection clause was meant to confer equality in jury service. The Civil Rights Act of 1866, which was quite explicit in its language, said nothing of jury service; "equal benefit of all laws and proceedings for the security of person and property" was the only language under which jury service could conceivably come.

68. 12 STAT. 376 (1862).

69. 12 STAT. 407 (1862).

70. 12 STAT. 539 (1862).

71. 13 STAT. 351 (1864).

72. 14 STAT. 27 (1866).

73. Speech at Lancaster, Pennsylvania, Sept. 27, 1866, in 1 McPHERSON'S SCRAPBOOK, CAMPAIGN OF 1866, at 48.

74. This subject was exhaustively considered in SEN. REP. No. 25, 38th Cong., 1st Sess. (1864) (Committee on Slavery and Freedmen).

Representative Wilson, floor leader for the bill, stated in debate that the Act would not affect jury service.⁷⁵ During the passage of the Fourteenth Amendment itself, no discussion of this point was had. Congress first acted to admit Negroes to juries in the District of Columbia in 1867,⁷⁶ labelling its bill an "equal rights" measure, although it had enacted five years earlier a provision requiring colored persons there to be subject to the same laws as free whites.⁷⁷ The Civil Rights Act of 1875 contained the first explicit provision for non-discrimination by states in jury service, indicating a subsequent judgment by the authors of the Amendment that jury service was included.⁷⁸ The Supreme Court promptly upheld the Act as within the equal protection clause.⁷⁹ It seems fair to conclude that, while Congress did not have jury service in mind in 1866 as a civil right, the language of the Amendment was broad enough to cover jury service in the apparent absence of any intent to the contrary.

Cases speedily came to lower courts testing the meaning of the Act, and it was interpreted as expected. A Delaware court held that Negroes could not testify regardless of the Act,⁸⁰ but Justice Swayne in a federal circuit court held to the contrary.⁸¹ George Ruby, a freedman beaten up by a New Orleans mob for teaching school, made history in Louisiana by being allowed to testify in the resultant assault case.⁸² The Attorney General of Tennessee declared that he would resist the Civil Rights Act by keeping Negroes out of the tipping-house and billiard trade; but the Memphis criminal court speedily overruled him with the pronouncement that "Negroes of Memphis may now open as many billiard saloons as they want."⁸³

In its criminal law aspect, the clause was the broadest possible generalization. To some it was the American equivalent of the pledge of Magna Carta: "We will sell to no man, we will deny to no man, we will delay to no man right or justice."⁸⁴

75. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866). Representative Wilson should not be confused with Senator Wilson. See also editorial to effect that jury duty is not a civil right. MCPHERSON'S SCRAPBOOK, CIVIL RIGHTS BILL OF 1866, at 41.

76. CONG. GLOBE, 40th Cong., 1st Sess. 727 (1867). The measure was pocket vetoed and then repassed in the next session as a measure "for the further security of equal rights." CONG. GLOBE, 40th Cong., 2d Sess. 51, 96 (1867). Again pocket vetoed, it finally was passed in Grant's administration. 16 STAT. 3 (1869).

77. 12 STAT. 407 (1862).

78. 18 STAT. 336 (1875), 8 U.S.C. § 44 (1946). Senator Carpenter ably opposed this provision, contending that jury service was a political, and not a civil, right; but he was over-ridden by his colleagues. See note 151 *infra*.

79. *Ex parte Virginia*, 100 U.S. 339, 345 (1879). Justice Field, dissenting, espoused the Carpenter position that jury service was a political right. *Id.* at 367, 368.

80. MCPHERSON'S SCRAPBOOK, CIVIL RIGHTS BILL OF 1866, at 149.

81. *United States v. Rhodes*, 27 Fed. Cas. 785, No. 16,151 (C.C. Ky. 1866).

82. MCPHERSON'S SCRAPBOOK, CIVIL RIGHTS BILL OF 1866, at 115, 116.

83. *Id.* at 109, 119.

84. "Nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam." The clause was given this florid interpretation by Bingham and Edmunds. CONG. GLOBE, 42nd Cong., 1st Sess. 697 (1871); *id.* at 81, 83 (App.).

B. Segregation

For the most part, the rights discussed above raise no possibility of reconciling equality with separation of Negroes from whites. The right to testify, for example, could not rationally be made a right to testify only in the presence of Negroes. On the other hand, a right to equal transportation could, at least without being as irrational, be a right to separate transportation.

Segregation, with its legal corollary of "separate but equal," is a term which our generation applies loosely as a unitary concept to cover the entire area in which separation of the races is feasible. This concept has been applied to such disparate situations as separation in transportation, schools, drinking fountains, housing, churches, hotels, restaurants, theaters, health services, employment opportunities, and cemeteries.⁸⁵

Difficulty exists in discovering the original meaning of equal protection as it relates to this problem because it never occurred to a substantial number of persons in the decade under study to approach this question in any such unitary way. Three distinct views can be identified. The abolitionist view of equality, represented by Sumner, permitted absolutely no distinctions of any kind based on color. Directly opposite was the views of the opponents of the Civil Rights Bill and the Fourteenth Amendment with their rough slogan of "no nigger equality."⁸⁶ Both of these groups may fairly be described as having a unitary concept of segregation. The abolitionists were against it in every context, though on this point no direct discussion among them has been found for the critical year of 1866. Some conservatives approved of segregation in all respects,⁸⁷ professing to believe that equal protection obliterated every restraint on intermingling.⁸⁸ This interpretation of equal protection probably was taken by them only as conventional opposition party Casandras, for after the Amendment was adopted the conservatives frequently gave a very narrow construction of the terms they had once thought so broad.

85. See MYRDAL, *AN AMERICAN DILEMMA* c. 28 (1944).

86. Senator Saulsbury of Delaware consistently represented this view. *CONG. GLOBE*, 38th Cong., 1st Sess. 1141, 1364 (1864). Contrast the resolution of the Republican State Convention at Syracuse, New York, in 1866, declaring that the Fourteenth Amendment terminated the old maxim "This is a white man's government", 1 MCPHERSON'S SCRAPBOOK, *ELECTION OF 1866*, at 3, with the opposition slogans: Placard of the Seventh Ward Johnson club in New York City at a Union Square rally, "No Negro equality", *id.* at 79; Address of General Spinola at a Johnson meeting in New York, "Every man who . . . rejects the Negro as his equal . . . will sustain the President," *id.* at 61; or the editorial of the St. Louis Republican supporting the Johnson veto of the Civil Rights Bill, "The President put his foot down on nigger equality." MCPHERSON'S SCRAPBOOK, *CIVIL RIGHTS BILL OF 1866*, at 54.

87. For example, Senator Hendricks of Indiana, a conservative, said that giving Negroes the right to testify, to be jurors, or to be in the same street cars with white persons was all of one erroneous piece: "These all stand upon the proposition that the Negro is the equal of the white man." *CONG. GLOBE*, 38th Cong., 1st Sess. 839 (1864).

88. See, e.g., remarks of Senators Cowan and Johnson, *CONG. GLOBE*, 39th Cong., 1st Sess. 500, 505 (1866).

Between these two extreme positions was a middle group which in the years 1865-68 in particular never had to take a stand on the problem as a whole because its outlines were not clearly perceived. Segregation, as compared, for instance, with twenty days hard labor for preaching the gospel, is a fairly refined development in the history of discrimination. In the South, with slavery just abolished, discrimination against the Negro which angered Congress was of a much cruder kind.

It is not surprising that Congress, concerned with securing to the freedman the most fundamental rights of life, liberty, and property, should not have devoted much time in its first post-war sessions to considering where he should sit in theaters and trains. Because the problem of segregation was never squarely faced during the incubation period of the Amendment, the task of interpreting mass opinion on equal protection with absolute assurance becomes impossible. This difficulty is heightened by acceptance in the middle group of a formula which evades precise analysis. Under that middle approach, there were three types of equality with corresponding rights: political equality, civil equality, and social equality. The equal protection clause was clearly not intended to include the right to vote.⁸⁹ Putting the question of political equality aside, this group made a hazy division between the other two terms, believing that equal protection granted "civil equality" but not "social equality." A typical example of a use of this conception by a supporter of the Amendment is Greeley's observation: "You can't make all men equal socially. One is stronger, better, braver than the other. Now what I want is that all men should be equal before the law. I want the black man to have his rights all over the South. The law should know nothing about a man's color."⁹⁰

One central theme emerges from the talk of "social equality": there are two kinds of relations of men, those that are controlled by the law and those that are controlled by purely personal choice. The former involves civil rights, the latter social rights. There are statements by proponents of the Amendment from which a different definition could be taken, but this seems

89. The history of the Amendment proves conclusively that the radicals were unable to deal with the suffrage problem at that time except by the circumlocutions of Section two of the Amendment. The whole reason for radical opposition to the Amendment was its failure to give complete and equal suffrage. The majority of the Massachusetts House Committee recommended against the Amendment because it permitted disfranchisement of Negroes, while the minority favored ratification but asked for an additional amendment on universal suffrage. MASS. LEG. DOC., H. R. REP. NO. 149, 4, 15 (1867). It follows that *Nixon v. Herndon*, 273 U.S. 536 (1927), invalidating a Texas statute barring Negroes from voting on the ground that the statute denied equal protection, was not in accord with the original understanding of equal protection; but the subsequent decision in *Smith v. Allwright*, 321 U.S. 649 (1944), returned to the original plan of the War Amendments by invalidating a similar Texas statute under the Fifteenth Amendment, rather than the Fourteenth.

90. 1 MCPHERSON'S SCRAPBOOK, ELECTION OF 1866, at 117-18.

to be the usual one. Frequently, of course, the terms were used with no content at all, as when a Pennsylvania Republican simply told his audience that the Amendment granted civil rights but not social rights;⁹¹ but when analysis began, the explanation given above usually appeared.

Thus, in one debate Senator Harlan of Iowa explained that the right of Negroes to use the street cars did not involve social equality since that right was legal in origin.⁹² Normally the hotel keeper's responsibility not to discriminate was explained in terms of a distinction between taking a Negro into the hotel or dining room, as distinguished from putting him into a particular room or at a particular table: the hotel keeper's obligation to take customers rested on law, but the right to choose one's own table-mate was "social."⁹³ Stevens himself stressed the vital distinction between matters of law and matters of taste: "This doctrine does not mean that a Negro shall sit on the same seat or eat at the same table with a white man. That is a matter of taste which every man must decide for himself. The law has nothing to do with it."⁹⁴

Thus the original distinction appears to have been that the law should know no distinctions of color, but that personal taste should be left to govern itself. In this the practical difference between the abolitionist and the middle position was that the abolitionists as a moral matter encouraged complete intermingling even though this entered the zone of taste, while the middle group lacked any such fervor.

Because the civil-social distinction was misty, it is easiest to diagnose original opinion by studying its application to concrete cases.

1. *Geographical segregation.* Restrictions of Negroes to particular regions of the country, or to particular areas in a city by limiting their right to buy and live on particular pieces of property, is the most obvious kind of segregation to have been forbidden by equal protection. As has already been noted, Illinois and Indiana excluded all Negro immigration into the state prior to the Civil War; and the Southern states by old and new codes for freedmen excluded them from particular areas and from buying real estate.

Section one of the Civil Rights Act of 1866 provided that "citizens of every race and color . . . shall have *the same right* in every State . . . to inherit, purchase, lease, sell, hold, and convey real and personal property. . . ." President Johnson, in his veto message, specifically challenged the right of Congress to "abrogate all State laws of discrimination between

91. 2 McPHERSON'S SCRAPBOOK, ELECTION OF 1866, at 37.

92. CONG. GLOBE, 38th Cong., 1st Sess. 839 (1864).

93. See, e.g., 2 CONG. REC. 4082 (1874) (remarks of Senator Pratt of Indiana).

94. CONG. GLOBE, 39th Cong., 2nd Sess. 252 (1867).

the two races in the matter of real estate."⁹⁵ The veto was overridden, and it was proclaimed by every advocate of the Fourteenth Amendment that it carried the principles of the Act into the Constitution.

There are many points of doubt in the determination of the original understanding of the Fourteenth Amendment, but on this one, we think there is no room for serious difference of opinion. In view of the specific grant in the Civil Rights Act of "the same right" to hold and use property, no distinctions whatsoever based on race or color could be made in respect to this right. Geographic segregation was completely forbidden.

2. *Segregation in Transportation.* The type of segregation most frequently considered between 1865 and 1875 was segregation in transportation. Before the Civil Rights Act of 1866, attention focused largely on transportation in Washington. Thereafter, the issue was widespread as Negroes sought to utilize the privileges they thought the Act had given them. The central legal theory of the attack on segregated transportation was that transportation companies had a common law duty to take all comers and that making any distinctions in the operation of this duty because of color denied an equal right to contract for transportation. The vital distinctions are highlighted by Senator Reverdy Johnson of Maryland, perhaps the ablest constitutionalist of the conservative faction:

It may be convenient, because it meets with the public wish or with the public taste of both classes, the white and the black, that there should be cars in which the white men and ladies are to travel, designated for that purpose, and cars in which the black men and black women are to travel, designated for that purpose. But that is a matter to be decided as between these two classes. There is no more right to exclude a black man from a car designated for the transportation of white persons than there is a right to refuse to transport in a car designated for black persons white men.⁹⁶

The matter was repeatedly before Congress. The Senate voted against segregated transportation in one form or another at least six times from 1863 to 1875. In 1863, Congress amended the charter of the Alexandria and Washington Railroad and provided that "No person shall be excluded from the cars on account of color."⁹⁷ A year later the Washington and Georgetown Railroad, a street railway in the District of Columbia, excluded a Negro army officer from a car. The District Committee, after an investigation in response to a request by Sumner, reported that no legislation was necessary; the major could sue because "colored persons are entitled to all the privileges

95. 6 RICHARDSON, MESSAGES OF THE PRESIDENTS. 405, 407 (1897).

96. CONG. GLOBE, 38th Cong., 1st Sess. 1156 (1864).

97. 12 STAT. 805 (1863).

of said road which any other persons have."⁹⁸ The company attempted to propitiate this sentiment by putting on more cars for the exclusive use of Negroes, a concession which gave Sumner no comfort because "whenever they exclude a colored person from anyone of their cars they do it in violation of law."⁹⁹

Sumner thereupon embarked upon a crusade to eliminate street car segregation in the District. He successfully carried an Amendment to the charter of the Depot and Ferry Co. Railway by a vote of 24 to 6, that "no person shall be excluded from any car on account of color."¹⁰⁰ He lost, 14 to 16, an effort to put a similar provision into the Washington and Georgetown Railway charter because some radicals thought it unnecessary in view of the clarity of the law; but finally he achieved complete victory in 1864 and 1865 when he carried an amendment to the Metropolitan Railway Company's charter by which the prohibition against exclusions from any car because of color was "extended to every other railroad in the District of Columbia."¹⁰¹

All this debate upon the whole issue of segregation in transportation took place before the enactment of the Fourteenth Amendment. Those who opposed the measures contended that segregation was perfectly valid. Senator Saulsbury of Delaware, for example, said such legislation would be "a war against nature and nature's God."¹⁰² More restrained Senators such as Grimes and Doolittle argued merely that there was no harm in separation.¹⁰³ Those who supported the legislation did so on grounds of equality. Senator Wilson denounced the "Jim Crow car"—to make Negroes stand on a front platform, he said, was "in defiance of decency."¹⁰⁴ Sumner observed of Massachusetts that there "the rights of every colored person are placed on an equality with those of white persons. They have the same right with white persons to ride in every public conveyance in the commonwealth."¹⁰⁵ He asked the same rule of equality for the District.

The first of the Sumner amendments came before the Supreme Court in *Railroad Co. v. Brown*,¹⁰⁶ a case which is an important part of this history. On February 8th, 1868, Catharine Brown, colored, bought a ticket on the Alexandria and Washington Railway. That company, its charter containing the Amendment providing that "no person shall be excluded from the cars on account of color," maintained two identical and connected cars, using one for

98. SEN. REP. No. 17, 38th Cong., 1st Sess. (1864).

99. CONG. GLOBE, 38th Cong., 1st Sess. 817 (1864).

100. CONG. GLOBE, 38th Cong., 2nd Sess. 294 (1865).

101. CONG. GLOBE, 38th Cong., 1st Sess. 3131-3135 (1864).

102. CONG. GLOBE, 38th Cong., 1st Sess. 1141 (1864).

103. *Id.* at 1159, 3133.

104. *Id.* at 3132, 3133.

105. *Id.* at 1158.

106. 17 Wall. 445 (U.S. 1873).

colored and the other for white passengers. When Mrs. Brown attempted to sit in the "white" car, she was ejected with great violence.

The episode attracted immediate attention because Mrs. Brown was in charge of the ladies' rest room at the Senate. An immediate Senate investigation was undertaken to explore whether the company's charter should be repealed. One hearing was held in the shanty in which Mrs. Brown lived and was recuperating. The Committee concluded that the company had violated its charter. It recommended against repeal of the charter because it thought compensation by judicial proceedings would be adequate, but it concluded: "If the result of the legal proceedings which Mrs. Brown has instituted should not be satisfactory, or if the conduct of the said Company in the future shall not be satisfactory, the resolution can be taken from the table, and the charter of the Company repealed."¹⁰⁷

The company, contending that segregation was "reasonable and legal," asked for a charge to the jury that it was under no obligation to plaintiff to do more than offer separate but equal cars. The trial court rejected the charge, and the Supreme Court unanimously affirmed, rejecting the "separate but equal" argument as "an ingenious attempt to evade a compliance with the obvious meaning of the requirement."¹⁰⁸ The Court declared that the object of Congress was not merely to afford transportation for Negroes, which anyone selling transportation would of course want to give them if they had the money to buy it. Rather:

It was the discrimination in the use of the cars on account of color, where slavery obtained, which was the subject of discussion at the time, and not the fact that the colored race could not ride in the cars at all. Congress, in the belief that this discrimination was unjust, acted. It told the company, in substance, that it could extend its road into the District as desired, but that this discrimination must cease, *and the colored and white race, in the use of the cars, be placed on an equality.* This condition it had the right to impose, and in the temper of Congress at the time, it is manifest the grant could not have been made without it.¹⁰⁹

Clearly "in the temper of the Congress at the time," segregation in transportation was "discrimination," not "equality." We believe that the equal protection clause, in the eyes of its contemporaries, froze into constitutional law the existing common law obligation of transportation companies to take all comers and to eliminate any possibility of their segregation. Congress decided so often in this period that color classifications were not permissible

107. SEN. REP. NO. 131, 40th Cong., 2nd Sess. (1868).

108. *Railroad Co. v. Brown*, 17 Wall. 445, 452 (U.S. 1873). See also brief for plaintiff in this case, United States Supreme Court Library.

109. *Id.* at 452, 453. (Emphasis added).

for purposes of transportation that it is difficult to understand how equal protection could possibly be given another meaning. In 1872, under the leadership of Carpenter, the Senate passed a bill forbidding the making of any distinctions because of color by railroads, inns, and theaters; the conservative opposition confined its attack—unsuccessfully—to the inns and theaters sections, apparently conceding the point as to transportation.¹¹⁰ By the Civil Rights Act of 1875, Congress made a final attempt to obliterate completely segregation in transportation.¹¹¹

3. *Segregation in hotels and theaters.* The hotel and theater problem was considered much the same as the transportation problem. As to all of these facilities, the radicals believed that there was a common law right to admittance which had obtained constitutional status. There was this difference in some minds: the common law right of transportation was wholly "civil" while the right to a hotel was partially "social." It was felt that the inn-keeper must accept a Negro applicant, give him a room and access to the dining room, and in no way treat him as an inferior guest. On the other hand, the white person renting a room or taking a table had his own right to decide whom he would have as his guest in what had become, for the moment, his own room and his own table; and the radicals conceded that such a guest could exercise dominion as he chose in the selection of his own guests and companions.¹¹²

There was an even more substantial difference as to theaters. Though highly regulated, theaters were not subject to a common law right of general use, as were trains or hotels. We find no thinking directed squarely at the consequences of this fact, but the inclusion of theaters in the Civil Rights Act of 1875 seems to have been based on a theory that since theaters were extensively regulated, they were creatures of the law and therefore subject to the requirements of equality.¹¹³

4. *Segregation in education.* To understand the relation of equal protection to education, it is necessary to recall two crusades, abolitionism and the public school movement, both of which began major aggressive development in the 1830's. The rapid spread of abolitionism from a few print shops and

110. CONG. GLOBE, 42d Cong., 2d Sess. 3729 *et seq.* (1872) (S.1141 and S.99). After a proposed amendment by Thurman was defeated, the measure passed the Senate but was unsatisfactory to the extreme radicals because it did not go far enough. *Id.* at 3735-37. Its provisions were eventually included in the broader Sumner Civil Rights bill.

111. This Act forbade interference with "the full and equal enjoyment" of any "public conveyances on land or water." 18 STAT. 335 (1875).

112. See note 93 *supra*.

113. Sumner's legal theory was expressed thus: "Show me, therefore, a legal institution, anything created or regulated by law, and I show you what must be opened equally to all without distinction of color." CONG. GLOBE, 42d Cong., 2d Sess. 242 (1871). Inclusion of theaters may reflect a Puritan attitude that theaters exist wholly by legal suffrage. Cf. 1 BEARD, RISE OF AMERICAN CIVILIZATION 465, 466 (1935).

meeting places occurred because the whole society was ripe for a wave of good works, such as land reforms, suffrage, temperance agitation, women's rights, and many other ameliorative movements. As abolition was a crusade, so was the movement for public schools, which were spread throughout the North in the years between 1830 and the Civil War. Frequently the abolitionists and the public school men were the same people. There was no limit to the social good which was expected of the schools by their sponsors. Said Thaddeus Stevens, as Pennsylvania leader of the free school movement: "What earthly glory is there equal in luster and duration to that conferred by education?"¹¹⁴

The public school system made much less headway in the South. The children of the well-to-do went to private academies, while others usually had little or no schooling at all. By the census of 1850, illiteracy among native whites was twenty percent in the South, three percent in the Midwest, and less than one percent in New England.¹¹⁵

In New England particularly, education was the vehicle for the indoctrination of Puritan morality, and nowhere was its use as an auxiliary to other crusades more fully appreciated. Hence in the wake of the Northern troops came the school teachers of the Freedmen's Aid societies, ready to make abolition a success by educating the South.¹¹⁶ A substantial part of post-war education in 1865 and 1866 was in the hands of these societies; the task of teachers included a mingling of education and propaganda for children and adults.¹¹⁷

To these societies with a blind confidence in the capacity of education to solve all of the nation's social ills, nothing was impossible; and this is an important element in the social psychology from which the Fourteenth Amendment emerged. In this philosophy, of course, schools should be mixed rather than segregated. The Constitution of the American Freedmen's and Union Commission, a central agency for these educational societies, specifically provided that "No schools or supply depots shall be maintained from the benefits of which any person shall be excluded because of color."¹¹⁸

Like the objects of many of the rest of the pre-Civil War crusades, com-

114. WOODBURN, *THE LIFE OF THADDEUS STEVENS*, 49 (1913).

115. EATON, *FREEDOM OF THOUGHT IN THE OLD SOUTH* c. 3 (1940).

116. "We must plant a 'Yankee school' in every Southern county, if we expect the rising generation of the recent slave States to march arm in arm with Massachusetts in the future." *FREEDMEN'S RECORD* 159 (1866). The most vivid record of the work of Northern educational agencies is in their publications, particularly the *AMERICAN FREEDMAN* and the *FREEDMEN'S JOURNAL*. Their work was very substantial, the Commission operating 307 schools with 774 teachers and 40,744 students, requiring \$769,000 in cash and supplies in 1866. *AMERICAN FREEDMAN* 9 (1866).

117. Typical is a report from one teacher: "Every member of my school subscribed without any hesitation to the third clause, relating to profanity; and all but three have now taken the first pledge, relating to intoxicating drinks. But the tobacco clause is the lion hardest to overcome." *AMERICAN FREEDMAN* 26 (1866).

118. *Id.* at 18.

mingled education was easier to dream than to achieve.¹¹⁹ At the close of the War in states both North and South, Negroes were excluded from education altogether. The first task was to achieve *any* kind of Negro education, and in the South efforts to do even this were sometimes met by violence or ostracism.¹²⁰

As will be shown, there is room for substantial difference of opinion concerning the dominant intent of the reconstruction decade as to mixed schools; but it does seem clear that if the schools were to be separate, genuine equality was required. Governor Morton of Indiana, at the same time that he recommended ratification by his state of the Amendment, recommended that the state terminate its policy of barring Negroes from public education and that tax funds proportionate with their number be allocated for their benefit.¹²¹ On the specific ground that the South was not offering opportunities for Negro education, Representative Donnelly sponsored an amendment to the Freedmen's Bureau Bill to permit the Bureau to aid education: "we must make all the citizens of the country equal before the law . . . [and] we must offer equal opportunities to all men."¹²² Senator Howe, in one of the leading Senate addresses in support of Section one of the Fourteenth Amendment, explained in detail that the equal protection clause would legalize a Florida system whereby Negroes paid taxes for educational purposes without getting full benefits in return.¹²³

The confused picture in respect to mixed schools from 1865 to 1875 is a product of several factors. In the first place, there was genuine difference of opinion in the North on the merits. To the abolitionists, to New England, and to the Freedmen's Aid Societies, it was clear that equality banned compulsory segregation. Yet to Governor Morton, also a good Republican, the schools in his state should remain separate "in the present state of public opinion."¹²⁴ In the second place, so long as the South made going to school optional, collisions were avoided by voluntary choices. Although the Freed-

119. At the same time, the whole psychology of the period must be seen in terms of the starry-eyed hopefulness with which the abolitionists approached the educational task. They objected to the name of "The Freedmen's Spelling Book" because it implied that freedmen were a class apart. *Id.* at 32. A Miss Mary Hosmer who ran a mixed school of 60 students at Summerville, S.C., became a heroine of the organization and her story was told under the triumphant heading, "It can be done." *Id.* at 76. Extended instructions were prepared on just how the teachers should handle mixed schools, *id.* at 38, and the New England Freedmen's Aid Society listed as one of its primary objectives, "To encourage white children to come into our schools, if they show any willingness to do so." *Id.* at 173. The fact is that few whites attended mixed schools during reconstruction. Boyd, *Some Phases of Educational History in the South since 1865* in *STUDIES IN SOUTHERN HISTORY* 259 (1914).

120. McPHERSON'S SCRAPBOOK, CIVIL RIGHTS BILL OF 1866, at 10.

121. 9 BREV. LEG. REP. 20, 26 (Ind. 1867).

122. CONG. GLOBE, 39th Cong., 1st Sess. 589 (1866).

123. *Id.* at 219 (App.).

124. See note 121 *supra*.

men's Aid Society threw their schools open to anyone who chose to come, it was only occasionally that white students attended. In the third place, the issue was a difficult one and its resolution could usually be postponed without the necessity of decision.

One measure of the contemporary radical attitude of the requirement of equality can be seen in the acts of the reconstruction governments in the South. In each reconstruction convention, mixed schools were debated, and in South Carolina, Florida, Mississippi, and Louisiana they were authorized. The South Carolina Constitution, for example, provided that all public schools "shall be free and open to all . . . without regard to race or color."¹²⁵ In the debate on this clause, opposition was expressed on the ground that the whites would not attend under such circumstances; the answer was made that this was a necessary part of securing to every one his full political and civil equality.¹²⁶

The attitude of Congress toward mixed schools in the reconstructed states prior to the consideration of the Civil Rights Bill of 1875 was inconclusive. When Arkansas was to be re-admitted, Senator Henderson offered an amendment to the enabling bill which would have permitted the state to establish separate schools, but it lost, 5 to 30.¹²⁷ Language which seems to have been incompatible with separate schools passed the Senate but was finally lost.¹²⁸ On the other hand, in the bill to re-admit six other states in 1868, the school problem was carefully left alone after obvious deliberation.¹²⁹ The dominant view seems to have been Trumbull's: the proper protection of freedmen was assured by giving them the ballot, which was required in each instance.¹³⁰

The District of Columbia was one place where segregation in schools was primarily the problem of Congress. As rapidly as the slaves were freed, schools were established for them in the District, and by 1864 the statutes provided for a proportional distribution of funds.¹³¹ Thus before the equality movement began its postwar activity, separate schools in the District were

125. S.C. CONST. Art. X, § 10 (1868).

126. 2 FLEMING, *op. cit. supra* note 64, at 187-189. Southerners seem to have held the view that "equality" required unsegregated education. In 1873 a group of Louisiana conservatives, headed by General P. T. Beauregard and determined to try to end reconstruction by making full compliance with the demands of the War Amendments, recommended "that hereafter no distinction shall exist among citizens of Louisiana in any of our public schools or State institutions of education." The movement foundered largely because of adverse reaction among up-state Democrats. Williams, *The Louisiana Unification Movement of 1873*, 11 J. SOUTHERN HIST. 349 (1945).

127. CONG. GLOBE, 40th Cong., 2nd Sess. 2748 (1868).

128. *Id.* at 2901, 2904.

129. *Id.* at 2858.

130. *Id.* at 2602. "They have got it now, and they will not give it up. They will protect themselves."

131: 13 STAT. 191 (1864).

already a going institution which the radicals were never quite able to upset.

In the movement to remove racial discrimination in the District, leadership fell to Sumner, and he had to place the various remedies in their proper order. A year after the Fourteenth Amendment passed Congress, a Negro still could not hold office or be a juror in the District; and Sumner chose first to eliminate these restrictions.¹³² With two pocket vetoes delaying this statute, it was not until 1870 that Sumner reached the District school question on his agenda. He introduced a bill "to secure equal rights in the public schools in Washington" which was reported out of the District Committee but was not considered.¹³³

Later in that Congress Sumner secured an amendment in Committee to a District school bill, providing that "no distinction on account of race, color, or previous condition of servitude shall be made in the admission of pupils in any of the schools under the control of the Board of Education."¹³⁴ The amendment precipitated general Senate discussion. Though he professed complete agreement with its principle, Patterson, the author of the bill, asked that the amendment be deleted on the ground that it was impolitic. Harris of Louisiana supported Sumner on constitutional grounds, saying "We have adopted the principle of equality in the Constitution of the United States, and I think this is a proper place to enact a law in accordance therewith." Sumner contended that intermingling in schools would work satisfactorily, as it had in transportation. In any case, equality required it: "Every child, white or black, has a right to be placed under precisely the same influences, with the same teachers, in the same school room, without any discrimination founded on color." Sawyer argued that the amendment was required in the name of equality, and Wilson agreed.¹³⁵

Harris and Sawyer were "reconstructed Southerners" and could be expected to echo Sumner. An independent thought came when Matt Carpenter of Wisconsin, one of the foremost constitutional lawyers in the Senate, added his view:

Mr. President, we have said by our constitution, we have said by our statutes, we have said by our party platforms, we have said through the political press, we have said from every stump in the land, that from this time henceforth forever, where the American flag floats, there shall be no distinction of race or color or on account of previous condition of servitude, but that all men, without regard to these distinctions, shall be equal, undistinguished before

132. Sumner expressed his intention to clean up the District of Columbia problems one at a time. CONG. GLOBE, 40th Cong., 2nd Sess. 39 (1867).

133. CONG. GLOBE, 41st Cong., 2nd Sess. 3273 (1870) (S. 361).

134. CONG. GLOBE, 41st Cong., 3d Sess. 1053 *et seq.* (1871) (S. 1244).

135. The statements referred to in the text are found in the debates, *id.* at 1054, 1055, 1058, 1061.

the law. Now, Mr. President, that principle covers this whole case.¹³⁶

According to Carpenter, it was absurd to draw the line at the school room after Negroes had been given the right to vote, to serve on juries, and to become judges. He insisted that there was no question of social equality, for in the management of a public institution distinctions of color could not be made. The bill, however, was put aside without action of any sort.

In 1872 Sumner brought a similar proposal to the floor of the Senate, but its opponents again caused the measure to be dropped. Sumner then turned to his general civil rights bill, which forbade segregation in schools and elsewhere throughout the Union, including the District. The District problem was thus merged with the question of segregation in schools generally.

Final consideration of mixed schools during Reconstruction came in connection with the Civil Rights Act of 1875. More than any other major measure of reconstruction, this bill was Sumner's.¹³⁷ It was a bill to forbid segregation throughout the Union, in conveyances, theaters, inns, and schools.

The core of the Sumner position on segregation, as he expressed it in the course of debate, was this:

Then comes the other excuse, which finds Equality in separation. Separate hotels, separate conveyances, separate theaters, separate schools, separate institutions of learning and science, separate churches, and separate cemeteries—these are the artificial substitutes for Equality; and this is the contrivance by which a transcendent right, involving a transcendent duty, is evaded. . . . Assuming what is most absurd to assume, and what is contradicted by all experience, that a substitute can be an equivalent, it is so in form only and not in reality. Every such attempt is an indignity to the colored race, instinct with the spirit of Slavery, and this decides its character. *It is Slavery in its last appearance.*¹³⁸

Sumner introduced his bill at three sessions in 1870 and 1871. In 1872 he momentarily attached it to an Amnesty Bill for Confederates with the deciding vote of Vice-President Colfax being cast in its favor; but since the amnesty measure required a two-thirds vote by virtue of Section three of the Fourteenth Amendment, the Democrats were able to defeat it in order to avoid the civil rights provisions.¹³⁹ Sumner was away from the Senate for

136. CONG. GLOBE, 41st Cong., 3d Sess. 1056 (1871).

137. This measure, which was the last serious effort of the abolition movement to control the country's policy toward Negroes, occupied Sumner's efforts for four years. Almost his last words, as he lay dying and semi-conscious in his home in Washington, surrounded by white and colored friends, were "Don't let it fail, my bill, the Civil Rights Bill." SHOTWELL, LIFE OF CHARLES SUMNER 717 (1910).

138. CONG. GLOBE, 42nd Cong., 2nd Sess. 382, 383 (1872). Emphasis added.

139. For a summary of these events, see SHOTWELL, *op. cit. supra* note 137, at 200,

the first part of the year 1873. In December of that year, he introduced the measure for the last time, and it passed the Senate shortly after his death in 1874.¹⁴⁰

The debate over the measure which eventually became the Civil Rights Act of 1875 resulted in the most thorough analysis of the segregation problem during the reconstruction period. Sumner himself rested the claim for the legality of such legislation on both the Thirteenth and the Fourteenth Amendments, claiming that the right not to be segregated was both a privilege of a citizen and an aspect of equality.¹⁴¹ A contemporary Ohio Supreme Court decision which had upheld separate schools in that state was urged upon the Senate as sound, but was specifically repudiated by the floor leader for the bill.¹⁴² The case in which Sumner had originally presented his views on equality in the schools, *Roberts v. Boston*, was cited by the opposition without persuasive effect.¹⁴³ After Sumner's death, Frelinghuysen of New Jersey as new floor leader for the bill, declared that separate schools should be tolerated only if voluntarily accepted by both races. He rejected the possibility that separate schools would ever in fact be equal, saying, "we know that if we establish separate schools for colored people, those schools will be inferior to those for the whites."¹⁴⁴

After Sumner's death, it was generally accepted that the basis of the bill was the equal protection clause. Frelinghuysen declared that the bill sought "freedom from all discrimination before the law on account of race, as one of the fundamental rights of United States citizenship." At the point when he was most precisely dealing with his claimed authority, he said: "We have the right, in the language of the Constitution, to give 'to all persons within the jurisdiction of the United States the equal protection of the laws.'" ¹⁴⁵

With Sumner's death, Edmunds of Vermont became the ablest of the New England school of constitutionalists. He declared that if the segregation principle triumphed, communities might decide that "the foreign born shall be taught in one house by one teacher and the native born in another." To

675 *et seq.* On one occasion, while Sumner was absent, the Democrats did accept such a compromise proposal where the school section was deleted. See CONG. GLOBE, 42nd Cong., 2nd Sess. 3729-42, (1872).

140. 2 CONG. REC. 4176 (1874).

141. CONG. GLOBE, 42nd Cong., 2nd Sess. 728 (1872).

142. State *ex rel.* *Garnes v. McCann*, 21 Ohio St. 198 (1871), was specifically disavowed by Senator Frelinghuysen. 2 CONG. REC. 3452 (1874). The Supreme Court, in *Plessy v. Ferguson*, 163 U.S. 537, 544, 545 (1896), upholding the validity of a segregated transportation system, relied on the *McCann* case and *Roberts v. Boston*, 5 Cush. 198 (Mass. 1850), in reaching its result and did not mention a contemporary Iowa case, *Clark v. Bd. Directors*, 24 Iowa 266 (1868), also discussed by Senator Frelinghuysen, which points in an opposite direction.

143. CONG. GLOBE, 42nd Cong., 2nd Sess. 3261 (1872).

144. 2 CONG. REC. 3452 (1874).

145. *Id.* at 3451.

take such a view, he said, would permit segregation of Catholics from Protestants, of Methodists from Congregationalists. He rejected "the slave doctrine that color and race are reasons for distinction among citizens."¹⁴⁶

The foregoing expressions should not mislead the reader into thinking that the New England position was the dominant one among those who carried the Civil Rights Bill in the Senate. That New England point of view, in essence, was that separate schools necessarily bred intolerance and should not be permitted even if both races desired it. However, the work of the Freedmen's Commission had in fact resulted in the existence of schools which Negroes attended and whites did not; and in cases where the entire population was willing to accept separate schools, the majority was willing to let them do so. It was thus contemplated that separate schools would be forbidden by law but that if whole communities chose to waive their rights under the statute, there would be no one to complain.¹⁴⁷

The critical judgment of the Senate on the school question came on an amendment by Sargent which would have permitted separate but equal schools. On May 22, 1874, that amendment failed, 26 to 21, the majority including Senators Boutwell, Conkling, and Morrill, all three of whom had been members of the committee which drafted the Fourteenth Amendment.¹⁴⁸ The next day the bill itself passed the Senate by a vote of 29 to 16, with 9 of the majority being members who had participated in the passage of the Fourteenth Amendment.¹⁴⁹

The passage of the Civil Rights Bill by the Senate represents a contemporary constitutional judgment that segregation in conveyances, theaters, inns, and schools violated either the privileges and immunities clause or the equal protection clause. While reference was frequently made to both provisions, the total impression of the debate is that the violation was thought by most to be of equal protection.¹⁵⁰ It is important that the bill as passed was restricted to regulations of institutions which were direct creatures of the law, as schools, and those which were thought of as having common law duties to

146. CONG. GLOBE, 42nd Cong., 2nd Sess. 3260 (1872).

147. "Let the individuals and not the superintendent of schools judge of the comparative merits of the schools." 2 CONG. REC. 4151 (1874). (Statement of Senator Howe).

148. *Id.* at 4167.

149. *Id.* at 4176. FLACK, *op. cit. supra* note 1, at 270-71, lists Allison, Boutwell, Conkling, Edmunds, Howe, Morrill of Vermont, Stewart, Washburne, and Windom.

150. The clauses neither should nor can be completely torn apart. They are, after all, parts not only of one plan, but of one sentence. It was perfectly natural, therefore, for Senator Carpenter to believe in "equal protection" of one's "privileges and immunities." CONG. GLOBE, 42nd Cong., 2nd Sess. 762 (1872). During the debates on the various proposals which finally emerged as the Civil Rights Act of 1875, greater reliance naturally was placed on the privileges and immunities clause before it was gutted by the decision in the Slaughterhouse Cases, 16 Wall. 36 (1873). Thereafter occurred a shift in debate toward reliance on equal protection.

take all comers, as inns and carriers, or were traditionally subject to regulation, as theaters. Sumner's original proposal had included churches and cemeteries to which Carpenter had successfully led the opposition on constitutional grounds.¹⁵¹ This abandonment, of course, may have represented a judgment as much of politics as of law, but it does represent the continued judgment of the decade that equal protection did not extend to purely personal relationships with no common law base.

The result in the House was a different story. Almost a year elapsed between the time of consideration in the Senate and in the House. In that interim there was sufficient change of sentiment to cause the House to delete the school clause, and the measure passed onto the statute books without it. The provisions forbidding separate conveyances, inns and theaters and requiring equality in jury service remained.¹⁵²

The House had on a previous occasion voted to require mixed schools¹⁵³ and the judgment on this occasion to omit that requirement was the product of many factors. The principal new element seems to have been the position of the George Peabody Fund. Peabody, an American merchant who founded what eventually became J. P. Morgan & Co., established a fund of over \$3,000,000 to aid education in the South. As the Freedmen's Aid Societies ran out of money and collapsed, the Peabody Fund became the only major outside agency aiding Southern education. While the Civil Rights Bill was pending, the Fund took the position that it would withdraw its aid where mixed schools were required. The principal historian of the Fund claims that this materially contributed to the change in the bill.¹⁵⁴ Coupled with the pressure from the Fund was the repeated assurance from Southern representatives that they would end their newly founded public school systems if

151. CONG. GLOBE, 42nd Cong., 2nd Sess. 758-767 (1872). Carpenter's point of view as to cemeteries is of particular interest. An argument had been made that any incorporated private business was sufficiently the creature of the law to be subject to the Fourteenth Amendment. He rejected this view, contrasting schools where he thought Congress should prohibit segregation, and private cemeteries which must be left alone. *Id.* at 763

152. 18 STAT. 335 (1875) (Part 3).

153. H.R. 1647, CONG. GLOBE, 42nd Cong., 2nd Sess. 2074-75 (1872).

154. As early as 1870, Dr. Sears, director of the funds, announced that where mixed schools were required and white children did not attend, it would help provide separate education for white children, 2 FLEMING, *op. cit. supra* note 64, at 194. In 1874 Sears wrote a friend detailing the manner in which he had lobbied against the school provision in the Civil Rights Bill, relating interviews with House members, Senators, and finally President Grant. In Sears' presence, Grant told Butler, who was eventually in charge of the bill in the House, that "it was unwise to attempt to force mixed schools on the South." CURRY, BRIEF SKETCH OF GEORGE PEABODY 64, 65 (1898). Sears consistently and effectively espoused the view that mixed education was a "calamity." *Id.* at 60-63. The abolitionists, in turn, thought very little of him, and one of them declared that Sears had imbibed Southern prejudices. *Id.* at 60. Curry, who was elected Sears' successor upon the latter's death in 1881, introduces the topic of mixed schools in the little book from which these excerpts are taken with the words, "Some persons, not 'to the manner born', took the lead in organizing a crusade for the co-education of the races." *Ibid.*

the Senate measure passed.¹⁵⁵ Perhaps for these reasons, as well as others, a leading Negro representative from South Carolina consented to eliminating the school clause in return for assurances that the rest of the bill would pass.¹⁵⁶

We conclude that it was accepted virtually unanimously by all who supported the Fourteenth Amendment that it required equal schools and that a very large number of its supporters thought that the Amendment forbade segregated schools.

5. *Miscegenation.* We find it impossible to reach an assured conclusion as to the original understanding concerning segregation in matrimony, or the prohibition of miscegenation. Senator Reverdy Johnson made a typical attack on the Civil Rights Bill by suggesting that equality of the right to contract extended to the marriage contract and thus permitted miscegenation;¹⁵⁷ but certainly the moderately radical Senators Trumbull and Fessenden thought otherwise.¹⁵⁸ The abolitionists affirmatively and enthusiastically advocated miscegenation on other occasions, but not in 1866; and such an extreme radical as Wilson of Massachusetts, who twenty-two years before had led the fight on the Massachusetts anti-miscegenation law, confined his remarks, perhaps discreetly, to the broadest possible generalities.¹⁵⁹

Charges that the Amendment permitted miscegenation were typically countered by the Republicans with a joke to the effect that possible elimination of anti-miscegenation statutes was not disturbing to them because Republicans had no intention of marrying Negroes.¹⁶⁰ Aside from the campaign oratory, it appears probable that miscegenation was so remote a possibility to the majority of persons who supported the Amendment that they never seriously thought out the relationship of the two.¹⁶¹

IV. "STATE ACTION," LYNCHING, AND CONGRESSIONAL ENFORCEMENT

The interpretation commonly given the Fourteenth Amendment since reconstruction has been that it applies only to affirmative state action, having no bearing upon discriminatory acts by private persons.¹⁶² A general judgment of this sort was so totally foreign to the conceptions of those who passed the

155. See, e.g., 3 CONG. REC. 981 (1875) (Statement by Representative Roberts).

156. *Id.* at 981 (remarks of Representative Cain).

157. CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866).

158. See note 52 *supra*.

159. See CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866).

160. For example, during the campaign of 1866 a Democratic meeting featured a bevy of white beauties dressed in virginal white and carrying a placard "white husbands or none." The ladies became the objects of considerable humor concerning their prospects. MCPHERSON'S SCRAPBOOK, ELECTION OF 1866, at 4.

161. Mr. Munro disagrees with this conclusion.

162. WILLOUGHBY, CONSTITUTIONAL LAW 150 (2d stud. ed. 1938) (this accurately summarizes the case).

Amendment that no real assessment of it can be made in terms of reconstruction attitudes.

The over-all judgment of reconstructionists is best illustrated by their views on three different matters. In their minds, in addition to affirmative discriminatory acts by the states which were clearly prohibited by the Amendment, as for example restrictions against Negroes in jury service, there were these different possibilities of discrimination: (a) Discriminations by public businesses subject to a common law duty to deal with all customers. Such a discrimination denied equal protection because the obligation itself had its roots in law. (b) Discriminations by private persons as to matters in which the law did not otherwise impose a legal duty, as by exclusion from a home, a hotel table, or a church. Such discriminations were wholly outside the reach of the Amendment. (c) Finally there was discrimination in the failure to enforce the law, as a result of which Negroes might be at the mercy of persons who chose to do violence to their persons or property.

It is clear beyond reasonable doubt that the Fourteenth Amendment was meant to enable Congress to legislate affirmatively in behalf of a racial group which a state might, because it was a racial group, choose not to protect from action of private persons. The major discussion of Congressional power under all of the new Amendments came in 1870 and 1871 with the enactment of the First and Second Enforcement Acts, and the Third Enforcement Act, usually known as the Ku Klux Act.¹⁶³

The First and Second Enforcement Acts, though they included some legislation in support of the Fourteenth Amendment, such as the reenactment of the Civil Rights Act of 1866, were predominantly aimed at protection of the right to vote in enforcement of the Fifteenth Amendment. However, the language of the Fifteenth Amendment, "the right . . . to vote shall not be denied by . . . any State," raises the same "State action" problems as does the language of the Fourteenth, "no State . . . shall deny to any person . . . the equal protection of the laws." What is important is that Congress construed the Fifteenth Amendment, after extended discussion, as warranting legislation against *individual* interference with the right to vote and included provisions to that effect. It was fully recognized that if "denial" in the Fifteenth Amendment extended to acts of omission to enforce by the States, it had the same effect in the Fourteenth Amendment.¹⁶⁴ The First Enforcement Act, passed within two years after the Fourteenth Amendment was ratified and in the same year that the Fifteenth Amendment was ratified, was

163. 16 STAT. 140 (1870); 16 STAT. 433 (1871); 17 STAT. 13 (1871).

164. A summary of the joint discussion of the "denial" problem in the Fourteenth and Fifteenth Amendments is set forth in FLACK, *op. cit. supra* note 1, at 218 *et seq.*

carried in the Senate by 48 to 11 and in the House by 133 to 58. It would be hard to imagine a clearer contemporary construction.

Extended contemporary debate on whether individual violence could violate the Fourteenth Amendment came in March 1871 when President Grant asked for control of the Klan.¹⁶⁵ The resultant legislation, sponsored by Representative Shellabarger of Ohio, contained many provisions and a variety of civil and criminal penalties against individual acts. The extremest passage was Section three, providing that "where insurrection, domestic violence, unlawful combinations, or conspiracies" should hinder the execution of the state's laws, and the state should for any reason fail to enforce the laws, "such facts will be deemed a denial by such State of the equal protection of the laws." The President was authorized to use military force to correct the situation.

The Ku Klux bill passed with large majorities after discussion which thoroughly explored the question of power. Perhaps the ablest argument against the claimed power was made by Trumbull, who had left the radicals over the Johnson impeachment issue and who in his address on this issue accurately foretold the position the Supreme Court was to take on most of the issues of interpretation of the War Amendments.¹⁶⁶

The prevailing view, however, was that a state denied equal protection when it permitted repeated outrages against one class in the community. It was concisely put by Representative Hoar: "It is an effectual denial by a State of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection."¹⁶⁷ Or, as it was said by Senator Frelinghuysen: "A State denies equal protection whenever it fails to give it. Denying includes inaction as well as action."¹⁶⁸

Bingham, vigorously claiming that he was the author of the relevant passages of Section one of the Fourteenth Amendment, made an extended address explaining every aspect of his handiwork.¹⁶⁹ The most concrete measure

165. SEN. REP. No. 112, 39th Cong., 1st Sess. 11 (1866); 14 STAT. 176, 177 (1866).

166. CONG. GLOBE, 42nd Cong., 1st Sess. 575 *et seq.* (1871). This debate is an extraordinarily lucid constitutional discussion. Illustrative of the range of opinion on the enforcement power are the remarks of Representative McHenry, denying its existence, *id.* at 429; Representative Poland, thinking it might be used only in extreme cases, *id.* at 514; and Representative Garfield, expressing doubts, *id.* at 149 (App.), but voting for the bill. The Garfield address is of substantial importance as a direct attack from a responsible Republican in 1866 on an important part of Bingham's theory of the Fourteenth Amendment.

167. *Id.* at 334. See also address of Senator Pratt. *Id.* at 502, 503, 506.

168. *Id.* at 501.

169. CONG. GLOBE, 42nd Cong., 1st Sess. 81 *et seq.* (App. 1871). On the basis of a consideration of substantially all of Bingham's Congressional utterances between 1860 and the termination of his service in Congress in 1873, we conclude that he was an able Congressman with a strong egocentricity and a touch of the windbag. As a legal thinker he

of his position on the subject is that he himself introduced a substitute for the Ku Klux bill before the House of which substantially all went into the final legislation. He completely endorsed the theory that by the fifth section of the Amendment Congress could reach acts of omission as well as those of commission.

The central point is too simple to warrant much exposition. By their words and votes, a decided majority of the members of Congress in 1871 recorded their opinion that a state denied equal protection of the laws when it tolerated widespread abuses against a class of citizens because of their color without seriously attempting to protect them by enforcing the law. The best answer to the question whether the contemporaries of the Fourteenth Amendment thought it permitted legislation against lynching is that they passed just such legislation.

Contemporaries of the Fourteenth Amendment assumed that affirmative legislation by Congress would have a place in the enforcement of the Amendment, an assumption which judicial decisions have subsequently denied. It was contemplated that there would, of course, on occasion be appeals to the Supreme Court from state judicial proceedings in which equal protection was denied,¹⁷⁰ but the real reach of the section was anticipated to be through measures such as the various civil rights acts passed or contemplated.

Enough has been said concerning the contemplated function of federal legislation in respect to discriminations in the affirmative operation of the law. The question remains how extensive the federal enforcement power was thought to be when a state failed in specific instances to enforce its laws.

No clear cut answer to that question emerges from the reconstruction decade because that question was never before the country. The country did not conceive of itself as confronted with petty municipal and local problems, but rather with large scale violence against a racial group in which state governments appeared to acquiesce.

Answers were offered, however, by two members of the radical group of outstanding legal ability and integrity, Senator Edmunds and Representative George F. Hoar. Speaking about the limitation of the power of Congress to maintain a republican form of government, Hoar used words which he doubt-

was not in the same class with the top notch minds of his time, such as Reverdy Johnson, Lyman Trumbull, Matt Carpenter or George Edmunds in the Senate, or George Hoar in the House.

170. See, *e.g.*, the remarks of Lieutenant-Governor Greene of Rhode Island in the State Senate on January 30 and 31, 1867, arguing that the Amendment would slightly, but only slightly, increase the federal appellate jurisdiction. Pamphlet, Providence Daily Journal Press (Lib. Cong.).

less considered equally applicable to the power of Congress under the Fourteenth Amendment:

Criminals escape punishment in Massachusetts and Vermont. A railroad company does not stand a fair chance for an impartial verdict before a Wisconsin jury. Is Congress to interfere? . . . We cannot interfere to deal with the incidental evils which attend upon republican government; but we should interfere where, we being the judges whether the case exists or not, on our oaths responsible to the great tribunal of the American people, wherever these evils have attained such a degree as amounts to the destruction, to the overthrow, to the denial to large classes of the people of the blessings of republican government altogether.¹⁷¹

Edmunds approached the problem more directly by pointing out that legislation must be aimed not merely at discriminatory law enforcement, but at discriminations for a reason forbidden by the clause. Congress, he explained, could not penalize interferences with the equal administration of justice if it were merely the result of, for example, a private feud, but only if it were because a man was "a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter."¹⁷²

The answer which Hoar's and Edmund's contemporaries probably would have given to the question emerges from their observations. Congress could legislate to correct state failures to enforce their own laws where the failure was of considerable magnitude and where the reason for the failure was racial, religious, or perhaps political bias.

V. SUMMARY AND CONCLUSIONS

The Thirteenth, Fourteenth, and Fifteenth Amendments were the new constitution which emerged from the second American Revolution. Drafted and carried to ratification by a group of stern and wilful men, they were intended to make complete changes in the American political system and to facilitate an economic revolution. One may easily challenge the wisdom of this second American Constitution by asserting that it permitted the federal government to reach unprecedentedly far into the internal affairs of the states, giving enormous discretion to Congress; but the challenge to wisdom is no challenge to the fact that this was exactly what was intended. The second American Constitution gave no greater power to the federal government than, for example, the Commerce Clause gave in the first American Constitution.

The differentiating factors in the fates of these two American constitutions were these: the economic and political elements that made up a major part of the original force behind the War Amendments eventually found that

171. CONG. GLOBE, 42nd Cong., 1st Sess. 333, 334 (1871).

172. *Id.* at 566, 567.

the policies they once espoused were no longer useful to them,¹⁷³ while the original Constitution had the consistent support of the wealthy class. Moreover, the original Constitution was interpreted by a Court determined to maximize its underlying purposes, while the War Amendments came to a Court inclined to construe them narrowly.¹⁷⁴ But vastly the most important difference was that the War Amendments, unlike the original Constitution, were thrust by force upon a community whose deepest mores they outraged. The net result was that the industrialist element in the original movement for the Fourteenth Amendment eventually found in it considerably more to their liking than they had ever anticipated, but the element in the movement which had desired to use all three of the War Amendments to create an America in which all citizens were truly equal was seriously disappointed.

Before summarizing the understanding of the reconstruction decade of the equal protection clause, we note again that the extreme volatility of this revolutionary era means that understandings may have altered between passage of the Amendment in 1866, its ratification in 1868, and the Civil Rights Act of 1875. Our interpretations are those of the reconstruction decade, wherever that evidence may be, and not the interpretation of any particular year.

The equal protection clause was, with the foregoing qualification, originally understood to mean the following: all men, without regard to race or color, should have the same rights to acquire real and personal property and to

173. Hesseltine, *Economic Factors in Abandonment of Reconstruction*, 22 *MISS. VAL. HIST. REV.* 191 (1935).

174. An admirer of the work of the Court says happily in respect of the reconstruction cases: "They marked the practical overthrow of the Congressional ideal for the Fourteenth Amendment within seven years after its victorious adoption. The Supreme Court thus at the outset practically annulled Section Five of the Amendment, and reduced the bill of rights section one to distant potentialities." COLLINS, *THE 14TH AMENDMENT AND THE STATES*, 22, 23 (1912). See also Collins, *Constitutional Aspects of the Truman Civil Rights Program*, 44 *ILL. L. REV.* 1 (1949). Lower court opinions moved in the same direction. Charge to Grand Jury, No. 13,260 (C.C.W.D. Tenn. 1875); Charge to Grand Jury, 30 Fed. Cas. No. 13,258 (C.C.W.D.N.C. 1875); Texas v. Gaines, 23 Fed. Cas. No. 13,847 (C.C.W.D. Tex. 1874) (opinion by Bradley foreshadowing Civil Rights Cases); Greene v. City of Bridgeton, 10 Fed. Cas. No. 5,754 (D.C. Ga. 1879); United States v. Dodge, 25 Fed. Cas. No. 14,976 (W.D. Tex. 1877); Bertonneau v. Bd. Directors, 3 Fed. Cas. No. 1,361 (C.C. La. 1878). The last three cases are forerunners of the Supreme Court's approval of "separate but equal." *Contra*: United States v. Newcomer, 27 Fed. Cas. No. 15,868 (E.D. Pa. 1876) (upholding validity of Civil Rights Acts of 1875 as applied to hotels). For leading state cases on segregated schools during this period, see State v. McCann, 21 Ohio St. 198 (1871), followed in, Nevada *ex rel.* Stoutmeyer v. Duffy, 7 Nev. 342 (1872); Clark v. Bd. of Directors, 24 Iowa 266 (1868) (contra but distinguishable).

The one fairly consistent judicial adherent to the original plan of the War Amendments was Mr. Justice Harlan, whose position is reviewed in CLARK, *THE CONSTITUTIONAL DOCTRINES OF JUSTICE HARLAN* (1915), and more recently in Watt and Orlikoff, *The Coming Vindication of Mr. Justice Harlan*, 44 *ILL. L. REV.* 13 (1949). Oddly enough, Harlan almost failed of confirmation to his Supreme Court seat because of fears in some quarters that he would not be sufficiently radical. Frank, *The Appointment of Supreme Court Justices*, [1941] *WIS. L. REV.* 172, 207-10.

enter into business enterprises;¹⁷⁵ criminal and civil law, in procedures or penalties, should make no distinctions whatsoever because of race or color;¹⁷⁶ there should be no segregation of individuals on the basis of race or color as to the right to own or use land;¹⁷⁷ there should be no segregation of individuals on the basis of race or color in the use of utilities, such as transportation or hotels;¹⁷⁸ with reservations, for here there is substantial divergence, there should be no segregation in the schools.¹⁷⁹ It was generally understood that Congress could legislate to secure these ends, without regard to whether the particular objective was frustrated by state action or by state inaction.¹⁸⁰ On the other hand, the clause was meant to have no bearing on the right to vote;¹⁸¹ the evidence of its contemplated effect on state anti-miscegenation laws is unclear;¹⁸² and it was generally understood to have no bearing on segregation of a purely private sort in situations fairly independent of the law, as in churches, cemeteries, or private clubs.

What has been said goes to the measure of equal protection as a rule of law. But equal protection deserves measure as more than a rule of law, for it represents a part of a symbol, the symbol of equality. The enormous

175. Decisions in accord with the text range from one of the earliest, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (invalidating a discrimination against Chinese laundrymen), to two very recent, *Oyama v. California*, 332 U.S. 633 (1948) (invalidating a California statute setting up racial qualifications for land ownership, some of the Court resting the decision on equal protection grounds), and *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (invalidating racial restraints on fishing).

176. *Accord* as to juries, *Strauder v. West Virginia*, 100 U.S. 303; *Ex parte Virginia*, 100 U.S. 339 (1880). It is common knowledge that there is in fact extreme discrimination against Negroes, but by no means exclusively in the South, in every aspect of the criminal law from arrest to sentence. 1 MYRDAL, *op. cit. supra* note 85, at Pt. 6.

177. *Accord*, *Buchanan v. Warley*, 245 U.S. 60 (1917). *Cf.* *Corrigan v. Buckley*, 271 U.S. 323 (1926); *The Restrictive Covenant Cases*, 334 U.S. 1, 34 (1948). On the practical fashion in which geographical segregation is in fact secured, see Frank, *The United States Supreme Court 1947-48*, 16 U. CHI. L. REV. 1, 21-26 (1948): "In sum, prior to the restrictive covenant cases, Negroes in Indianapolis could not move out of the areas identified. That situation is in no wise changed by the restrictive covenant cases."

178. *Contra*: *The Civil Rights Cases*, 109 U.S. 3 (1883) (invalidating so much of the Civil Rights Act of 1875 as forbade denial of equal rights in transportation and hotels); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding valid a state segregation statute as applied to transportation).

179. There is no United States Supreme Court opinion which deals in a reasoned way with the question of segregation in education. *Gong Lum v. Rice*, 275 U.S. 78 (1927), assumes that such segregation is valid, without actually considering it. For a review of the segregated school cases, see Note, 56 YALE L.J. 1059 (1947).

180. *Contra*: *United States v. Cruikshank*, 92 U.S. 542, 555 (1875) (in substance construing the Enforcement Act of 1870 and equal protection so as to eliminate "private violence" from Congressional control); *United States v. Harris*, 106 U.S. 629 (1882) (invalidating so much of the Third Enforcement Act as applied to acts of private individuals).

181. *Contra*: *Nixon v. Herndon*, 273 U.S. 536 (1927) (invalidating a state election law discriminating against Negroes as a violation of equal protection). The same result is reached in accordance with the original understanding of the Fifteenth Amendment, *Smith v. Allwright*, 321 U.S. 649 (1944).

182. *Cf.* *Perez v. Lippold*, 198 P. 2d 17 (1948), in which a California anti-miscegenation statute was held invalid, three Justices resting the decision on equal protection grounds.

potentiality which made that symbol the banner of the abolitionists manifested itself not only in the Equal Protection clause but also in the remainder of the war amendments. The strongest advocates of "equality before the law" in Congress during the Reconstruction decade hoped to place the recent slaves, not half way on the scale between slavery and freedom, but at a level substantially equivalent and undistinguished from that of the white population. That ultimate goal was to be achieved through equal freedom, equal privileges and immunities, equal due process, equal rights to vote, and equal protection of the laws. As Speaker of the House Schuyler Colfax said in a speech at the opening of the Thirty-ninth Congress, "I call them free men, not freedmen."¹⁸³ Perhaps equality in all its manifestations is as good a measure as any of the difference between free men and freedmen. Who would say that we have not made of the Negroes of America a class apart, freedmen still?

183. HOLLISTER, *LIFE OF COLFAX*, 270, 271 (1887).