where, and how its citizens would enjoy the various civil rights afforded by the states; (2) in so far as views of undeveloped public education in the 1860's can be applied to universal compulsory education in the 1950's, the right to public school education was one of the civil rights with respect to which the states were deprived of the power to impose racial distinctions; (3) while the framers of the Fourteenth Amendment clearly intended that Congress should have the power to enforce the provisions of the Amendment, they also clearly intended that the Amendment would be prohibitory on the states without Congressional action.

The historic background of the Fourteenth Amendment and the legislative history of its adoption show clearly that the framers intended that the Amendment would deprive the states of power to make any racial distinction in the enjoyment of civil rights. It is also clear that the statutes involved in these cases impose racial distinctions which the framers of the Amendment and others concerned with its adoption understood to be beyond the power of a state to enforce.

The framers of the Fourteenth Amendment were men who came to the 39th Congress with a well defined background of Abolitionist doctrine dedicated to the equalitarian principles of real and complete equality for all men. Congressional debates during this period must be read with an understanding of this background along with the actual legal and political status of the Negro at the end of the Civil War. This background gives an understanding of the determination of the framers of the Fourteenth Amendment to change the inferior legal and political status of Negroes and to give them the full protection of the Federal Government in the enjoyment of complete and real equality in all civil rights.[34]

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[34] tenBroek, The Antislavery Origins of the Fourteenth Amendment 185, 186 (1951).

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A. The Era Prior to the Civil War Was Marked By Determined Efforts to Secure Recognition of the Principle of Complete and Real Equality For All Men Within the Existing Constitutional Framework of Our Government.

The men who wrote the Fourteenth Amendment were themselves products of a gigantic antislavery crusade which, in turn, was an expression of the great humanitarian reform movement of the Age of Enlightenment. This philosophy upon which the Abolitionists had taken their stand had been adequately summed up in Jefferson's basic proposition "that all men are created equal" and "are endowed by their Creator with certain unalienable Rights." To this philosophy they adhered with an almost fanatic devotion and an unswerving determination to obliterate any obstructions which stood in the way of its fulfillment. In their drive toward this goal, it may be that they thrust aside some then accepted notions of law and, indeed, that they attempted to give to the Declaration of Independence a substance which might have surprised its draftsmen. No matter, the crucial point is that their revolutionary drive was successful and that it was climaxed in the Amendment here under discussion.

The first Section of the Fourteenth Amendment is the legal capstone of the revolutionary drive of the Abolitionists to reach the goal of true equality. It was in this spirit that they wrote the Fourteenth Amendment and it is in the light of this revolutionary idealism that the questions propounded by this Court can best be answered.

In the beginning, the basic and immediate concern of the Abolitionists was necessarily slavery itself. The total question of removing all other discriminatory relationships after the abolition of slavery was at first a matter for the future. As a consequence, the philosophy of equality was in a state of continuous development from 1830 through the time of the passage of the Fourteenth Amendment. However, the ultimate objective was always clearly in mind—absolute and complete equality for all Americans.

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During the pre-Civil War decades, the antislavery movement here and there began to develop special meaning and significance in the legal concept of "privileges and immunities," the concept of "due process" and the most important concept of all for these cases, "equal protection of the laws." In the immediately succeeding sections, we shall show how the development of these ideas culminated in a firm intention to obliterate all class distinction as a part of the destruction of a caste society in America.

The development of each of these conceptions was often ragged and uneven with much overlapping: what was "equal protection" to one was "due process" or "privilege and immunity" to another. However, regardless of the phrase used, the basic tenet of all was the uniform belief that Negroes were citizens and, as citizens, freedom from discrimination was their right. To them "discrimination" included all forms of racial distinctions.

Equality Under Law

One tool developed to secure full standing for Negroes was the concept of equal protection of the laws. It was one thing, and a very important one, to declare as a political abstraction that "all men are created equal," and quite another to attach concrete rights to this state of equality. The Declaration of Independence did the former. The latter was Charles Sumner's outstanding contribution to American law.

The great abstraction of the Declaration of Independence was the central rallying point for the Abolitionists. When slavery was the evil to be attacked, no more was needed. But as some of the New England states became progressively more committed to abolition, the focus of interest shifted from slavery itself to the status and rights of the free Negro. In the Massachusetts legislature in the 1840's, Henry Wilson, manufacturer, Abolitionist, and later United States Senator and Vice President, led

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the fight against discrimination, with "equality" as his rallying cry.[35] One Wilson measure adopted by the Massachusetts Legislature in 1845 gave the right to recover damages to any person "unlawfully excluded" from the Massachusetts public schools.[36]

Boston thereafter established a segregated school for Negro children, the legality of which was challenged in *Roberts* v. *City of Boston,* 5 Cush. (Mass.) 198 (1849). Charles Sumner, who later was to play such an important role in the Congress that formulated the Fourteenth Amendment, was counsel for Roberts. His oral argument, which the Abolitionists widely circulated, is one of the landmarks in the crystallization of the equalitarian concept.

This case was technically an action for damages under the Wilson Act. However, Sumner attacked segregation in public schools on the broader ground that segregation violated the Massachusetts Constitution which provided: "All men are created free and equal", and it was from this base that he launched his attack.

> "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 congenital 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." [37]

"Equality before the law" [38] was the formula he employed. He traced the equalitarian theory from the eighteenth

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[35] For an account of Wilson's struggles against anti-miscegenation laws, against jim-crow transportation and jim-crow education, see NASON, LIFE OF HENRY WILSON 48 *et seq.* (1876).

[36] Massachusetts Act 1845, § 214.

[37] 2 WORKS OF CHARLES SUMNER 330, 335-336 (1875). The entire argument is reprinted at 327 *et seq.*

[38] *Id.* at 327, 330-331.

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century French philosophers through the French Revolution into the language of the French Revolutionary Constitution of 1791,[39] the Constitution of February 1793,[40] the Constitution of June 1793[41] and the Charter of Louis Phillipe.[42] Equality before the law, i.e., equality of rights, was the real meaning of the Massachusetts constitutional provision. Before it "all . . . distinctions disappear":

> "He may be poor, weak, humble, or black—he may be 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 French, German, English or Irish; he is a MAN, the equal of all his fellowmen."[43]

Hence, he urged, separate schools are illegal.

The Massachusetts court rejected Sumner's argument and refused to grant relief. Subsequent thereto, in 1853, the Legislature of Massachusetts, after careful consideration of the problem involving hearings and reports, amended the Wilson statute by providing, among other things, that in determining the qualifications of school children in public schools in Massachusetts "no distinction was to be made on account of the race, color or religious opinions of the appellant or scholar."[44]

The Committee on Education of the House of Representatives in its report recommending adoption of this bill carefully considered the arguments for and against the measure and concluded:

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[39] "Men are born and continue free and *equal in their rights.*" *Id.* at 337.

[40] "The law ought to be equal for all." *Id.* at 338.

[41] "All men are equal by nature *and before the law.*" *Id.* at 339.

[42] "Frenchmen are *equal before the law. . . .*" *Ibid.*

[43] *Id.* at 341-342.

[44] General Laws of Mass. c. 256, § 1 (1855).

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"Your committee believe, in the words of another, that 'The only security we can have for a healthy and efficient system of public instruction rests in the deep interest and vigilant care with which the more intelligent watch over the welfare of the schools. This only will secure competent teachers, indefatigable exertion, and a high standard of excellence; and where the colored children are mingled up with the mass of their more favored fellows, they will partake of the advantages of this watchful oversight. Shut out and separated, they are sure to be neglected and to experience all the evils of an isolated and despised class. One of the great merits of our system of public instruction is the fusion of all classes which it produces. From a childhood which shares the same bench and sports there can hardly arise a manhood of aristocratic prejudice or separate castes and classes. Our common-school system suits our institutions, promotes the feeling of brotherhood, and the habit of republican equality. To debar the colored race from these advantages, even if we still secured to them equal educational results, is a sore injustice and wrong, and is taking the surest means of perpetuating a prejudice that should be depreciated and discountenanced by all intelligent and Christian men." [45]

Thus, the argument and theories advanced by Sumner, although rejected by the Supreme Court of Massachusetts, finally became incorporated into the law of the State of Massachusetts. More important, however, is the fact that the argument of Sumner was widely distributed throughout the country during the period immediately preceding the consideration of the Fourteenth Amendment.[46] As a consequence it became a fundamental article of faith among

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[45] Report of Committee on Education to House of Representatives, Commonwealth of Massachusetts, March 17, 1855.

[46] Among those active in distributing the argument was SALMON P. Chase. DIARY AND CORRESPONDENCE OF SALMON P. CHASE, Chase to Sumner, Dec. 14,1849, in 2 Ann. Rep. Am. Hist. Ass'n. 188 (1902).

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the Radical Republicans that from a constitutional standpoint racial segregation was incompatible with constitutional guarantees of equal protection.[47]

The analysis of the available materials covering the period from 1830 to 1860, while important to this point, is too voluminous to be included in the argument at this point. We have, therefore, placed this analysis in a supplement at the end of the brief. The analysis of these materials compels the following historical conclusions:

1. To the Abolitionists, equality was an absolute—not a relative—concept which comprehended that no legal recognition be given to racial distinctions of any kind. The notion that any state could require racial segregation was totally incompatible with this doctrine.

2. The phrases—"privileges and immunities," "equal protection," and "due process"—that were to appear in the Amendment had come to have a specific significance to opponents of slavery in the United States. Proponents of slavery knew and understood what that significance was, even as they disagreed with these theories. Members of the Congress that proposed the Amendment, shared this knowledge.

3. These radical Abolitionists, who had been in the minority prior to the Civil War, gained control of the Republican party in Congress during the course of the war and thus emerged in a dominant position in the Congress which was to write the Fourteenth Amendment. Ten of the members of the Joint Committee of Fifteen were men who had definite antislavery backgrounds and two others had likewise opposed slavery.

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[47] See, for example, Sumner resolution offered Congress on December 4, 1865 which called for "The organization of an educational system for the equal benefit of all without distinction of color or race." Cong. Globe, 39th Cong., 1st Sess. 2 (1865-1866).

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4. When the Joint Committee of Fifteen translated into constitutional provisions the equalitarian concepts held and widely bruited about in the struggle against slavery, it used the traditional phrases that had all become freighted with equalitarian meaning in its widest sense: "equal protection", "privileges and immunities" and "due process."

In these respects history buttresses and gives particular content to the recent admonition of this Court that "[w]hatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race and color." *Shelley* v. *Kraemer,* 334 U. S. 1, 23.

Despite the high principles and dedication of the leaders of the Abolitionist movement, their program ran into repeated roadblocks from both individual groups and state machinery. The movement was not only blocked in so far as the abolition of slavery itself was concerned, but was met by an ever increasing tendency on the part of all the southern states and some northern states to gradually cut down on the rights of free Negroes and to bring their status nearer and nearer to that of slaves. This countermovement culminated in the decision of the Supreme Court in the *Dred Scott* case (*Scott* v. *Sandford,* 19 How. 393) that no person of the "African race, whether free or not" could enjoy, under the Constitution of the United States, any right or protection whatsoever. All Negroes were thereby left, by the principles of that case, to the absolute, unrestrained power of the several states.

B. The Movement For Complete Equality Reached Its Successful Culmination in the Civil War and the Fourteenth Amendment.

The onset of the Civil War marked the turning point of the Abolitionists' drive to achieve absolute equality for all Americans. The first great success came on January 1,

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1863, when President Lincoln's Emancipation Proclamation freed all slaves in those areas in insurrection against the United States. Obviously this was far from a complete victory. The doctrines enunciated by Chief Justice Taney in the *Dred Scott* case were still unqualified and remained as a part of the "constitutional law" of the time.

In February, 1865, the Abolitionist-dominated 38th Congress adopted and submitted to the states what was to become the Thirteenth Amendment to the Constitution. However, the Radical Republicans in Congress were intensely aware that the abolition of slavery constituted only a partial attainment of their goal of complete political and legal equality for Negroes. They had already determined as early as the spring and summer of 1862 to strike at the objective of federal statutory and constitutional guarantees for Negro equality. As yet, however, their thinking had not succeeded in distilling clearly a series of specifically defined legal and political objectives which they proposed to write into federal law and Constitution.

It should be observed in passing that their reason for this obviously was not necessarily pure Abolitionist idealism. They were in part motivated by hard practical considerations of Republican Party ascendency, and the fear that a restored South, in which Negroes were not given complete legal and political equality, would fall into the hands of a pre-war conservative white political leadership which would threaten the national political control of the Radical Republicans themselves. Thus their idealistic, social philosophy and their hard practical considerations of party interest dovetailed very nicely.[48]

It was to require the events of 1865-66, most notably the attempt to restore political rule in the South and the attempt to impose an inferior non-citizenship status upon the Negro in the restored southern states, to make clear to

[48] tenBroek, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 117-119 (1951).

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the Radical Republicans their new constitutional objectives and the means they would seek to obtain it.

C. The Principle of Absolute and Complete Equality Began to Be Translated Into Federal Law as Early as 1862.

In 1862 Congress addressed itself to an immediate problem over which it had authority. In debating the bill which was to abolish slavery in the District of Columbia, Representative Bingham said: "The great privilege and immunity of an American citizen to be respected everywhere in this land, and especially in this District, is that they shall not be deprived of life, liberty, or property without due process of law".[49] Representative Fessenden concluded: "If I do not mistake, it is quite apparent that when this bill shall be put on its final passage it will proclaim liberty to the slaves within this District. These men—for God created them men, though man has used them as goods and chattels—slaves—these men and women and children will, when the President of the United States signs this bill, be translated ... [to a] condition in which they are invested with the rights of freemen, upon which none can trespass with impunity; since over the person of the free black as well as the free white man there is thrown the broad shield of the nation's majesty." [50] The bill was enacted into law.[51]

Simultaneously Congress discontinued the application of the Black Codes of Maryland and Virginia to the District of Columbia.[52]

Between the time of the Emancipation Proclamation in 1863 and the formulation of the Fourteenth Amendment, Congress took several forward steps to secure complete equality for the class so recently freed. These steps came in the form of particular solutions to particular problems.

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[49] Cong. Globe, 37th Cong., 2d Sess. 1639 (1862).

[50] *Id.* at 1642.

[51] 12 Stat. 376 (1862).

[52] 12 Stat. 407 (1862).

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To this Congress (38th), the most immediate problem was one which fell under their glance daily, the problem of transportation in the District of Columbia. Congressional treatment of this problem is of significance because it reveals the early determination of the Radical Republicans to prohibit racial segregation.

In 1863, Congress amended the charter of the Alexandria and Washington Railroad to eliminate the practice of putting white and Negro passengers in separate parts of the street cars.[53] When, in 1864, the Washington and Georgetown street car company attempted to put colored passengers in cars separate from those of the white passengers, Senator Sumner denounced the practice in the Senate and set forth on his crusade to prohibit all racial distinctions by first eliminating street car segregation in the District.[54] In 1865, he carried to passage a law applicable to all District carriers that "no person shall be excluded from any car on account of color."[55]

The debate on the street car bill covered the entire issue of segregation in transportation. Those who supported prohibition of segregation did so on the ground that any such separation was a denial of equality itself. Senator Wilson denounced the "Jim Crow car," declaring it to be "in defiance of decency."[56] Senator Sumner persuaded his brethen to accept the Massachusetts view, saying that in Massachusetts, "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."[57] Thus, when Congress in 1866 framed the Fourteenth Amendment, it did so against a background of Congressional determination that segregation in transportation was unequal, unjust, and was "in defiance of decency."

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[53] 12 Stat. 805 (1863).

[54] Cong. Globe, 38th Cong., 1st Sess. 553, 817 (1864).

[55] 13 Stat. 536, 537 (1865).

[56] Cong. Globe, 38th Cong., 1st Sess. 3132, 3133 (1864).

[57] *Id.* at 1158.

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D. From the Beginning the Thirty-Ninth Congress Was Determined to Eliminate Race Distinctions From American Law.

The 39th Congress which was to propose the Fourteenth Amendment convened in December 1865 with the realization that, although slavery had been abolished, the overall objective, the complete legal and political equality for all men had not been realized. This was dramatically emphasized by the infamous Black Codes being enacted throughout the southern states. These Black Codes had the single purpose of providing additional legislative sanction to maintain the inferior status for all Negroes which had been judicially decreed in the opinion in the case of *Scott v. Sandford,* 19 How. 393.

The Black Codes, while they grudgingly admitted that Negroes were no longer slaves, nonetheless used the states' power to impose and maintain essentially the same inferior, servile position which Negroes had occupied prior to the abolition of slavery. These codes thus followed the legal pattern of the ante-bellum slave codes. Like their slavery forerunners, these codes compelled Negroes to work for arbitrarily limited pay; restricted their mobility; forbade them, among other things, to carry firearms; forbade their testimony in a court against any white man; and highly significant here, contained innumerable provisions for segregation on carriers and in public places. In at least three states these codes prohibited Negroes from attending the public schools provided for white children.[58]

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[58] See the summary in Senator Wilson's speech before Congress, Cong. Globe, 39th Cong., 1st Sess. 39-40, 589 (1866); 1 FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 273-312 (1906); MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES DURING THE PERIOD OF RECONSTRUCTION 29-44 (1880).

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It was this inferior caste position which the Radical Republicans in Congress were determined to destroy. They were equally determined that by federal statutory or constitutional means, or both, Congress would not only invalidate the existing Black Codes but would proscribe any and all future attempts to enforce governmentally-imposed caste distinctions.

Congress was well aware of the fact that to take this step involved a veritable revolution in federal-state relations. A number of Senators and Representatives in the 39th Congress, by speech and resolution, made it eminently clear that they aimed at nothing less than the total destruction of all hierarchy, oligarchy and class rule in the southern states. One of the more notable resolutions of this kind was that of Senator Charles Sumner, introduced on December 4, 1865, at the opening of the session. This resolution asserted that no state formerly declared to be in rebellion was to be allowed to resume its relation to the Union until "the complete reestablishment of loyalty . . ." and:

> "The complete suppression of all oligarchical pretensions, and the complete enfranchisement of all citizens, so that there shall be no denial of rights on account of color or race; but justice shall be impartial, and all shall be equal before the law."

Another requirement of Sumner's resolution called for:

> "The organization of an educational system for the equal benefit of all without distinction of color or race."[59]

Sumner thus recognized the close relationship between the destruction of the southern ruling class and the elimination of segregation in the educational system.

Representative Jehu Baker of Illinois introduced a similar resolution in the House of Representatives, which read in part as follows:

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[59] Cong. Globe, 39th Cong., 1st Sess. 2 (1865-1866).

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> "Whereas class rule and aristocratic principles of government have burdened well nigh all Europe with enormous public debts and standing armies, which press as a grievous incubus on the people, absorbing their substance, impeding their culture, and impairing their happiness; and whereas the class rule and aristocratic element of slaveholding which found a place in our Republic has proved itself, in like manne, hurtful to our people . . . Therefore,
>
> "*Resolved*, (as the sense of this House,) That once for all we should have done with class rule and aristocracy as a privileged power before the law in this nation, no matter where or in what form they may appear; and that, in restoring the normal relations of the States lately in rebellion, it is the high and sacred duty of the Representatives of the people to proceed upon the true, as distinguished from the false, democratic principle, and to realize and secure the largest attainable liberty to the whole people of the Republic, irrespective of class or race."[60]

There were numerous other resolutions and speeches expressing similar sentiments. All of the resolutions were referred to the Joint Committee on Reconstruction and are a part of the background of that committee's work in the framing of the Fourteenth Amendment.

These expressions of principle were started toward statutory fruition by Senator Trumbull's Bill to enlarge the powers of the Freedmen's Bureau. The debates which followed the introduction of his Senate Bill No. 60 are of particular interest because they make it clear that a large number of the Radical Republicans regarded the destruction of segregation in the school districts of the southern states as a highly desirable legislative objective. What followed amounted to a forthright assault on the idea that there could be racial segregation in the public schools.

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[60] Cong. Globe, 39th Cong. 1st Sess. 69 (1865-1866).

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Representative Hubbard of Connecticut expressed the broad pattern of thinking of which this bill was a part:

> "The words, caste, race, color, ever unknown to the Constitution, . . . are still potent for evil on the lips of men whose minds are swayed by prejudice or blinded by passion, and the freedmen need the protection of this bill.
>
> "The era is dawning when it will be a reproach to talk in scorn about the distinctions of race or color. Our country is, and must be, cosmopolitan. . . .
>
> "It is in vain that we talk about race, caste, or color. . . ."[61]

Likewise, Representative Rousseau of Kentucky stated:

> ". . . Here are four school-houses taken possession of, and unless they mix up white children with black, the white children can have no chance in these schools for instruction. And so it is wherever this Freedmen's Bureau operates."[62]

Representative Dawson of Pennsylvania recognized that the supporters of the bill:

> ". . . hold that the white and black race are equal. . . . Their children are to attend the same schools with white children, and to sit side by side with them. . . ."[63]

Of more importance was S.61 "A Bill to Protect All Persons in the United States in Their Civil Rights and Furnish the Means of Vindication." This bill, though introduced through Senator Trumbull in his capacity as Chairman of the Judiciary Committee, was in fact a measure sponsored by the entire Radical Republican majority.

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[61] *Id.* at 630.

[62] *Id.* at App. 71.

[63] *Id.* at 541.

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The bill forbade any "discrimination in civil rights or immunities" among "the people of the United States on account of race, color, or previous condition of slavery". It provided that all persons should have "full and equal benefits of all laws" for the security of their persons and their property.

In a lengthy speech, Senator Trumbull defended the wisdom and constitutionality of this bill in detail. The Thirteenth Amendment, he argued, made the bill both constitutional and necessary.

> "Then, sir, I take it that any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited."[64]

Senator Trumbull's argument precipitated a lengthy debate on the constitutional issues. Opponents of the measure, conceding that Congress had the power under the Thirteenth Amendment to assure freedom of Negroes, denied that Congress had the power to endow Negroes with citizenship and civil rights. To sustain their position they pointed to the fact that Negroes who were freed prior to the Emancipation Proclamation were not treated as citizens and under the authority of the *Dred Scott* case could not be citizens.[65]

In reply, Trumbull advanced the additional constitutional argument that, once slavery was abolished, the naturalization clause of the Constitution provided Congress with the power to endow Negroes with the citizenship the *Dred Scott* case had held they could not otherwise enjoy. Trumbull thus adopted the position of Chief Justice Taney in

[64] *Id.* at 474.

[65] See statements of Senators Van Winkle of West Virginia and Saulsbury of Delaware. *Id.* at 475 ff.

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the *Dred Scott* case that the power to confer citizenship was vested in the federal, not the state government.

Another major area of controversy with respect to the bill was as to its scope. Time and again the Democrats and the more conservative Republicans in the Senate asserted that the bill would invalidate every state law which provided for racial segregation, or provided a different rule for persons of different races.[66] For example, there was the charge of Senator Cowan, a Republican of Pennsylvania, who said:

> "Now, as I understand the meaning . . . of this bill, it is that there shall be no discrimination made between the inhabitants of the several States of this Union, none in any way. In Pennsylvania, for the greater convenience of the people, and for the greater convenience, I may say, of both classes of the people, in certain districts the Legislature has provided schools for colored children, has discriminated as between the two classes of children. We put the African children in this school-house and the white children over in that school-house, and educate them there as we best can. Is this amendment to the Constitution of the United States abolishing slavery to break up that system which Pennsylvania has adopted for the education of her white and colored children? Are the school directors who carry out that law and who make this distinction between these classes of children to be punished for a violation of this statute of the United States? To me it is monstrous."[67]

Senator Howard in reply gave the Conservatives no comfort:

> "I do not understand the bill which is now before us to contemplate anything else but this, that in respect to all civil rights . . . there is to be hereafter

[66] *Id.* at 500 ff.

[67] *Id.* at 500.

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> no distinction between the white race and the black race. It is to secure to these men whom we have made free the ordinary rights of a freeman and nothing else. . . . There is no invasion of the legitimate rights of the States." [68]

But, perhaps the best answer of all to these assertions of the sweeping character of the bill was given by Senator Morrill of Vermont, a member of the Joint Committee of Fifteen:

> "The Senator from Kentucky tells us that the proposition [federal guarantee of civil rights] is revolutionary, . . . I admit that this species of legislation is absolutely revoluntionary. But are we not in the midst of revolution? Is the Senator from Kentucky utterly oblivious to the grant results of four years of war?"[69]

It is highly significant that Senator Morrill was not only a member of the Joint Committee of Fifteen, even then engaged in drafting the Fourteenth Amendment, but that he later was to insist that the Fourteenth Amendment prohibited separate but equal provisions in state school legislation.

After two full days of debate, the Senate passed the Trumbull bill by a vote of 33 to 12.

The only rational inference to be drawn from the legislative history of the Trumbull bill in the Senate is that the great majority of that body was determined to bar the states from using their power to impose or maintain racial distinctions. The same majority was of the opinion that the federal government had constitutional authority so to delimit such action by the state.

In the House, the Conservatives pointed out forcefully that the text of the bill presented would destroy all

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[68] *Id.* at 504.

[69] *Id.* at 570.

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limitations on federal power over state legislation and would likewise destroy all state legislative and judicial provisions making distinctions against Negroes. Representative Rogers observed:

> "In the State of Pennsylvania there is a discrimination made between the schools for white children and the schools for black. The laws there provide that certain schools shall be set apart for black persons, and certain schools shall be set apart for white persons. Now, if this Congress has a right, by such a bill as this, to enter the soveriegn domain of a State . . . then, by parity of reasoning, it has a right to enter the domain of that State and inflict upon the people there, without their consent, the right of the negro to enjoy the elective franchise. . . ."[70]

In a somewhat disingenous attempt to deal with the argument of the Conservatives, Representative Wilson of Iowa, chairman of the House Judiciary Committee, argued vaguely that the bill would not have the effect of destroying all legislation discriminating on the basis of race.[71] Nevertheless Wilson broadly defined the term civil rights as used in the bill as being "the natural rights of man." Moreover, he observed that "immunities" secured "to citizens of the United States equality in the exemptions of the law."[72]

At this point, Representative Bingham of Ohio, who had become converted to the Conservatives' constitutional power argument, made a notable address to the House. While admitting that perhaps Congress was at that time without constitutional authority to enact so sweeping a bill, he said it was nevertheless true that the bill as it stood was as sweeping as was charged by the Conservatives.

Representative Bingham then made it preeminently clear that he entirely approved of the sweeping objectives of the

[70] *Id.* at 1121.

[71] *Id.* at 1117.

[72] *Ibid.*

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bill as it came from the Senate. His willingness to accept any modification of the bill was *solely* on the grounds of an overwhelming present constitutional objection which he himself was even then in the process of curing with a proposal for a constitutional amendment. He said:

> "If civil rights has this extent, what, then, is proposed by the provision of the first section? Simply to strike down by congressional enactment every State constitution which makes a discrimination on account of race or color in any of the civil rights of the citizen. I might say here, without the least fear of contradiction, that there is scarcely a State in this Union which does not, by its Constitution or by its statute laws, make some discrimination on account of race or color between citizens of the United States in respect of civil rights."[73]

Bingham then insisted that he believed that all discriminatory legislation should be wiped out by amending the Constitution.

> "The law in every State should be just; it should be no respecter of persons. It is otherwise now, and it has been otherwise for many years in many of the States of the Union. I should remedy that not by an arbitrary assumption of power, but by amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future."[74]

Bingham's prestige as a leader of the Radical Republican majority obliged Wilson to accept the Ohioan's interpretation. Consequently, the bill was returned to the Judiciary Committee and amended to eliminate the sweeping phrase "there shall be no discrimination in civil rights and immunities." Wilson no doubt comforted himself with the fact that even as amended the language of the bill was

[73] *Id.* at 1291.

[74] *Id.* at 1294.

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still revolutionary. At any rate, the Conservatives were still convinced that the bill invalidated state racial segregation laws. With considerable force, they argued that the phrase "the inhabitants of every state" . . . shall have the rights to full and equal benefits of all laws and proceedings for the "security of persons and property . . ." was properly to be broadly interpreted. In fact, Senator Davis of Kentucky had this to say:

> ". . . [T]his measure proscribes all discriminations against negroes in favor of white persons that may be made anywhere in the United States by any 'ordinance, regulation, or custom,' as well as by 'law or statute.' . . .
>
> But there are civil rights, immunities, and privileges 'which ordinances, regulations, and customs' confer upon white persons everywhere in the United States, and withhold from negroes. On ships and steamboats the most comfortable and handsomely furnished cabins and state-rooms, the first tables, and other privileges; in public hotels the most luxuriously appointed parlors, chambers, and saloons, the most sumptuous tables, and baths; in churches not only the most softly cushioned pews, but the most eligible sections of the edifices; on railroads, national, local, and street, not only seats, but whole cars, are assigned to white persons to the exclusion of negroes and mulattoes. All these discriminations in the entire society of the United States are established by ordinances, regulations, and customs. This bill proposes to break down and sweep them all away and to consummate their destruction, and bring the two races upon the same great plane of perfect equality, declares all persons who enforce those distinctions to be criminals against the United States, and subjects them to punishment by fine and imprisonment. . . ."[75]

Significantly, there was no attempt to reply to this interpretation of the amended bill.

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[75] *Id.* at App. 183.

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The bill in its amended form was adopted by Congress and vetoed by President Johnson.

Representative Lawrence, who spoke in favor of overriding President Johnson's veto said:

> "This section does not limit the enjoyment of privileges to such as may be accorded only to citizens of 'some class,' or 'some race,' or 'of the least favored class,' or 'of the most favored class,' or of a particular complexion, for these distinctions were never contemplated or recognized as possible in fundamental civil rights, which are alike necessary and important to all citizens, and to make inequalities in which is rank injustice."[76]

He also said:

> ". . . distinctions created by nature of sex, age, insanity, etc., are recognized as modifying conditions and privileges, but mere race or color, as among citizens never can [be]."[77]

Numerous newspapers also thought the bill destroyed all segregation in schools, theatres, churches, public vehicles and the like.[78] Flack said of the bill:

> "Many [Congressmen] believed that the negro would be entitled to sit on juries, to attend the same schools, etc., since, if the States undertook to legislate on those matters, it might be claimed that he was denied the equal rights and privileges accorded to white men. It does not appear that all of these contentions were specifically contradicted.
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> * * *

[76] *Id.* at 1836.

[77] *Id.* at 1835.

[78] New York Herald, March 29 and April 10, 1866: Commercial March 30, 1866; National Intelligencer, April 16, 1866 and May 16, 1866. There were a number of suits against local segregation laws banning Negroes from theatres, omnibuses, etc., McPherson's Scrap Book, The Civil Rights Bill, pp. 110 ff. None of these suits appear to have involved school segregation laws.

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It would seem reasonable to suppose that if the bill should prove to be constitutional that these rights could not be legally denied them."[79]

* * *

". . . many of the leading papers of the country, including some of the principal Republican papers, regarded the Civil Rights Bill as a limitation of the powers of the States, and as a step towards centralization, in that it interfered with the regulation of local affairs which had hitherto been regulated by state and local authorities or by custom. This opinion was held in the North as well as in the South. There also seems to have been a general impression among the press that negroes would, by the provisions of the bill, be admitted, on the same terms and conditions as the white people, to schools, theaters, hotels, churches, railway cars, steamboats, etc."[80]

* * *

"What the papers gave as their opinion must necessarily have been the opinion of large numbers of people. There is much evidence to substantiate this conclusion, for almost immediately after the passage of the bill over the President's veto, efforts were made by the negroes to secure these rights."[81]

The following generalizations are pertinent to the relationship of the Civil Rights Act (S. 61 as amended) to the problem of segregation in schools and the Fourteenth Amendment:

1. As originally drafted, the Act contained a phrase "there shall be no discrimination in civil rights and immunities among the inhabitants of any state . . ." This was so broad in scope that most Senators and Representatives believed that it would have the effect of destroying entirely all state legis-

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[79] FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 40 (1908).

[80] *Id.* at 45.

[81] *Ibid.*

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tion which distinguished or classified in any manner on the basis of race. School segregation laws, statutes establishing unequal penalties in criminal codes, laws banning Negroes from juries, all alike would have become invalid as against the federal statute.

2. A great majority of the Republicans—the men who formulated the Fourteenth Amendment—had no objection to a bill which went this far. Men like Rogers, Kerr and Cowan objected to the bill on the ground that it would end all caste legislation, including segregated schools, and this was the view of the Senate. None of the bill's supporters in the House, except Wilson, denied that the bill had that effect.

3. The Bingham amendment was finally adopted in the House which struck out the "no discrimination" clause, simply because a majority of the members of the House believed that so sweeping a measure could not be justified under the Constitution as it stood. They accepted Bingham's argument that the proper remedy for removing racial distinctions and classifications in the states was a new amendment to the Constitution.

4. The logic of the Bingham constitutional objections aside, the persuasiveness of his technical objection to the Trumbull bill was immeasurably enhanced by the fact that several days before his motion to amend the Civil Rights Bill, Bingham had in fact proposed to the House, on behalf of the Joint Committee, a constitutional amendment by the terms of which his constitutional objections to the Trumbull bill were obviated. That measure, H. R. 63, with some significant changes intended to underscore the prohibition on state governmental action with the

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addition of the citizenship clause became the Fourteenth Amendment.[82]

5. The law as finally enacted enumerated certain rights which Trumbull and other Radicals had felt were inseparably connected with the status of freedom. However, there is no evidence that even after the modification of the bill, the enumeration in the bill was considered to exclude rights not mentioned. Kerr, Rogers, Cowan, Grimes and other conservatives still insisted that the bill, even in its final form, banned segregation laws. The phrase "the inhabitants of every race . . . shall have the right . . . to full and equal benefit of all laws and proceedings for the security of persons and property" still stood in the bill and was susceptible of broad interpretation.

6. Finally, it may be observed that a majority of both Houses of Congress were ready to go beyond the provisions of the Civil Rights Act. Congressmen as diverse in their views as John A. Bingham and Henry J. Raymond, a moderate Republican and editor of the New York Times, united in proposing a constitutional amendment which would remove doubts as to the ability of Congress to destroy all state legislation discriminating and segregating on the basis of race. The forthcoming amendment, at all odds, was to set at rest all doubts as to the power of Congress to abolish all state laws making any racial distinctions or classifications.

[82] "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment)." THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 61 (Kendrick ed. 1914).

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THE FRAMERS OF THE FOURTEENTH AMENDMENT

While Congress was engaged in the passage of the Civil Rights Act, a powerful congressional committee was even then wrestling with the problem of drafting a constitutional amendment which they hoped would definitely destroy all class and caste legislation in the United States. This committee was the now famous Joint Committee of Fifteen, which the two houses of Congress had established by Joint Resolution in December, 1865, to "inquire into the conditions of the states which formed the so-called Confederate States of America and report whether any or all of them were entitled to representation in Congress." It is extremely important for the purpose of this brief to observe that the Joint Committee of Fifteen was altogether under the domination of a group of Radical Republicans who were products of the great Abolitionist tradition, the equalitarianism which has been set forth earlier in this brief.

Section 1 of the Fourteenth Amendment, and particularly the equal protection clause, is pecularily the product of this group, plus Senators Sumner, Wilson and Trumbull.[83]

Co-chairmen of the Commitee were Representative Thaddeus Stevens of Pennsylvania and Senator William P. Fessenden of Maine.

Stevens was virtually dictator of the House. It was his dedicated belief that the Negro must be immediately elevated to a position of unconditional, legal, economic, political and social equality; and to this end he was determined to destroy every legal and political barrier that stood in

[83] KELLY AND HARBISON, THE AMERICAN CONSTITUTION, ITS ORIGIN AND DEVELOPMENT 460-463 (1948); BOUDIN, TRUTH AND FICTION ABOUT THE FOURTEENTH AMENDMENT, 16 N. Y. U. L. Q. REV. 19 (1938); FRANK AND MUNRO, THE ORIGINAL UNDERSTANDING OF "EQUAL PROTECTION OF THE LAWS", 50 COL. L. REV. 131, 141 (1950).

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the way of his goal.[84] Obviously, any constitutional amendment affecting the Negro would very heavily reflect his point of view.

Stevens believed that the law could not permit any distinctions between men because of their race. It was his understanding of the first section of the Fourteenth Amendment that: "... where any State makes a distinction in the same law between different classes of individuals, Congress shall have power to correct such discrimination and inequality ..." [85] He believed that it was up to Congress to repudiate "... the whole doctrine of the legal superiority of families or races," [85a] and that under the Amendment, "... no distinction would be tolerated in this purified Republic but what arose from merit and conduct." [86]

Senator Fessenden undoubtedly held moderate views on the Reconstruction and, these views probably accounted for his selection as Co-chairman of the Joint Committee. Although Fessenden hoped that the Republican Party would work successfully with President Johnson, he broke with Johnson on the Civil Rights Act, which he supported with conviction. He was a staunch champion of the Fourteenth Amendment. Fessenden believed that all distinctions in civil rights based upon race must be swept away, and he

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[84] See for example, Stevens' speech attacking the "doctrine of the legal superiority of families or races" and denouncing the idea that "this is a white man's government." Cong. Globe, 39th Cong., 1st Sess. 75 (1865). "Sir," he said on this occasion, "this doctrine of a white man's Government is as atrocious as the infamous sentiment that damned the late Chief Justice to everlasting fame; and, I fear, to everlasting fire." See also similar observations on Stevens in BOWERS, THE TRAGIC ERA (1929) and WOODBURN, THE LIFE OF THADDEUS STEVENS (1913).

[85] Cong. Globe, 39th Cong., 1st Sess. 1063 (1866).

[85a] *Id.* at 74.

[86] *Id.* at 3148.

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was in favor of excluding the southern states from any representation in Congress until this end was assured.[87]

His son reports that the essence of his views was "all civil and political distinctions on account of race or color [would] be inoperative and void...."[88]

Senator James W. Grimes, Republican of Iowa, was a Moderate and a close friend of Fessenden.[89] While he was governor of Iowa, prior to his election to the Senate the state constitution was revised to provide schools free and open to all children.[90] He insisted upon free schools open to all,[91] and Lewellen, who analyzed Grimes' political ideas, concluded that—

> "Special legislation, whether for individual or class, was opposed by Grimes as contrary 'to the true theory of a Republican government' and as the 'source of great corruption.' Although he sympathized with the newly freed Negroes after the Civil War, he opposed any attempt to make them wards of the Federal government. They had been made citizens and had been given the right to vote; there was no reason in the world why a law should be passed 'applicable to colored people' and not to white people. While his ideas on the Negro question were colored by his radical opinions on the slavery question his opposition to race legislation would probably have been practically as firm upon any other subject."[92]

Senator Ira Harris of New York, one of the least vocal members of the Committee of Fifteen, was a close friend

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[87] KENDRICK, *op. cit. supra* n. 82, at 172-177; 6 DICTIONARY OF AMERICAN BIOGRAPHY 349-350 (1931).

[88] 2 FESSENDEN, LIFE AND PUBLIC SERVICES OF WILLIAM PITT FESSENDEN 36 (1931).

[89] KENDRICK, *op. cit. supra* n. 82, at 190-191.

[90] 7 DICTIONARY OF AMERICAN BIOGRAPHY 632 (1931).

[91] *Ibid.;* SALTER, LIFE OF JAMES W. GRIMES, c. 3 (1876).

[92] LEWELLEN, POLITICAL IDEAS OF JAMES W. GRIMES 42 IOWA HIST. & POL. 339, 347 (1944).

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of Charles Sumner,[93] and "acted with the radicals in all matters pertaining to reconstruction." [94] His explicit views on segregation are unascertained.[95] He was, however, so closely allied to the insiders on the Committee who considered race and color an indefensible basis for making legal distinctions,[96] that it is safe to conclude that he espoused, or at least acquiesced in, this viewpoint.

Senator George H. Williams, an Oregon Republican and former Douglas Democrat, claimed authorship of the First Reconstruction Act of 1867, originally called the Military Reconstruction Bill, which he introduced in the Senate on February 4, 1867.[97] In commenting upon this bill he said:

> "I will say that in preparing this bill, I had no desire to oppress or injure the people of the South, but my sole purpose was to provide a system by which all classes would be protected in life, liberty, and property . . ." [98]

His views on segregation are also unascertained.[99] It should be noted, however, that there is no record of his ever lending his voice or his votes to any law providing segregation based upon race or color.

Senator Jacob H. Howard of Michigan was clearly in the vanguard of that group which worked to secure full

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[93] 8 DICTIONARY OF AMERICAN BIOGRAPHY 310 (1932).

[94] KENDRICK, *op. cit. supra* n. 82, at 195.

[95] FRANK AND MUNRO, THE ORIGINAL UNDERSTANDING OF EQUAL PROTECTION OF THE LAWS, 50 COL. L. REV. 131, 142 (1950).

[96] *Ibid.*

[97] KENDRICK, *op. cit. supra* n. 82, at 191; Williams, *Six Years in the United States Senate,* Daily Oregonian, Dec. 3, 10, 1905.

[98] CHRISTENSEN, THE GRAND OLD MAN OF OREGON: THE LIFE OF GEORGE H. WILLIAMS 26 (1939).

[99] FRANK AND MUNRO, *op. cit. supra* n. 83, at 142.

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equality for Negroes.[100] He was clear and definite in his interpretation of the Civil Rights Act of 1866 and the Fourteenth Amendment. He said after the passage of the former that "in respect of all civil rights, there is to be hereafter no distinction between the white race and the black race." [101] In explaining the intention of the Joint Committee during discussion of the joint resolution to propose what was to become the Fourteenth Amendment, he said:

> "He desired to put this question of citizenship and the rights of citizens and freedmen under the civil rights bill beyond the legislative power of such gentlemen as [Senator Doolittle of Wisconsin] who would pull the whole system up by the roots and destroy it, and expose the freedmen again to the oppressions of their old masters." [102]

In another speech, while acting for Senator Fessenden as floor leader for the Amendment, Howard interpreted Section 1 as follows:

> "The last two clauses of first section . . . disable a state from depriving . . . any person . . . of life, liberty or property without due process of law, or from denying to him the equal protection of the laws of the state. This abolishes all class legislation and does away with the injustice of subjecting one caste of persons to a code not applicable to another . . . Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States . . .[103]

The evidence conclusively establishes that Howard's interpretation of the equal protection clause precluded any

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[100] KENDRICK, *op. cit. supra* n. 82, at 192.

[101] FRANK AND MUNRO, *op. cit. supra* n. 83, at 140.

[102] Cong. Globe, 39th Cong., 1st Sess. 2896 (1866).

[103] *Id.* at 2766.

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use whatever of color as a basis for legal distinctions.[104]

Senator Reverdy Johnson, Democrat of Maryland, was attorney for the defense in *Dred Scott* v. *Sandford*.[105] George I. Curtis, one of Scott's attorneys, credited Johnson with being the major influence in shaping the decision.[106] Where segregation was concerned, Johnson was not entirely consistent or predictable.

In 1864 he supported the motion of Senator Charles Sumner that the Washington Railroad end the exclusion of persons of color.[107] During the debate upon Sumner's motion, Johnson said:

> "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; and I do not suppose that anybody will contend . . . that there exists any power in the company to exclude white men from a car because the company have appropriated that car for the general transportation of black passengers.[108]

Two years later, Johnson said:

> ". . . as slavery has been abolished in the several States, those who were before slaves are now citizens of the United States, standing . . . upon the same condi-

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[104] Frank and Munro, *op. cit. supra* n. 83, at 142.

[105] 19 How. 393.

[106] 10 Dictionary of American Biography 113 (1933).

[107] Wilson, History of the Rise and Fall of the Slave Power in America 507 (1877).

[108] Cong. Globe, 38th Cong., 1st Sess. 1156 (1864).

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tion, therefore, with the white citizens. If there is an authority in the Constitution to provide for the black citizen, it cannot be because he is black; it must be because he is a citizen; and that reason [is] equally applicable to the white man as to the black man. . . ." [109]

Thus it appears that he understood that the granting of citizenship rights to Negroes meant that racial distinctions could no longer be imposed by law.

Representative John A. Bingham of Ohio, a member of the committee who has been described as the "Madison of the first section of the Fourteenth Amendment" [110] and undoubtedly its author, was a strong and fervent Abolitionist, classified with those whose views of equal protection "precluded any use whatsoever of color as a basis of legal distinctions." [111]

While the Fourteenth Amendment was pending, Representative Bingham took the view that state constitutions which barred segregated schools were "in accordance with the spirit and letter of the Constitution of the United States . . . [if] the utterance of Jefferson ever meant anything . . . it meant precisely that when he declared for equal and exact justice. . . ." [112]

Representative George Boutwell of Massachusetts, was a hard, practical politician rather than an idealist. He was how-

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[109] Cong. Globe, 39th Cong., 1st Sess. 372-374 (1865-1866).

[110] Dissent of Mr. Justice Black in Adamson v. California, 332 U. S. 46, 74.

[111] Frank and Munro, The Original Understanding of Equal Protection of the Laws, 50 Col. L. Rev. at 151. See Graham, The "Conspiracy Theory" of the Fourteenth Amendment, 47 Yale L. J. 371, 400-401 (1938); Graham, The Early Antislavery Backgrounds of the Fourteenth Amendment, 1950 Wis. L. Rev. 479 at 492; Cong. Globe, 39th Cong., 1st Sess. 1291, 1293, 2461-2462 (1866). For other sketches of Bingham see 2 Dictionary of American Biography 278 (1929) and Kendrick, *op. cit. supra* n. 82 at 183.

[112] Cong. Globe, 40th Cong., 1st Sess. 2462 (1868).

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ever, no less extreme in his demands for Negro civil rights and Negro suffrage than men like Stevens and Sumner. Indicative of his views is his vote on May 22, 1874 against the Sargent amendment to the Civil Rights Act of 1875, which would have permitted separate but equal schools.[113] During Reconstruction Alabama was "flooded with the radical speeches of Morton and Boutwell in favor of mixed schools." [114] He was among those whose interpretation of "equal protection" would not admit color as a basis for legal distinctions.[115]

Representative Roscoe Conkling, a New York Republican, was thought to have taken his views on Reconstruction from Stevens.[116] He was called by some a protege of Stevens; at any rate, they worked as partners on much reconstruction legislation.[117] In 1868, when the readmission of Arkansas was being discussed, he voted against the Henderson Amendment to the bill which would have permitted the state to establish segregated schools.[118] In 1872 he favored the supplementary civil rights bill and voted against the Thurman amendment which would have struck out a clause permitting colored persons to enter "any place of public amusement or entertainment." [119] He was in the Senate majority which on May 22, 1874, voted down the Sargent amendment to the Civil Rights Bill, an amendment which would have permitted separate but equal schools.[120] Conkling must be classified as one of those who agreed to no legal classifications or distinctions based upon color.[121]

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[113] 2 Cong. Rec. 4167 (1874).

[114] BOWERS, THE TRAGIC ERA 427 (1929).

[115] FRANK AND MUNRO, *op. cit. supra* n. 83, at 142.

[116] KENDRICK, *op. cit. supra n.* 82, at 186.

[117] CHIDSEY, THE GENTLEMAN FROM NEW YORK 34-35 (1935).

[118] Cong. Globe, 40th Cong., 2nd Sess. 2748 (1868).

[119] CONKLING, LIFE AND LETTERS OF ROSCOE CONKLING 432 (1869).

[120] 2 Cong. Rec. 4167 (1874).

[121] FRANK AND MUNRO, *op. cit. supra* n. 83, at 142.

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Representative Henry T. Blow, a Missouri Republican, first supported the views of Thaddeus Stevens in the Joint Committee and then in the second session gave his support to Bingham.[122] In either case, he acted with those who favored a broad and sweeping denial of the right of the states to make legal classifications on the basis of race or color. Blow came to Congress with a strong antislavery background and took the position that color discrimination could not be defended, as a matter of course.[123]

Representative Justin S. Morrill of Vermont is characterized as "an extreme radical", one "regularly on the side of radicalism". It is said of him that "the only part taken by him in Reconstruction was to attend the meetings of the Committee and cast his vote."[124] However, he was among those voting against the "white" clause in the Nebraska constitution when the bill to admit that state to the union was under consideration.[125] He voted against the Henderson amendment to permit segregated schools in the bill to readmit Arkansas.[126] He voted against the Sargent Amendment to allow separate but equal schools, during the debates on the bill that became the Civil Rights Act of 1875.[127] Morrill thus belongs in the group of those who did not consider color a reasonable ground for legal distinctions.[128]

Representative Elihu Washburne of Illinois was a staunch member of the House Radical bloc, and a pronounced enemy of the more moderate Reconstruction policies of President Johnson. He supported both the Civil

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[122] KENDRICK, *op. cit. supra* n. 82, at 194.

[123] FRANK AND MUNRO, *op. cit. supra* n. 83, at 142.

[124] KENDRICK, *op. cit. supra* n. 82, at 140, 193.

[125] Cong. Globe, 39th Cong., 1st Sess. 4275-4276 (1866).

[126] Cong. Globe, 40th Cong., 2nd Sess. 2748 (1868).

[127] 2 Cong. Rec. 4167 (1874).

[128] FRANK AND MUNRO, *op. cit. supra* n. 83, at 142.

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Rights Act and the Fourteenth Amendment and his remarks make it clear that he favored a revolution in the southern social order.[129]

The two Democratic members of the Joint Committee from the House were both enemies of the Civil Rights Act and the Fourteenth Amendment. Representative Henry Grider of Kentucky was without influence in the drafting of the Fourteenth Amendment by the Joint Committee.[130] However, remarks of Representative Andrew Jackson Rogers of New Jersey, in opposition to these measures, are significant indication of contemporary understanding of their reach and thrust. Thus, in speaking of the Civil Rights Bill, Rogers said:

> "In the State of Pennsylvania there is a discrimination made between the schools for white children and the schools for black. The laws there provide that certain schools shall be set apart for black persons, and certain schools shall be set apart for white persons. Now, if this Congress has a right, by such a bill as this, to enter the sovereign domain of a State and interfere with these statutes . . . , then . . . it has a right to . . . , inflict upon the people . . . the right of the negro to [vote]. . . ." [131]

Similarly, in speaking of the proposed Section 1 of the Fourteenth Amendment on February 26, 1866, he said:

> ". . . Under this amendment, Congress would have power to compel the State to provide for white children and black children to attend the same school, upon the principle that all the people . . . shall have

[129] 19 DICTIONARY OF AMERICAN BIOGRAPHY 504 (1936); see also KENDRICK, *op. cit. supra* n. 82, at 194.

[130] KENDRICK, *op. cit. supra* n. 82, at 196. Grider is not even listed in the DICTIONARY OF AMERICAN BIOGRAPHY. He died before the second session of the 39th Congress. KENDRICK, *op. cit. supra* n. 82, at 197.

[131] Cong. Globe., 39th Cong., 1st Sess. 1121 (1866).

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> equal protection in all the rights of life, liberty, and property, and all the privileges and immunities of citizens. . . ." [132]

Again, in denouncing the Amendment, he declared:

> "This section of the joint resolution is no more nor less than an attempt to embody in the Constitution of the United States that outrageous and miserable civil rights bill. . . ."
>
> ". . . I hold [the amendment] will prevent any State from refusing to allow anything to anybody." [133]

E. The Fourteenth Amendment Was Intended to Write into the Organic Law of the United States the Principle of Absolute and Complete Equality in Broad Constitutional Language.

While the Civil Rights Act of 1866 was moving through the two Houses of Congress, the Joint Committee of Fifteen was engaged in the task of drafting a constitutional amendment as a part of a program for the "readmission" of the southern states to the Union. When the Committee began its meetings in January 1866, several of its members introduced proposals for constitutional amendments guaranteeing civil rights to the freedmen. After a series of drafting experiments, Representative Bingham on February 3 proposed the following:

> "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment)." [134]

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[132] *Id.* at App. 134 (1866).

[133] *Id.* at 2538.

[134] This proposal with some changes was destined to become eventually the second portion of Section 1 of the Fourteenth Amendment. KENDRICK, *op. cit. supra* n. 82, at 61.

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The Joint Committee found this proposal satisfactory and accordingly on February 13th introduced it in the House as H. R. 63.[135]

By now the dedicated purpose of the Radical Republicans based in part upon the ante-war equalitarian principles as opposed to caste and class legislation had to be crystallized in a Fourteenth Amendment. Necessarily, the drafters of this amendment and those who participated in the debates on the amendment recognized that constitutional amendments are properly worded in the broadest and most comprehensive language possible.

It must be borne in mind that Representative Bingham, and those who supported his position on the amendment to the Civil Rights Bill of 1866, had already demonstrated that the constitutional amendment under consideration would be at least as comprehensive in its scope and effect as the original sweeping language of the Trumbull Civil Rights Bill *before* it was amended in the House, and that it would be far broader than the scope of the bill as finally enacted into law. On this point, Bingham repeatedly made his intentions clear, both in his discussion on the power limitations on the Civil Rights Bill itself and in his defense of his early drafts of the proposed constitutional amendment.

Representative Rogers immediately attacked the proposed constitutional amendment (H. R. 63) as "more dangerous to the liberties of the people and the foundations of the government" than any proposal for amending the Constitution heretofore advanced. This amendment, he said, would destroy all state legislation distinguishing Negroes on the basis of race. Laws against racial intermarriage, laws applying special punishments to Negroes for certain crimes, and laws imposing segregation, including school segregation laws, alike would become unconstitutional. He said:

[135] Cong. Globe, 39th Cong., 1st Sess. 813 (1865-1866).

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"Who gave the Senate the constitutional power to pass that bill guarantying equal rights to all, if it is necessary to amend the organic law in the manner proposed by this joint resolution? . . . It provides that all persons in the several States shall have equal protection in the right of life, liberty, and property. Now, it is claimed by gentlemen upon the other side of the House that Negroes are citizens of the United States. Suppose that in the State of New Jersey Negroes are citizens, as they are claimed to be by the other side of the House, and they change their residence to the State of South Carolina, if this amendment be passed Congress can pass under it a law compelling South Carolina to grant to Negroes every right accorded to white people there; and as white men there have the right to marry white women, Negroes, under this amendment, would be entitled to the same right; and thus miscegenation and mixture of the races could be authorized in any State, as all citizens under this amendment are entitled to the same privileges and immunities, and the same protection in life, liberty, and property.

* * *

"In the State of Pennsylvania there are laws which make a distinction with regard to the schooling of white children and the schooling of black children. It is provided that certain schools shall be designated and set apart for white children, and certain other schools designated and set apart for black children. Under this amendment, Congress would have power to compel the State to provide for white children and black children to attend the same school, upon the principle that all the people . . . shall have equal protection in all the rights of life, liberty, and property, and all the privileges and immunities of citizens in the several States." [136]

Representative Bingham, who was contemporaneously amending the original Trumbull Civil Rights Bill because its broad anti-discrimination provisions lacked constitu-

[136] Cong. Globe, 39th Cong., 1st Sess., App. 134 (1865-1866).

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tional foundation, naturally did not dispute Representative Rogers' appraisal of the wide scope of H. R. 63. On the contrary, Representative Bingham two days later indicated his concurrence in that appraisal in the course of a colloquy with Representative Hale.

Representative Hale inquired of Representative Bingham whether his proposed constitutional amendment did not "confer upon Congress a general power of legislation for the purpose of securing to all persons in the several states protection of life, liberty and property, subject only to the qualification that the protection shall be equal." And Representative Bingham replied, "I believe it does . . ."

In order to nail down the precise source of the proposed grant of power, Representative Hale then asked Representative Bingham to "point me to that clause or part . . . which contains the doctrine he here announces?" To which the answer was, "The words 'equal protection', contain it, and nothing else." [137]

The House at the end of February was preoccupied with debating Reconstruction generally as well as the Civil Rights Bill, and it showed itself in no hurry to take up Bingham's proposal, especially since it was obvious that a more comprehensive measure would soon be forthcoming from the Joint Committee. Following the debate on February 28, the House postponed further consideration of the proposed amendment until mid-April.[138] In fact, "H. R. 63" was not to be heard from in that form again. Yet its protective scope presently passed into the more extensive proposal which the Joint Committee brought forward at the end of April and which became, after some changes, the amendment which Congress finally submitted to the states.

During most of March and April, the Joint Committee paid little attention to the question of civil rights.

[137] *Id.* at 1094.

[138] *Id.* at 1095

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It was concerned, for a time, with the question of the admission of Tennessee; then, for a time, it appears to have been inactive. Not until late April did it resume sessions looking forward to the drafting of a comprehensive constitutional amendment on Reconstruction. On April 21, Stevens offered to the committee a draft of a proposed constitutional amendment, covering civil rights, representation, Negro suffrage and the repudiation of the "rebel" debt.

This proposal became the frame upon which the Fourteenth Amendment was constructed. Most significant from our point of view was section 1:

> "No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude." [139]

Section 2 provided that on and after July 4, 1876, no discrimination should be made between persons in the rights of suffrage on account of race, color, or previous condition of servitude. Section 3 provided that until that time, no class of persons against whom a state imposed suffrage discrimination because of race, color or previous condition of servitude should be included in the state's basis of representation. Section 4 invalidated the "rebel" debt. Section 5, which passed substantially intact into the Fourteenth Amendment, provided that Congress was to have the power to enforce the provisions of the amendment by appropriate legislation.[140]

Section 1 was to pass through several critical changes in the next few days. Almost at once, Senator Bingham moved to have the following provision added to section 1:

> "... nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation." [141]

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[139] KENDRICK, *op. cit. supra* n. 82, at 83.

[140] *Ibid.*

[141] *Id.* at 85.

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It will be noticed that Bingham's suggestion had within it the substance of the equal protection clause of the Fourteenth Amendment. After some discussion, the committee voted this suggestion down, seven to five.

Other changes followed. After some further discussion, Bingham moved that the following be added as a new section of the amendment:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." [142]

This was substantially Bingham's earlier amendment, submitted to Congress in February as H. R. 63 with the addition of the equal protection clause. One significant difference lay in the fact that Bingham's new section did not confer power upon Congress to legislate; instead, it made privileges and immunities, due process and equal protection constitutional guarantees against state interference.

F. The Republican Majority in the 39th Congress Was Determined to Prevent Future Congresses from Diminishing Federal Protection of These Rights.

There were two rather obvious reasons for Senator Bingham's last two amendments. First, a number of committee members had earlier expressed some concern over the phraseology of H. R. 63 because it allowed Congress to refuse to enforce the guarantees if it saw fit. The Radical Republicans were openly fearful lest later and more conservative Congresses destroy their work.[143] But direct

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[142] *Id.* at 87.

[143] See speeches of Representatives Garfield, Broomall, Eldridge, and Stevens and Senator Howard, Cong. Globe, 39th Cong., 1st Sess. 2459, 2462, 2498, 2506, 2896 (1865-1866).

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constitutional guarantees would be beyond the power of Congress to impair or destroy. Second, Bingham was acting with the knowledge that section 5 of the proposed amendment already granted Congress full power to legislate to enforce the guarantees of the amendment. In other words, the Radical Republicans had no thought of stripping Congress of the power to enforce the amendment by adequate legislation. They put the guarantees themselves beyond the reach of a hostile Congress.[144]

The Committee at once adopted Representative Bingham's suggested addition by a vote of ten to two.[145] Four days later, however, on April 25, the Committee on Williams' motion, struck out Bingham's latest suggested revision, only Stevens, Bingham, Morrill, Rogers and Blow voting to retain it.[146] On April 28, in the final stages of committee discussion, Bingham moved to strike out section 1, reading "no discrimination shall be made . . ." and insert his proposal of April 21 in its place. Although the Committee had voted only three days earlier to kill Bingham's proposal entirely, it now passed his new motion.[147] Thus, Bingham's proposal ultimately became section 1 of the amendment which the Committee now submitted to Congress. As such, and with the addition of the citizenship clause adopted from the Civil Rights Act of 1866, it was to pass into the Fourteenth Amendment as finally accepted by Congress.

On April 30, Representative Stevens introduced the text of the Committee's proposed amendment in the House of Representatives. As presented, the amendment differed in two particulars from the Fourteenth Amendment as finally adopted: the first section as yet did not contain the citizen-

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[144] See for example Stevens's explanations on the reasons for reenforcing the Civil Rights Act by constitutional guarantees. *Id.* at 2459.

[145] KENDRICK, *op. cit. supra* n. 82, at 87.

[146] *Id.* at 98.

[147] *Id.* at 106.

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ship clause; and the third section carried a clause for the complete disfranchisement of Confederate supporters until 1870. An accompanying resolution proposed to make successful ratification of the amendment, together with ratification by the several southern states, a condition precedent to the readmission of the southern states to representation in Congress.[148]

On May 8, Stevens opened debate in the House on the proposed amendment. In a sharp speech he emphasized the legislative power of Congress under the proposed amendment:

> "I can hardly believe that any person can be found who will not admit that every one of these provisions [in the first section] is just. They are all asserted, in some form or other, in our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime, shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection to the black man." [149]

The amendment, he added, was made necessary by the "oppressive codes" which had become law in the southern states. "Unless the Constitution should restrain them, those States will all, I fear, keep up this discrimination and crush to death the hated freedmen." [150]

Finally, he stated that the purpose of section 1 was to place the Civil Rights Act beyond the reach of a hostile Congress:

[148] Cong. Globe, 39th Cong., 1st Sess. 2459 (1866).

[149] *Ibid.* (italics in original).

[150] *Ibid.*

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> "Some answer, 'Your civil rights bill secures the same things.' That is partly true, but a law is repealable by a majority. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed . . . This amendment once adopted cannot be annulled without two-thirds of Congress. That they will hardly get." [151]

There was general agreement among subsequent speakers that one of the purpose of section 1 of the amendment was to reinforce the Civil Rights Act. Enemies of the proposed amendment charged that Radical Republicans, having forced through what was an unconstitutional statute, were now attempting to clear up the constitutional issue by writing the statute into the supreme law.[152]

The Radical Republicans refused to admit that they were attempting to cover up the passage of an unconstitutional statute. Instead, they insisted that one of the purposes of the present proposed amendment was to place the guarantees of the Civil Rights Act beyond attack by future Congresses unfriendly to the rights of the freedman "The Civil Rights Bill is now part of the law of this land," said Representative James A. Garfield of Ohio in defending the amendment. "But every gentleman knows it will cease to

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[151] *Ibid.*

[152] Representative William Finck of Ohio asserted, for example, that "all I have to say about this section is, that if it is necessary to adopt it . . . then the civil rights bill, which the President vetoed, was passed without authority and was clearly unconstitutional." *Id.* at 2461. Representative Benjamin Boyer of Pennsylvania, another enemy of the amendment, after observing that "the first section embodies the principles of the civil rights bill," twitted the Republicans for seeking to rectify their own constitutional error and attacked the present amendment as "objectionable, also, in its phraseology, being open to ambiguity and admitting the conflicting constructions." *Id.* at 2467. Representative Charles Eldridge of Wisconsin asked ironically, "What necessity is there, then, for this amendment if that bill was constitutional at the time of its passage?" *Id.* at 2506.

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be a part of the law whenever the sad moment arrives when that gentleman's party comes into power . . . For this reason, and not because I believe the civil rights bill to be unconstitutional, I am glad to see that first section here."[153] Representative John Broomall of Ohio, making the same point, said, "If we are already safe with the civil rights bill, it will do no harm to become the more effectually so, and to prevent a mere majority from repealing the law and thus thwarting the will of the loyal people." Broomall pointed out, also, that no less a friend of the Negro than Representative John A. Bingham, had entertained grave doubts as to the constitutionality of the measure, and thought a constitutional amendment necessary. He disagreed, Broomall said, with Bingham's doubts, but he was not so sure of himself that he felt justified "in refusing to place the power to enact the law unmistakably in the Constitution."[154]

Probably other moderate Republicans agreed with Representative Henry J. Raymond of New York who had voted against the Civil Rights bill because he "regarded it as very doubtful, to say the least, whether Congress, under the existing Constitution had any power to enact such a law...." But he nonetheless had heartily favored the principles and objectives of the bill, and because he still favored "securing an equality of rights to all citizens" he would vote "very cheerfully" for the present amendment.[155]

There was little discussion during the debate in the House of the scope of the civil rights which would be protected by the proposed amendment, apparently because both sides realized that debate on the original Civil Rights Bill had exhausted the issue. The indefatigable Rogers, fighting to the last against any attempt to guarantee rights for the Negro, repeatedly reminded Congress that the amendment would sweep the entire range of civil rights

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[153] *Id.* at 2462.

[154] *Id.* at 2498.

[155] *Id.* at 2502.

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under the protection of the Federal Government and so work a revolution in the constitutional system.[156]

Although it was not necessary to answer Rogers, Bingham reminded Congress:

> "The necessity for the first section of this amendment to the Constitution, Mr. Speaker, is one of the lessons that have been taught to your committee and taught to all the people of this country by the history of the past four years of terrific conflict—that history in which God is, and in which He teaches the profoundest lessons to men and nations. There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.
>
> Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy." [157]

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[156] *Id.* at 2537.

[157] *Id.* at 2542.

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G. Congress Understood That While the Fourteenth Amendment Would Give Authority to Congress to Enforce Its Provisions, the Amendment in and of Itself Would Invalidate All Class Legislation by the States.

On May 10, the House passed the amendment without modification by a vote of 128 to 37. The measure then went to the Senate.[158]

On the same day, Senator Howard opened the debate in the Senate. Speaking for the Joint Committee because of Senator Fessenden's illness, Howard gave a broad interpretation of the first section of the proposed amendment. He emphasized the scope of legislative power which Congress would possess in the enforcement of the Amendment.

> "How will it be done under the present amendment? As I have remarked, they are not [at present] powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power be given to Congress to that end. This is done by the fifth section of this amendment which declares that 'the Congress shall have power to enforce by appropriate legislation the provisions of this article.' Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution." [159]

Senator Howard's interpretation of the legislative power of Congress under the proposed amendment makes it obvious that the Joint Committee, in separating the guarantees of civil rights from the congressional power to legislate thereon, had not at all intended to weaken the legislative capacity of Congress to enforce the rights conferred by the amendment. The guarantees, however, no longer depended upon congressional fiat alone for their effectiveness as they

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[158] *Id.* at 2545.

[159] *Id.* at 2766.

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had in Bingham's proposed civil rights amendment of January (H. R. 63). But in Howard's view and that of the Committee, this meant merely that future Congresses could not destroy the rights conferred.

Senator Howard then passed to an equally expansive interpretation of the due process and equal protection clauses of the amendment:

> "The last two clauses of the first section of the amendment disabled a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law or from denying to him the equal protection of the laws of the State. *This 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.* It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man." [160] (Italics added.)

The only class of rights, Howard added, which were not conferred by the first section of the amendment was "the right of suffrage." Howard concluded this analysis by asserting that the entire first section, taken in conjunction with the legislative power of Congress conferred in section five, was of epoch-making importance:

> "I look upon the first section, taken in connection with the fifth, as very important. It will, if adopted by the States, forever disable everyone of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction. It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it

[160] *Id.* at 2766.

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> gives to the most powerful, the most wealthy, or the most haughty. That, sir, is republican government, as I understand it, and the only one which can claim the praise of a just Government."[161]

Thus, Senator Howard understood that due process and equal protection would sweep away entirely "all class legislation" in the states. By implication, he subscribed to a "substantive interpretation" of due process of law, thus making due process a limitation upon state governments to subvert civil liberties.

No Senator thereafter challenged these sweeping claims for the efficacy of the civil rights portion of Section 1. Howard's allies subscribed enthusiastically to his interpretation. Senator Luke Poland of Vermont, a staunch Radical Republican, regarded the amendment as necessary to set to rest all questions of congressional competence in enacting the civil rights bill:

> "Congress has already shown its desire and intention to uproot and destroy all such partial State legislation in the passage of what is called the civil rights bill. The power of Congress to do this has been doubted and denied by persons entitled to high consideration. It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States. . . ."[162]

Certainly the Conservatives in the Senate agreed altogether with Senator Howard and the other Senate Republicans about the sweeping impact which the prospective amendment would have upon state caste legislation. Senator Thomas Hendricks of Indiana, in condemning the legislative power to enforce the amendment which Congress would

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[161] *Id.* at 2766.

[162] *Id.* at 2961.

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acquire from the operation of section 5, said that these words had

> "... such force and scope of meaning as that Congress might invade the jurisdiction of the States, rob them of their reserved rights, and crown the Federal Government with absolute and despotic power. As construed this provision is most dangerous."[163]

The prospective amendment moved forward rapidly in the Senate, with comparatively little debate. The Radical Republicans were confident of their objectives. The conservative Republicans and Democrats despaired of arresting the tide of events. One significant change occurred on May 30 when Howard brought forward the citizenship clause of the Civil Rights Act and successfully moved it as an amendment to section 1. Few Republicans doubted that Congress already had the power to legislate upon the question of citizenship. However, the new provision cleared up a serious hiatus in the original Constitution by settling in unequivocal fashion the definition of national and state citizenship. Needless to say, the new provision, like its predecessor in the Civil Rights Act, specifically endowed Negroes with citizenship and reversed the dictum of the *Dred Scott* case that no Negro could be a citizen of the United States.

The Radical Republicans were well aware that by endowing the Negro with citizenship, they strengthened his claim to the entire scope of civil rights. Bingham had mentioned as much in debate in the House, while Representative Raymond of New York had added that once the Negro became a citizen, it would not be possible in a republican government to deny him any right or to impose upon him any restriction, even including that of suffrage. The force of this stratagem did not escape the Conservatives in the Senate.

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[163] *Id.* at 2940.

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Senator Garrett Davis of Kentucky had this to say of the citizenship provision of the amendment:

> "The real and only object of the first provision of this section, which the Senate has added to it, is to make Negroes citizens, to prop the civil rights bill, and give them a more plausible, if not a valid, claim to its provisions, and to press them forward to a full community of civil and political rights with the white race, for which its authors are struggling and mean to continue to struggle." [164]

The Senate passed the amendment in June, 33 to 11. Congress formally proposed the amendment on June 13 and it was submitted to the states.

Congress Intended to Destroy All Class Distinctions In Law

What, then, may one conclude concerning the intent of Congress with regard to segregation in the framing of the amendment?

Both Senator Howard and Representative Stevens made it definitely clear that the scope of the rights guaranteed by the amendment was much greater than that embraced in the Civil Rights Act.

It is evident that the members of the Joint Committee intended to place all civil rights within the protection of the Federal Government and to deny the states any power to interfere with those rights on the basis of color. The scope of the concept of liberties entertained by the Committee was very broad. The breadth of this concept was recognized by this Court in all of its decisions up to *Plessy* v. *Ferguson*.

In adopting the Civil Rights Act of 1866, Congress had enumerated the rights protected. This was done because Bingham and others doubted that Congress had the power to take all civil liberties under federal protection. Un-

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[164] *Id.* at App. 240.

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restricted by this consideration in drafting a constitutional provision, Congress used broad comprehensive language to define the standards necessary to guarantee complete federal protection. This was promptly recognized by this Court in one of the earliest decisions construing the Amendment when it was held: "The 14th Amendment makes no effort to enumerate the rights it designs to protect. It speaks in general terms, and those are as comprehensive as possible." *Strauder* v. *West Virginia,* 100 U. S. 303, 310.

Did Congress specifically intend to ban state laws imposing segregation by race? And more specifically, did it intend to prohibit segregation in school systems, even where a state provided a separate but equal system for Negroes? To begin with it must be recognized that the "separate but equal" doctrine was yet to be born. The whole tenor of the dominant argument in Congress was at odds with any governmentally enforced racial segregation as a constitutionally permissible state practice.

Senator Howard, among others, asserted categorically that the effect of the due process and equal protection clauses of the Fourteenth Amendment would be to sweep away entirely all caste legislation in the United States. Certainly a number of Conservatives, notably Representative Rogers of New Jersey, a member of the Joint Committee and Senator Davis of Kentucky, were convinced that the effect of the amendment would be to prohibit entirely all laws classifying or segregating on the basis of race. They believed, and stated, that school laws providing separate systems for whites and Negroes of the kind which existed in Pennsylvania, Ohio and in several of the Johnson-Reconstructed southern states would be made illegal by the amendment.

It is notable that while there were some assurances extended by Radical Republicans to the Moderates and Conservatives as to the scope of the Civil Rights Act of 1866 in this regard, there were no such assurances in the debates on the Fourteenth Amendment.

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The Republican majority realized full well that it could not envisage all possible future applications of the amendment to protect civil rights. By separating section 1 of the amendment, which provides an absolute federal constitutional guarantee for those rights, from section 5, which endows Congress with legislative capacity to protect such rights, the framers of the amendment assured continued protection of these rights, by making it possible to win enforcement of them in the courts and eliminated the power of Congress alone to diminish them.

H. The Treatment of Public Education or Segregation in Public Schools During the 39th Congress Must Be Considered in the Light of the Status of Public Education at That Time.

Although today, compulsory free public education is universally regarded as a basic, appropriate governmental function, there was no such unanimity existing at the time the Fourteenth Amendment was adopted. Arrayed against those who then visualized education as vital to effective government, there were many who still regarded education as a purely private function.

While it has already been shown that the conception of equal protection of the laws and due process of law, developed by the Abolitionists before the Civil War, was so broad that it would necessarily cover such educational segregation as is now before this Court, compulsory public education at that time was the exception rather than the rule. The conception of universal compulsory free education was not established throughout the states in 1866. The struggle for such education went on through most of the 19th century and, even where accepted in principle in some of the states, it sometimes was not fully put into practice.

Prior to the first quarter of the nineteenth century childhood education was considered an individual private responsibility.[165] The period 1830-1860 was one of marked

[165] CUBBERLY, A BRIEF HISTORY OF EDUCATION, cc. XXV-XXVI (1920).

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educational advancement. It has commonly been termed as the era of the Common School Revival, a movement to extend and improve facilities for general education. This movement flourished in New England under the leadership of Horace Mann, Henry Barnard and others. There was a definite tendency throughout the country to shift from private to public support of education and this trend extended to normal schools and facilities for secondary and higher education. Many states, urged on by educational leaders, publicists and statesmen, began making legislative provisions for public education.

On the other hand, these gains have been commonly exaggerated and in some respects misinterpreted. The laws were by no means always carried into effect and the recommendations of the reformers were, in most instances, accepted with great hesitancy.[166] Another authority after appraising public education during the period just prior to the Civil War made the following generalizations:

> "Practically all the states were making substantial progress in the development of systems of public education. (2) At the close of the period no single state can be said to have been providing any large percentage of its children and youth with schools well-supported and well-taught. (3) The facilities for secondary education were by no means as extensive as has commonly been reported. (4) Regional differences in educational development have been exaggerated; and (5) where sectional differences in school support and attendance did exist they appear to have been due more to differentials in urban and rural development than to differences in social attitudes and philosophies." [167]

In general, it should be noted that in New England and in New York the main problem during this period was to

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[166] EDWARDS AND RICHEY, THE SCHOOL IN THE SOCIAL ORDER 421 (1947).

[167] *Id.* at 423.

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improve the educational systems which had already been established and to secure additional support for them. In the Middle Atlantic states the major problem was to establish systems of public schools and to provide effective public education. In the West, the prevailing political and social philosophy required that at least some degree of education be provided to as large an element of the population as possible.

Public education was much slower in getting under way in the South. In most of the southern states, despite some promising beginnings, an educational system was not created until after the close of the Civil War. One historian concluded:

> ". . . although the 'common school awakening' which took place in the Northern States after Horace Mann began his work in Massachusetts (1837) was felt in some of the Southern States as well, and although some very commendable beginnings had been made in a few of these States before 1860, the establishment of state educational systems in the South was in reality the work of the period following the close of the Civil War. The coming of this conflict, evident for a decade before the storm broke, tended to postpone further educational development." [168]

Public education in the South made progress only after it became acceptable as being compatible with its ideal of a white aristocracy.[169]

Among the factors responsible for this condition were the aristocratic attitude which held that it was not neces-

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[168] CUBBERLY, PUBLIC EDUCATION IN THE UNITED STATES 251 (1919).

[169] EDWARDS AND RICHEY, *op. cit. supra* n. 166, at 434.

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sary to educate the masses, the reluctance of the people to tax themselves for educational purposes, the marked individualism of the people, born of isolation, and the imperfect state of social and political institutions. Most southerners saw little or no relation between education and life. Consequently, the view prevailed that those who could afford education could indulge themselves in securing it and those who could not afford it lost little, if anything. This southern attitude was aptly summed up fifteen years after the close of the war by the statement of Virginia's Governor F. W. M. Holliday that public schools were "a luxury . . . to be paid for like any other luxury, by the people who wish their benefits." [170] Education in the South was not so much a process of individual and community improvement as it was an experience that carried with it a presumption of social equality for those who shared it, a view hardly compatible with any notion of universal education which included persons of diverse social and ethnic backgrounds.

Between 1840 and 1860, public education began to advance in the South but its benefits were denied Negroes. It is significant that racist and other types of intolerant legislation increased markedly during this period. While education could be extended to all whites who, for political purposes, belonged to one big happy family, there was nothing in such a conception that suggested that Negroes should be included.[171] The editor of the authoritative antebellum organ of southern opinion, *DeBow's Review,* summed up the matter of education for Negroes during slavery as follows: "Under the institution of slavery we used to teach them everything nearly except to read." [172]

The framers of the Fourteenth Amendment were familiar with public education, therefore, only as a developing con-

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[170] Quoted in WOODWARD, ORIGINS OF THE NEW SOUTH 61 (1951).

[171] DEBOW, THE INTEREST IN SLAVERY OF THE SOUTHERN NON-SLAVEHOLDER 3-12 (1860).

[172] REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 39th Cong., 1st Sess., Pt. IV, 135 (1866).

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cept. We have already demonstrated that they were determined to eliminate all governmentally imposed racial distinctions—sophisticated as well as simple minded—and expressed their views in the broadest and most conclusive terms. The intentions they expressed were definitely broad enough to proscribe state imposed racial distinctions in public education as they knew it, and the language which they used in the Fourteenth Amendment was broad enough to forever bar racial distinctions in whatever public educational system the states might later develop.

Furthermore, the framers intended that Congress would have the power under section 5 to provide additional sanctions, civil and criminal, against persons who attempted to enforce states statutes made invalid by section 1 of the Amendment. As stated above, Representative Bingham purposely revised an earlier draft of the Amendment so that the prohibitions of section 1 would be self-executing against state statutes repugnant thereto and would be beyond the threat of hostile Congressional action seeking to repeal civil rights legislation. In other words, the judicial power to enforce the prohibitory effect of section 1 was not made dependent upon Congressional action.

Thus, the exercise of this Court's judicial power does not await precise Congressional legislation. This Court has repeatedly declared invalid state statutes which conflicted with section 1 of the Fourteenth Amendment, even though Congress had not acted.[173] For example, there

[173] Of course, Title 8 provides a remedy in law or equity against any person acting under color of State law who deprives anyone within the jurisdiction of the United States of rights secured by the Federal Constitution or laws. It provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 8 U. S. C. § 43.

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is no federal statute to the effect that a state which permits released time for religious instructions is acting in a way prohibited by the Fourteenth Amendment. This Court, nevertheless, held that such state action conflicted with section 1 of the Fourteenth Amendment and directed the trial court to enjoin the continuance of the proscribed state action. *Illinois ex rel. McCollum* v. *Board of Education,* 333 U. S. 203.

Similarly, this Court has acted to redress violations of constitutional rights, even in the absence of specific Congressional statute, in a long series of cases involving the rights of freedom of expression and freedom of worship under the Fourteenth Amendment. See *e.g., De Jonge* v. *Oregon,* 299 U. S. 353. And this Court has often vindicated the constitutional rights of members of minority groups in the area of public education in the absence of any Congressional statute. *Sweatt* v. *Painter, supra.*

Indeed, this rule has been applied in all areas in which the prohibitory effect of section 1 has been employed by the Court. *E.g., Miller* v. *Schoene,* 276 U. S. 272; *McCardle* v. *Indianapolis Water Co.,* 272 U. S. 400. To now hold Congressional action a condition precedent to judicial action would be to stultify the provisions in the Federal Constitution protecting the rights of minorities. In effect, this Court would be holding that action by a state against an unpopular minority which the Constitution prohibits cannot be judicially restrained unless the unpopular minority convinces a large majority (the whole country as represented in Congress) that a forum in which to ask relief should be provided for the precise protection they seek.

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I. During the Congressional Debates on Proposed Legislation Which Culminated in the Civil Rights Act of 1875 Veterans of the Thirty-Ninth Congress Adhered to Their Conviction That the Fourteenth Amendment Had Proscribed Segregation in Public Schools.

At various times during the 1870's, Congress considered bills for implementing the Fourteenth Amendment as well as the Civil Rights Act of 1866. Debate on these measures was on occasion extremely significant, since it gave members of Congress an opportunity to express themselves as to the meaning and scope of the Amendment. These observations were the more significant in that perhaps two-fifths of the members of both Houses in the early seventies were veterans of the Thirty-ninth Congress which had formulated the Amendment. Moreover, the impact of the Amendment upon segregated schools had by this time moved into the public consciousness so that Congressmen now had an opportunity to say specifically what they thought about the validity under the Amendment of state statutes imposing segregation upon public school systems.

The second session of the Forty-second Congress, which convened in December, 1871, soon found itself involved in a fairly extended discussion of the effect of the Fourteenth Amendment upon racial segregation, particularly in school systems. Early in the session the Senate took under consideration an amnesty bill to restore the political rights of ex-Confederate officials in accordance with the provisions of section 3 of the Amendment. On December 20, Senator Sumner of Massachusetts, now a veteran champion of the rights of the Negro, moved the following as an amendment to the measure under consideration:

> "Section—That all citizens of the United States, without distinction of race, color, or previous condition of servitude, are entitled to the equal and impartial enjoyment of any accommodation, advantage, facility, or privilege furnished by common carriers, whether on land or water; by inn-keepers;

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> by licensed owners, managers, or lessees of theaters or other places of public amusement; by trustees, commissioners, superintendents, teachers, or other officers of common schools and other public institutions of learning, the same being supported or authorized by law. . . and this right shall not be denied or abridged on any pretense of race, color, or previous condition of servitude."[174]

Here was a provision, which if adopted would commit Congress to the proposition that under the Fourteenth Amendment it could do away entirely with state school statutes providing for segregated school systems. Sumner attacked school segregation at length. The public school, he asserted, "must be open to all or its designation is a misnomer and a mockery. It is not a school for whites or a school for blacks, but a school for all; in other words a common school for all." Segregation he called an "odius discrimination" and an "ill-disguised violation of the principle of Equality."[175]

In the debate that followed, it was apparent that a large majority of the Republicans in the Senate were convinced that Congress quite appropriately might enact such legislation in accordance with section 5 of the Fourteenth Amendment.

Senator Carpenter of Wisconsin, one of the best constitutional lawyers in the Upper House, was doubtful of the constitutionality of Sumner's measure insofar as it applied to churches. But he had no doubt on the authority of Congress to guarantee the right of all persons, regardless of race or color, to attend public schools, to use transportation facilities, and the like, and he offered a resolution of his own to this end.[176] Even the conservative Kentuckian Garrett Davis admitted that there was no question of congressional competence under the Amendment to guarantee these

[174] Cong. Globe, 42nd Cong., 2nd Sess. 244 (1871).

[175] *Id.* at 383-384.

[176] *Id.* at 760.

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rights as against state action, though he challenged the validity of any statute protecting rights against private discrimination.[177] And Senator Stevenson of Kentucky, another strong enemy of mixed schools, confined his attack to discussion of the evil involved in an attempt to "coerce social equality between the races in public schools, in hotels, in theatres. . . ."; he spoke not at all of constitutional objections.[178]

The real objection to Sumner's measure, however, was not the constitutionality of the measure itself, but the incongruity of its attachment as a rider to an amnesty bill, which required a two-thirds majority of both Houses of Congress. Nonetheless, the Senate, after extended debate, adopted Sumner's amendment, including the provision banning segregated schools, by a vote of 28-28, the ballot of the Vice President breaking the tie.[179] The amnesty measure itself later failed to obtain the necessary two-thirds majority of the Senate.

The impressive Senate support in favor of a bill which would have banned segregation in state school systems alarmed Conservatives in both Houses, who now began to advance, very deliberately, the idea that "separate but equal" facilities would be constitutional under the limitations of the equal protection clause of the Fourteenth Amendment. In the House, a few days after the defeat of the amnesty bill, Representative Frank Hereford of West Virginia offered the following resolution as an expression of conservative sentiment:

> "*Be it resolved,* That it would be contrary to the Constitution and a tyrannical usurpation of power for Congress to force mixed schools upon the States, and equally unconstitutional and tyrannical for Con-

[177] *Id.* at 764.

[178] *Id.* at 913.

[179] *Id.* at 919. The Senate vote on the amnesty bill was 33 to 19 in favor of the measure. *Id.* at 929.

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> gress to pass any law interfering with churches, public carriers, or inn-keepers, such subjects of legislation belonging of right to the States respectively."

There was no debate on the Hereford resolution, which was put to an immediate vote and defeated, 85 to 61, 94 not voting.[180]

Later in the session, there was still further debate in the Senate concerning segregated schools. With a second amnesty bill up for consideration, Sumner on May 8 again moved an amendment providing:

> "That no citizen of the United States shall, by reason of race, color, or previous condition of servitude, be excepted or excluded from the full and equal enjoyment of any accommodation, advantage, facility, or privilege furnished by inn-keepers; by common carriers . . . or . . . by trustees, commissioners, superintendents, teachers, and other officers of common schools and other public institutions of learning, the same being supported by moneys derived from general taxation, or authorized by law. . . ." [181]

This proposal led to sharp debate and decided differences of opinion among the Republican majority. Senator Trumbull of Illinois, who was the author of the Civil Rights Act of 1866 and who had become decidedly more conservative in his political outlook since the early Reconstruction era, now insisted that the right to attend public schools was in any event not a civil right, so that Congress could not legislate on the subject under the Fourteenth Amendment. But Senator George Edmunds of Vermont, already known as a distinguished constitutional lawyer and who had entered the Senate in 1866 in time to participate in the debates on the Fourteenth Amendment, dissented sharply, insisting that the right to attend tax-supported public schools was a civil right and therefore subject to regulation by Con-

[180] *Id.* at 1582.

[181] *Id.* at 3181.

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gress.[182] Senator Morton taking the same view, insisted that "if the right to participate in these schools is to be governed by color, I say that it is a fraud upon those who pay the taxes." And he added that where there are public schools supported by common taxation upon everybody, white and black, then there is a civil rights that there shall be equal participation in those schools.

Observing that the Ohio Supreme Court had but lately held constitutional a state statute providing for segregation in public schools, he argued that Congress was entirely competent under the Fourteenth Amendment to prohibit segregated schools.

Senator Arthur Boreman of West Virginia also took it as a matter of course that Congress had the power under the amendment to prohibit separate but equal facilities in school systems; he thought that Congress ought not to force the issue at present:

> "The time will come when . . . these distinctions will pass away in all the States, when school laws will be passed without this question appearing upon the face of those laws; but it is not so now, and for the present I am willing to allow the laws of the State to remain as they are where they provide schools for both classes."[183]

At the close of the debate, the proponents of segregated school systems tried unsuccessfully to modify the Sumner measure to eliminate the requirement for mixed school systems. Senator Orris Ferry of Connecticut first moved to strike out entirely the provisions of the Sumner amendment which related to public school systems. This motion the Senate defeated 26 to 25.[184] Senator Francis P. Blair of Missouri then offered another amendment to allow "local

[182] *Id.* at 3190.

[183] *Id.* at 3195.

[184] *Id.* at 3256, 3258.

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option" elections within the states on the question of mixed versus segregated schools. Sumner, Edmunds and Howe all strongly condemned this proposal, which the border and southern Senators as strongly commended. The Blair amendment in turn met defeat, 23 to 30.[185] Finally, an amendment to strike out the first five sections of the Sumner measure, thereby completely destroying its effect, was defeated 29 to 29, with the Vice President casting a deciding negative vote.[186] The Senate then formally adopted the Sumner amendment to the amnesty bill, 28 to 28, with the Vice President voting in the affirmative.[187]

The conclusion seems inescapable that as of 1872 a substantial majority of the Republican Senators and perhaps half of the Senate at large believed that the prohibitions of the Fourteenth Amendment extended to segregated schools.

The authority of the judiciary to act in this field was specifically recognized and not disputed.[188] A significant number of the Senators in question, among them Edmunds, Howe, Sumner, Conkling, and Morrill, had been in Congress during the debates on the adoption of the Amendment, while Conkling and Morrill had been members of the Joint Committee. And Vice President Henry Wilson, who several times cast a deciding vote in favor of prohibiting segregated schools not only had been in Congress during the debates on the Amendment but had also authored one of the early civil rights bills of the Thirty-ninth Congress.

The first session of the Forty-third Congress, which opened in December, 1873, saw extended discussion of the issue of segregated schools in both Houses. On December

[185] *Id.* at 3262.

[186] *Id.* at 3264-3265.

[187] *Id.* at 3268. The amnesty bill itself subsequently received a favorable vote of 32 to 22, thereby failing to receive the necessary two-thirds majority. *Id.* at 3270.

[188] *Id.* at 3192.

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18, Representative Benjamin F. Butler of Massachusetts, chairman of the House Judiciary Committee and long one of the most outspoken leaders of the Radical faction of the Republican party, introduced the following measure from his committee:

> "... whoever, being a corporation or natural person and owner, or in charge of any public inn, or of any place of public amusement or entertainment for which a license from any legal authority is required, or of any line of stage-coaches, railroad, or other means of public carriage of passengers or freight, or of any cemetery or other benevolent institution, or any public school supported in whole or in part at public expense or by endowment for public use, shall make any distinction as to admission or accommodation therein of any citizen of the United States because of race, color, or previous condition of servitude, shall, on conviction thereof, be fined not less than $100 nor more than $5000 for each offense. . . ." [189]

This measure inspired a somewhat bitter two-day debate early in January, 1874, during which the power of Congress to prohibit segregated schools received more attention than any other single issue involved. The most extended defense of the constitutionality of Butler's measure was made by Representative William Lawrence of Ohio, who began with the flat assertion that "Congress has the constitutional power to pass this bill." Denying that civil rights were any longer in the exclusive care of the states, he asserted that since the passage of the Fourteenth Amendment, "if a state permits any inequality in rights to be created or meted out by citizens or corporations enjoying its protection, it denied the equal protection of laws." He then launched into an extended historical analysis of the debates in the Thirty-ninth Congress before and during the passage of the Amendment. He recalled Bingham's

[189] 2 CONG. REC. 318 (1873-1874).

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statement in opposition to the original extreme language of the Civil Rights bill, in which the Ohioan had said that the proper remedy for state violation of civil rights was to be achieved not by an "arbitrary assumption of power," but "by amending the Constitution of the United States expressly prohibiting the States from any such abuse of power in the future." He quoted Stevens' and Howard's speeches introducing the Amendment in Congress to show the broad purpose which they had represented to be the objectives of the Joint Committee. In some irony, he quoted various conservatives in the House, among them Finck, Boyer and Shanklin, who had asserted again and again that the Amendment would place all civil rights within the protective custody of the federal government.[190] Lawrence's speech was the more impressive in that he was a veteran of the Thirty-ninth Congress who had actively supported both the Civil Rights Act and the passage of the Fourteenth Amendment. Moreover, he was held in great respect in Congress as an able jurist and constitutional lawyer.[191]

The most extended argument in opposition to Lawrence was advanced by Representative Roger Q. Mills of Texas, who presented the contention that civil rights, in spite of the Fourteenth Amendment, were still entrusted entirely to the care of the states. Congress, he thought, had no right to touch the public school system of the several states. "The States," he said, "have . . . [an] unquestioned right . . . to establish universities, colleges, academies, and common schools, and govern them according to their own pleasure." He relied upon the narrow interpretation of the "privileges or immunities" clause of the Fourteenth Amendment recently advanced by the Supreme Court in the *Slaughter House Cases* as a new argument in support of

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[190] *Id.* at 412 ff.

[191] 11 DICTIONARY, *op. cit. supra* n. 129, at 52. He was later the author of the statute creating the Department of Justice.

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his contention. And he finished with the warning, not entirely unheard in the twentieth century, that if Congress passed any such measure as the Butler bill, "the Legislatures of every State where the white people have control will repeal the common-school laws." [192] At the end of debate, Butler's bill was recommitted on the motion of its sponsor, and was not heard of again during the session.

More significant events were occurring in the Senate. On December 2, Sumner had once more presented his now well-known civil rights measure, this time as an independent Senate bill instead of a proposed amendment to an amnesty resolution.[193] This bill finally came up for debate in late April and May, although Sumner himself had died in March. Conkling of New York, Boutwell of Massachusetts, Howe of Wisconsin, Edmunds of Vermont, and Frelinghuysen of New Jersey all gave it very effective support in debate.[194]

In a strong speech, Senator Frelinghuysen pointed out that a variety of conflicting state decisions had introduced some confusion into the question of whether or not state statutes setting up segregated school systems were constitutional under the Amendment. The present measure, he thought, would destroy "injurious agitation" on that subject. There could be no question of the constitutional power of Congress to enact the bill; the "privileges or immunities" and "the equal protection" clauses, in particular, were especially germane to congressional power. And he pointed out that if the present bill became law, it would still be possible to pursue an informal voluntary segregation by the consent of both parents and school boards, where for a time that seemed advisable. But he added that segregated school systems established by law

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[192] 2 Cong. Rec. 383 ff. (1873-1874).

[193] *Id.* at 2.

[194] Boutwell and Conkling, it will be recalled, had both served as members of the Joint Committee.

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were in complete violation of the whole spirit of the Amendment; separate schools for colored people were inevitably inferior to those for whites. "Sir", he said in conclusion, "if we did not intend to make the colored race full citizens . . . we should have left them slaves." [195]

Senator Edmunds used both constitutional and pragmatic arguments in support of the bill. "What the Constitution authorizes us to do is to enforce equality," he said, "and . . . not half-equality, for there is no such thing as half-equality. It is entire equality or none at all." And segregated schools imposed inequality on Negroes. He quoted figures from Georgia school statistics, to demonstrate that although forty-three percent of the children in that state were colored, there were nonetheless only 356 schools for colored children as against 1379 for whites. In the light of this kind of evidence, he thought, the duty of Congress was clear.[196]

Senator Boutwell declared that "opening the public schools of this country to every class and condition of people without distinction of race and color, is security . . . that . . . the rising . . . generations will advance to manhood with the fixed purpose of maintaining these principles [of the Republic]." Like Edmunds, he argued that segregation made either adequate or equal facilities impossible; there was not enough money in the South to support two school systems.[197]

Senator Howe asserted that ". . . I am of the opinion that the authority of Congress to issue these commands, to enact this bill into law, is as clear, as indisputable as its authority to lay taxes or do any other one thing referred to in the Constitution." Like Frelinghuysen he thought that voluntary segregation might exist in some places for a time without violating the amendment. "Open two school houses

[195] *Id.* at 3451-3455.

[196] *Id.* at 4173.

[197] *Id.* at 4116.

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wherever you please;'' he said, and ''furnish in them equal accommodations and equal instruction, and the whites will for a time go by themselves, and the colored children will go by themselves for the same reason, because each will feel more at home by themselves than at present either can feel with the other. . . .'' But legally segregated schools, he thought would not in fact be equal, and it was the duty of Congress to prohibit them.[198]

Senator Pease of Mississippi shortly before the bill was passed speaking in favor of the bill said in unequivocal terms:

> ''The main objection that has been brought forward by the opponents of this bill is the objection growing out of mixed schools. . . . There has been a great revolution in public sentiment in the South during the last three or four years, and I believe that to-day a majority of the southern people are in favor of supporting, maintaining, and fostering a system of common education . . . I believe that the people of the South so fully recognize this, that if this measure shall become a law, there is not a State south of Mason and Dixon's line that will abolish its school system. . . .
>
> * * * I say that whenever a State shall legislate that the races shall be separated, and that legislation is based upon color or race, there is a distinction made; it is a distinction the intent of which is to foster a concomitant of slavery and to degrade him. The colored man understands and appreciates his former condition; and when laws are passed that say that 'because you are a black man you shall have a separate school,' he looks upon that, and justly, as tending to degrade him. There is no equality in that.
>
> ''. . . because when this question is settled I want every college and every institution of learning in this broad land to be open to every citizen, that there shall be no discrimination.''[199]

[198] *Id.* at 4151.

[199] *Id.* at 4153-4154.

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The opponents of the Sumner bill meantime had become aware of the epoch-making significance of the Supreme Court's decision in the *Slaughter House Cases,* and they leaned very heavily upon Justice Miller's opinion during the debate. Thurman of Ohio analysed the *Slaughter House Cases* at length to prove his former contention that the main body of civil rights was still in the custody of the states and that the present bill was unconstitutional.''[200] Senator Henry Cooper of Tennessee, after citing Justice Miller's opinion to make the same constitutional point, asked the Republican majority, ''. . . what good are you to accomplish thus by forcing the mixture of the races in schools?''[201] And Senator Saulsbury of Delaware, who, in 1866 had insisted that if Congress enacted the Fourteenth Amendment it would work an entire revolution in state-federal relations, now argued flatly that the Sumner bill was unconstitutional under Justice Miller's interpretation of the limited scope of the ''privileges or immunities'' clause of the Amendment.[202]

However, the Senate majority remained firm in its intention to pass the bill with the ban on segregated schools. At the close of debate, Senator Aaron Sargent of California presented an amendment that ''nothing herein contained shall be construed to prohibit any State or school district from providing separate schools for persons of different sex or color, where such separate schools are equal in all respects to others of the same grade established by such authority, and supported by an equal *pro rata* expenditure of school funds.'' This amendment the Senate promptly defeated, 21 to 26.[203] Senator McCreery then moved an amendment providing that ''nothing herein contained shall be so construed as to apply to schools already

[200] *Id.* at 4089.
[201] *Id.* at 4154.
[202] *Id.* at 4159.
[203] *Id.* at 4167.

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established." This, too, met defeat, mustering but eleven "ayes" in its support.[204] Immediately after this, the Senate, on May 22, passed the Sumner bill, by a vote of 29 to 16, and sent it to the House.[205]

Again the conclusion with respect to congressional intent as regards segregated schools seems fairly clear: a majority of the Senate in the Forty-third Congress, under control of leaders, a number of whom had supported the passage of the Fourteenth Amendment eight years earlier, thought Congress had the constitutional power to ban segregated schools and that it would be good national policy to do so.[206]

Congress adjourned before the House could take action on the Sumner bill, so that the measure carried over to the second session of the Congress, beginning in December, 1874. And now occurred a curious anticlimax with respect to the prohibition of segregated schools; Congress speedily enacted what virtually amounted to the Sumner bill of 1874 into law, but with the provision banning segregated schools eliminated from the bill.

The critical action occurred in the House of Representatives, where Butler on December 16 introduced what amounted to a somewhat modified draft of the measure passed by the Senate the previous spring. The constitutional debates produced little that was new. It was apparent that Congress by virtue of Section 5 had the constitutional power to take all civil liberties under its protection. Representative Robert Hale of New York, a veteran of the Thirty-ninth Congress, twitted Finck of Ohio for his fallible memory in forgetting so conveniently that in 1866,

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[204] *Id.* at 4171.

[205] *Id.* at 4176.

[206] Flack long ago reached a similar conclusion, that the great majority in Congress who voted for Sumner's bill "fully believed they had the power to pass it." "Of all the evidence," he said, "only a very minor part of it against this conclusion." FLACK, *op. cit. supra* n. 79, at 271.

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he had solemnly warned that the impending amendment would place all civil rights under federal protection.[207]

Whatever may be said about the quantum or quality of Congressional debates on one side or the other no one can deny that the 39th Congress opened with a determination on the part of the Radical Republican majority to deprive the states of all power to maintain racial distinctions in governmental functions. No one can gainsay that this determination permeated the 39th Congress and continued through the passage adoption of the Fourteenth Amendment. The debates and all of the related materials show conclusively that the Fourteenth Amendment effectively gave constitutional sanction to the principle that states are thereby deprived of all power to enforce racial distinctions in governmental functions including public schools.

II

There is convincing evidence that the State Legislatures and conventions which ratified the Fourteenth Amendment contemplated and understood that it prohibited State legislation which would require racial segregation in public schools.

The Fourteenth Amendment was submitted to the states for consideration on June 16, 1866. 14 Stat. 358. It was deliberated by thirty-seven states and ratified by thirty-three.[208] We urge that the evidence with respect to the

[207] 3 Cong. Rec. 979, 980 (1875).

[208] The ratifying states included twenty free or non-slaveholding states (Connecticut, New Hampshire, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, Kansas, Maine, Nevada, Indiana, Minnesota, Rhode Island, Wisconsin, Pennsylvania, Michigan, Massachusetts, Nebraska and Iowa), two former slave-holding but loyal states (West Virginia and Missouri), and the eleven former slaveholding states which had seceded (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas and Virginia). Delaware, Kentucky and Maryland, three former slave-holding but non-seceding states, expressly rejected the Amendment. California, probably because the control of its legislature differed in each house, was unable to take any definitive action.

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states' understanding indicates that three-fourths of the states understood and contemplated the Amendment to forbid legislation compelling the assignment of white and Negro youth to separate schools.

The evidence which compels this conclusion is adduced from governors' messages, reports of the legislative committees on federal relations and entries in the journals of the legislatures. At that time, the legislatures, almost without exception, kept no verbatim record of debates and speeches; and the journals merely noted motions and votes. There are, however, newspaper summaries of some speeches and proceedings. But much of the evidence from these sources is inadequate.

More significant is the modifications which the states made in their schools laws. For if it was understood in the legislatures, which considered the proposed Amendment, that ratification would perforce forbid compulsory segregated schools, it seems certain that the legislatures would have apprehended its effect upon the state's constitutional or statutory provisions for public schools. If, for example, a state required or authorized segregated schools under existing law, presumably the legislature would not knowingly adopt the Amendment without giving some thought to its implications. After adoption, it would be expected that measures would be taken to conform the school laws to the new constitutional mandate. If, however, a state's school laws and practices already conformed to the understanding that the Fourteenth Amendment forbade segregated schools, it is probable that its legislature would not have objected to the Amendment on this question and would afterwards either retain or reinforce its school laws. On the other hand, if there was an authorization or requirement of segregation in a state's school laws, and, after ratification, the legislature took no action to end this disparity, undoubtedly it would appear that this state did not understand the Amendment to have the effect which Appellants urge. Yet, if a state under these same conditions had

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rejected the Amendment, it would suggest that the Amendment's impact upon the school segregation law was a controlling factor. We submit, the new constitutional and statutory provisions enacted with respect to public schools during the critical period, i.e., from 1866, the year the Amendment was submitted, until several years following adoption, constitute strong evidence on the question of the understanding of the Amendment in the state legislatures.

Then, too, we note that the Fourteenth Amendment was designed particularly as a limitation upon the late Confederate States. *Slaughter House Cases,* 16 Wall. 36. Each of them, except Tennessee, was required to endorse the Amendment and the price of readmission also required each to demonstrate that it "modified its constitution and laws in conformity therewith." 14 Stat. 428 (Act of March 2, 1867). In this connection, Representative Boutwell significantly declared: [209]

> "We are engaged in the great work of reconstructing this Government, and I suppose if we are committed to anything, it is this: that in the ten States not now represented there shall hereafter be no distinction on account of race or color."

These new constitutions, and the proposals and debates of the conventions which framed them, then are of utmost significance. Certainly, they had to measure up to the requirements of the Fourteenth Amendment and, therefore, their educational provisions apparently reflect the understanding of the draftsmen as to the Amendment's effect upon compulsory public school segregation. Similarly, since the constitutions of these states, were subject to the scrutiny of Congress, an additional insight into the understanding of Congress is provided. For it would hardly be possible to maintain that Congress contemplated

[209] Cong. Globe, 39th Cong., 2nd Sess. 472 (1867).

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the Fourteenth Amendment as a prohibition on compulsory segregated schools if it had approved a constitution having a provision inconsistent with this proposition.

We now turn to the legislative history of the Fourteenth Amendment in the states. The proceedings in the several states shall be taken up in turn. Because of the geographic origin of certain of the instant cases and the significance of the contemporary understanding and contemplation of the effect of the Amendment upon Southern institutions, we will first treat the evidence from the states whose readmission to the Union was conditioned upon their conformity with the Amendment.

A. The Eleven States Seeking Readmission Understood that the Fourteenth Amendment Stripped Them of Power to Maintain Segregated Schools.

Subsequent to the proclamation of the Thirteenth Amendment the South sought to define the relations between the new freedmen and white men in a manner which retained most of the taint of the former master-slave relationship. The ante-bellum constitutions remained inviolate although prohibitions against slavery were added. Laws were passed which restricted Negroes in their freedom of movement, employment, and opportunities for learning. *Slaughter House Cases,* 16 Wall. 36, 71-72; *Strauder* v. *West Virginia,* 100 U. S. 303, 306-307. In Arkansas [210] and Florida,[211] the so-called Black Codes required separate schools for the children of the two races.

After March 2, 1867, the date of the First Reconstruction Act, 14 Stat. 428, the South was obliged to redefine the status of the freedmen in conformity with their understanding of the Fourteenth Amendment. New constitutions were adopted which without exception were free of

[210] Ark. Acts 1866-67 p. 100.

[211] Cong. Globe, 39th Cong., 1st Sess. 217 (1866).

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any requirement or specific authorization of segregated schools. It is also significant that in almost all of these constitutional conventions and legislatures, the issue of segregated schools was specifically raised and rejected. And no law compelling segregated schools was enacted in any state until after it had been readmitted.

ARKANSAS

The first of these states to be readmitted was Arkansas. 15 Stat. 72 (Act of June 22, 1868). The constitution which it submitted to Congress had not one reference to race; the education article merely obligated the general assembly to "establish and maintain a system of free schools for all persons" of school age.[212] It is reported that this article was adopted to nullify the segregated school law passed by the legislature earlier in 1867.[213] Its adoption had been generally opposed in the Convention on the ground that it would "establish schools in which there would be 'indiscriminate social intercourse between whites and blacks.' "[214] The electorate was warned that this constitution would "force children into mixed schools." [215] But the new constitution was adopted and proclaimed law on April 1, 1868.[216]

The general assembly convened on April 3, and ratified the Fourteenth Amendment on April 6, 1868.[217] It then proceeded to repeal the former school statute and a new school law was proposed whereby taxes were to be assessed to support a system of common schools for the education of all children. This law was interpreted as establishing "a system of schools where the two races are blended together." [218] And it was attacked because it granted white

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[212] ARK. CONST. 1868, Art. IX, § 1.

[213] STAPLES, RECONSTRUCTION IN ARKANSAS 28 (1923).

[214] *Id.* at 247.

[215] Daily Arkansas Gazette, March 19, 1868; *Id.*, March 15, 1868.

[216] *Id.*, April 2, 1868.

[217] Ark. Sen. J., 17th Sess. 19-21 (1869).

[218] *Ibid.*

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parents "no option to their children . . . but to send them to the negro schools . . . unless, as is now rarely the case, they are able to give their children education in other schools." [219]

These provisions for public schools were included in the legislative record which Arkansas submitted to the scrutiny of Congress. Whereupon, Arkansas was re-admitted on June 22, 1868. 15 Stat. 72. One month later, but after readmission, the legislature amended the public school statute and directed the Board of Education to "make the necessary provisions for establishing separate schools for white and colored children and youths. . . ." [220]

NORTH CAROLINA, SOUTH CAROLINA, LOUISIANA, GEORGIA, ALABAMA AND FLORIDA.

The North Carolina, South Carolina, Louisiana, Georgia, Alabama and Florida modifications in their constitutions and laws were approved by Congress in the Omnibus Act of June 25, 1868 and Congress authorized readmittance effective on the date each ratified the Amendment. 15 Stat. 73. The constitution which Florida offered for congressional review imposed a specific duty on the state to provide "for the education of all children residing within its borders without distinction or preference." [221] The legislature ratified the Amendment on June 9, 1868 and when it next convened passed a law to maintain "a uniform system of instruction, free to all youth of six to twenty-one years." [222] It is agreed that this law was not designed to foster segregated schools and by its operation "mixed schools were authorized or required." [223]

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[219] Daily Arkansas Gazette, April 10, 1868.

[220] Act of July 23, 1868 as amended by Ark. Acts 1873, p. 423. See Ark. Dig. Stats., c. 120 § 5513 (1874).

[221] FLA. CONST. 1868, Art. VIII § 1.

[222] Fla. Laws 1869, Act of Jan. 30, 1869.

[223] KNIGHT, PUBLIC EDUCATION IN THE SOUTH 306 (1922); EATON, "SPECIAL REPORT TO THE UNITED STATES COMMISSIONER OF EDUCATION", REP. U. S. COMMR. EDUC. TO SECY. INT. 127 (1871).

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Several years later the Florida Legislature passed a sweeping law which forbade any racial distinction in the full and equal enjoyment of public schools, conveyances, accommodations and amusements.[224] The first compulsory school segregation provision did not appear until over twenty years after readmission.[225]

In the North Carolina Constitution of 1868, the education article called for the general assembly to maintain "a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and sixteen." [226] Furthermore, the general assembly was "empowered to enact that every child of sufficient mental and physical ability, shall attend the public schools" unless otherwise educated.[227] It is reported that the Constitutional Convention refused by a vote of 86 to 11 to adopt a section which provided that "The General Assembly shall provide separate and distinct schools for the black children of the state, from those provided for white children." [228] The adopted article also survived amendments which would have permitted separate schools "for any class of the population" providing each class shared equally in the school fund.[229] Some proponents of the education article said that it did not force racial commingling but they frankly admitted that it did not prevent it and contended that separate schools, if established, should only develop out of the mutual agreement of parents rather than through legislation.[230] Avail-

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[224] Fla. Laws 1873, c. 1947.

[225] FLA. CONST. 1885, Art. XII § 2.

[226] N. C. CONST. 1868, Art. IX § 2.

[227] *Id.*, § 17.

[228] Motion of Mr. Durham reported in KNIGHT, INFLUENCE OF RECONSTRUCTION ON EDUCATION 22 (1913).

[229] Motions of Messrs. Graham and Tourgee reported in *Id.* at 22.

[230] NOBLE, A HISTORY OF PUBLIC SCHOOLS IN NORTH CAROLINA 340-41 (1930).

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able contemporary comment upon the education article of the 1868 constitution uniformly agreed that it either authorized or required mixed schools.[231]

The 1868 Constitution, with this education article, was submitted to Congress and treated as being in conformity with the Amendment. North Carolina's readmission was thus assured contingent upon its ratification of the Fourteenth Amendment.

The state legislature convened on July 1, 1868 and ratified the Amendment on July 4th.[232] Three days later the lower house adopted a resolution providing for the establishment of separate schools, but it failed to win support in the upper house which successfully carried a resolution instructing the Board of Education to prepare a code for the maintenance of the system of free public schools contemplated in the constitution.[233] Significantly, this measure made no reference to race. It was enrolled on July 28, 1868.[234]

At the next regular session after readmission, the legislature passed a school law which required separate schools.[235] However doubtful the validity of this law was to some as late as 1870,[236] the state constitution as amended in 1872, settled the issue by specifically requiring racial separation in education.[237]

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[231] Wilmington Morning Star, March 27, 1868; *id.*, March 28, 1868, p. 2; Charlotte Western Democrat, March 24, 1868; *id.*, April 17, 1868, p. 2; Greensboro Times, April 2, 1868, p. 3; *id.*, April 16, 1868, p. 1; Fayetteville News, April 14, 1868, p. 2; *id.*, June 2, 1868, p. 1.

[232] N. C. Laws 1867, ch. CLXXXIV, Sec. 50.

[233] Noble, *op. cit. supra* n. 230, at 297, 299.

[234] See List of Public Acts and Resolutions Passed by the General Assembly of North Carolina, Spec. Sess. of July, 1868.

[235] N. C. Laws 1868-69, c. CLXXXIV, § 50.

[236] Noble, *op. cit. supra* n. 230, at 325.

[237] Art. IX, § 2.

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South Carolina and Louisiana both ratified the Amendment on July 9, 1868 and were readmitted as of that date pursuant to the Omnibus Act. 15 Stat. 73. The educational articles in their 1868 constitutions were of the same cloth. The Louisiana article flatly said: "There shall be no separate schools or institutions of learning established exclusively for any race by the State of Louisiana." [238] South Carolina's constitution provided that: "All the public schools, colleges and universities of this State, supported in whole or in part by the public school fund, shall be free and open to all the children and youths of the State, without regard to race or color."[239] In addition to this, the South Carolina Constitution required the legislature to pass a compulsory school law after it organized facilities for the education of all children.[240] The 1868 constitutions of both states also declared that all citizens, without regard to race or color, were entitled to equal civil and political rights.[241]

The proponents of the education articles in the Louisiana and South Carolina conventions defended the provisions prohibiting segregation by force of law in public schools as an incident of equal justice or equal benefits in return for equal burdens; and they overwhelmingly considered compulsory segregation to be a hostile distinction based on race and previous condition.[242] The chairman of the Education Committee of the South Carolina Convention, defending the proposed education article, explained: [243]

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[238] LA. CONST. 1868, Title VII, Art. 135.

[239] S. C. CONST. 1868, Art. XX § 10.

[240] *Id.*, § 4.

[241] *Id.*, Art. I, § 7; LA. CONST. 1868, Title I, Art 2.

[242] Proceedings of the South Carolina Constitutional Convention of 1868, Held at Charleston, S. C., Beginning January 14th and Ending March 17th, 1868, pp. 654-900 (1868); Official Journal of the Proceedings for Framing a Constitution for Louisiana, 1867-1868, *passim* (1868).

[243] Proceedings, *op. cit. supra* n. 242, at 899.

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"The whole measure of Reconstruction is antagonistic to the wishes of the people of the State, and this section is a legitimate portion of that scheme. It secures to every man in this State full political and civil equality, and I hope members will not commit so suicidal an act as to oppose the adoption of this section."

Continuing, he explained:[244]

"*We only compel parents to send their children to some school, not that they shall send them with the colored children; we simply give those colored children who desire to go to white schools, the privilege to do so.*" (Emphasis supplied.)

After the Louisiana and South Carolina constitutions were approved by Congress, the South Carolina Legislature, in a special session, ratified the Amendment and temporarily organized the school system in conformity with the education article, despite Governor Scott's plea for a law which would require racial separation in schools as a preventive against "educational miscegenation."[245] At the next regular session, the school system was permanently organized, and a law was passed forbidding officials of the state university to "make any distinction in the admission of students or management of the university on account of race, color or creed."[246]

The Louisiana legislature acted with similar celerity and consistency. It assembled on June 29, 1868, ratified the Amendment on July 9, 1868 and enacted laws conforming to the constitutional mandate against segregated schools.[247] At its next session, it supplemented the school

[244] *Id.* at 690.

[245] S. C. House J., Spec. Sess., p. 51 *et seq.* (1868). See Charleston Daily News, July 10, 1868.

[246] S. C. Acts 1868-69, pp. 203-204.

[247] Dabney, Universal Education in the South 370 (1936).

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laws by imposing penal and civil sanctions against any teacher refusing to accept a pupil of either race.[248] Subsequent laws forbade racial distinctions at a state institution for the instruction of the blind, prohibited racial separation on common carriers, and provided that there should be no racial discrimination in admission, management and discipline at an agricultural and mechanical college.[249]

More than a quarter-century elapsed before South Carolina and Louisiana in 1895 and 1898, respectively, changed these laws to require racial segregation in public education.[250]

The Alabama Constitutional Convention assembled on November 4, 1867, but the education article was not adopted until December 5th, the final day of the session. What emerged was borrowed directly from the Iowa Constitution of 1857, in most particulars, plus the language of a statute passed by the 1865-66 Iowa legislature to specifically bar segregation in schools.[251] This anti-segregation article survived two attempts to introduce provisos specifically requiring the establishment of separate schools.[252]

Congress found that Alabama had conformed its constitution with the Amendment and considered the state qualified for readmission as soon as it ratified the Fourteenth Amendment. On July 13th, 1868, the General Assembly fulfilled the final requirement. Thereafter, on August 11th, the State Board of Education, acting under the legislative powers conferred upon it in the constitution,

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[248] FAY, "THE HISTORY OF EDUCATION IN LOUISIANA", 1 U. S. Bu. Educ. Cir. No. 1, p. 101 (1898).

[249] La. Acts 1869, p. 37; La. Laws 1871, pp. 208-10; La. Laws 1875, pp. 50-52.

[250] S. C. CONST. 1895, Art. XI § 7; LA. CONST. 1898, Art. 248.

[251] Compare ALA. CONST. 1867, Art. XI with IOWA CONST. 1857, Art. IX and Iowa Laws 1865-66, p. 158.

[252] Official Journal of the Constitutional Convention of the State of Alabama 1867-68, pp. 237, 242 (1869).

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passed a regulation which made it unlawful "to unite in one school both colored and white children, unless it be by the unanimous consent of the parents and guardians of such children . . ."[253] But the significant point again is that this was done only after readmission.

Georgia, like most of the South, had no public school system prior to Reconstruction. In fact, no reference to public schools appears in either the ante-bellum Georgia Constitution or the Constitution of 1865 which was substantially a reenactment of the former.[254]

The Constitutional Convention of 1867-68, however, rewrote the basic state document and the committee on education reported a proposal to establish a thorough system of public education "without partiality or distinction."[255] During the drafting and consideration of the proposed education article, several efforts to include provisions requiring segregated schools were defeated.[256] The Convention adopted an article which directed the General Assembly to "provide a thorough system of general education to be forever free to all children of the State . . .".[257]

After this constitution was approved by Congress, the legislature ratified the Fourteenth Amendment on July 21, 1868 and Georgia apparently qualified for readmission. But the General Assembly forcibly expelled its Negro complement at this session on the ground that their color

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[253] Ala. Laws 1868, App., Acts Ala. Bd. of Educ. It would appear that had this law been tested, application of the rule applicable to borrowed statutes would have invalidated it inasmuch as a similar statute in Iowa had been struck down on the basis of a less stringent constitutional provision. Clark v. Board of School Directors, 24 Iowa 266 (1868).

[254] 2 Thorpe, Federal and State Constitutions 765 *et seq.* (1909).

[255] Journal of the Constitutional Convention of Georgia, 1867-68, p. 151 (1868).

[256] *Id.*, at 69, 151, 479, 558. See ORR, HISTORY OF EDUCATION IN GEORGIA 187 (1950).

[257] GA. CONST. 1868, Art. VI.

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made them ineligible to hold office. This action prompted Congress to refuse to seat the Georgia congressional delegation.[258] The General Assembly then reconvened on January 10, 1870, re-seated its Negro members, ratified the Fourteenth Amendment again, and expunged the word "white" from all state laws.[259] The conduct of this legislature satisfied Congress and Georgia was readmitted to the Union on July 15, 1870. 16 Stat. 363.

Three months later, on October 13, 1870, the state legislature passed a public school act which in section 32 established a system of segregated schools.[260] The state constitution was amended in 1877 and validated this legislation by an express requirement for racial separation in public schools.[261]

TEXAS.

In Texas a Constitutional Convention met in June 1868 to frame the constitution under which it was subsequently readmitted. Drafted to secure the approval of Congress,[262] it required the legislature to maintain "a system of public free schools, for the gratuitous instruction of all the inhabitants of this State of school age."[263] This constitution was accepted at the elections in 1869, and the legislature, without discussion, ratified the three Civil War Amendments on February 18, 1870.[264] Texas was readmitted on March 30, 1870, 16 Stat. 80, and the legislature drafted a public school law which provided that local boards of

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[258] ORR, *op. cit. supra* n. 256, at 195-196.

[259] Ga. Sen. J. Pt. II, p. 289 (1870); Ga. House J. pp. 307, 1065 (1870).

[260] Ga. Laws 1870, p. 57.

[261] GA. CONST. 1877, Art. VIII § 1.

[262] TEX. CONST. 1871, Art. I § 1.

[263] *Id.* Art. IX §§ 1-4.

[264] Daily State Journal, February 20, 1870.

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education, "when in their opinion the harmony and success of the schools require it, . . . *may* make any separation of the students or schools necessary to secure success in operation . . .".[265] Contemporary opinion was that this grant of discretion to school boards was a restrained effort to achieve racial separation without offending Congress and that the Fourteenth Amendment forbade the requirement of separate schools although it did not compel mixed schools.[266] It was not until 1876, when Texas adopted a new constitution, that racial separation in schools was expressly required by law.[267]

Virginia.

Virginia submitted to Congress a constitution which contained no reference to race or racial separation in public schools.[268] In the Constitutional Convention, the issue of segregation was introduced when the report of the committee on education was being considered. First, an amendment was proposed to provide "that in no case shall white and colored children be taught in the same school." [269] This amendment was defeated.[270] Subsequently, a proposal to add an independent section providing for the establishment of segregated schools met a like fate.[271] A provision was also submitted to require that public schools be open to all classes without distinction and that the legislature be denied the power to make any law which would admit of any

[265] 6 Tex. Laws 1866-71, p. 288. (Emphasis added.)

[266] Flake's Daily Bulletin, March 3, 1870; *Id.* March 13, 1870.

[267] Tex. Const. 1876, Art. VII § 7; 8 Tex. Laws 1873-79 CXX § 54.

[268] Va. Const. 1868, Art. VIII § 3.

[269] Journal of the Virginia Constitutional Convention, 1867-68, p. 299 (1868).

[270] *Id.* at 300; Richmond Enquirer, March 31, 1868.

[271] Journal, *op cit. supra* n. 269, at 301.

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invidious distinctions.[272] This proposal and a substitute to the same effect were also defeated.[273] Opponents of the proposals to prohibit segregated schools explained the failure of passage, not on the grounds of fundamental objection, but because it was feared that the adoption of such an article in the constitution would doom its chance of ratification.[274] Thus, an article merely directing the general assembly to provide for a uniform system of public free schools was adopted "rather than risk having the Congress or Union Leagues force an obnoxious law on them." [275]

After the election of 1869, at which the constitution was adopted, the General Assembly convened and ratified the Fourteenth Amendment on October 8, 1869. This session passed no school laws and the establishment of the public school system was deferred until after readmission. Full statehood status was regained on January 26, 1870. 16 Stat. 62. Six months later, on June 11th, the General Assembly established a "uniform system of schools" in which separate schools were required.[276] A specific constitutional mandate for segregated[277] schools, however, did not appear until 1902.

MISSISSIPPI.

Mississippi followed the general pattern of the former seceded states. The Constitutional Convention of 1868, adopted an education article which made no mention of race or racial separation.[278] At least two unsuccessful

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[272] *Id.*, at 333.

[273] *Id.*, at 335-40.

[274] ADDRESS OF THE CONSERVATIVE MEMBERS OF THE LATE STATE CONVENTION TO THE VOTERS OF VIRGINIA (1868).

[275] DABNEY, UNIVERSAL EDUCATION IN THE SOUTH 143-44 (1936).

[276] Va. Acts 1869-70, c. 259 § 47, p. 402.

[277] VA. CONST. 1902, Art. IX § 140.

[278] MISS. CONST. 1868, Art. VIII.

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attempts were also made in the Convention to require segregated schools.[279]

While the convention journal does not specifically indicate that the Fourteenth Amendment was raised as an objection to segregated schools, the convention had passed a resolution which declared that:

> ". . . the paramount political object . . . is the restoration or reconstruction of our government upon a truly loyal and national basis, or a basis which will secure liberty and equality before the law, to all men, regardless of race, color or previous conditions." [280]

The convention also framed a Bill of Rights which required all public conveyances to accord all persons the same rights,[281] and it refused to adopt an article forbidding intermarriage.[282]

The next legislature convened in January, 1870, ratified the Fourteenth and Fifteenth Amendments, repealed all laws relative to Negroes in the Code of 1857, as amended by the Black Code of 1865, and indicated that it intended to remove all laws "which in any manner recognize any natural difference or distinction between citizens and inhabitants of the state." [283]

The Constitution and actions of the legislature proved acceptable to Congress, and Mississippi was restored to the Union on February 23, 1870. 16 Stat. 77. It was not until 1878 that Mississippi passed a law requiring segregated

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[279] Journal of the Mississippi Constitutional Convention of 1868, pp. 316-18, 479-80 (1868).

[280] *Id.* at 123.

[281] *Id.* at 47; Miss. Const. 1868, Art I, § 24.

[282] Journal of the Mississippi Constitutional Convention of 1868, pp. 199, 212 (1868).

[283] Garner, Reconstruction in Mississippi 285 (1901).

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schools;[284] and it was still later when the Constitution was altered to reiterate this requirement.[285]

TENNESSEE.

Tennessee, although a member state in the late Confederacy, was not subjected to the requirements of the First Reconstruction Act, inasmuch as it had promptly ratified the Fourteenth Amendment and had been readmitted prior to the passage of that Act. Nevertheless, this state likewise reentered the Union with compulsory racial segregation absent from its constitution and statutory provisions on public schools. Readmission was under the Constitution of 1834, inasmuch as the Constitutional Convention of 1865 merely amended it to abrogate slavery and authorize the general assembly to determine the qualifications of the exercise of the elective franchise.[286] The education article in this constitution merely required the legislature to encourage and support common schools "for the benefit of all the people" in the state.[287] The first law providing for tax supported schools, on its face, also made no racial distinction.[288] The next law, however, prohibited compulsory integrated schools.[289] Contemporary federal

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[284] Miss. Laws 1878, p. 103.

[285] MISS. CONST. 1890, Art. IX, § 2.

[286] TENN. CONST. 1834 as amended by §§ 1 and 9 of "Schedule" ratified February 22, 1865. In conformity with the Schedule's directive the legislature enacted that Negroes could exercise and pursue all types of employment and business under the laws applicable to white persons, Tenn. Acts. 1865-66, c. 15; that Negroes were competent witnesses, *Id.*, c. 18; and that persons of color henceforth had the same rights in courts, contracts and property as white persons except that Negroes could not serve on juries and that this act "shall not be construed as to require the education of white and colored children in the same school." *Id.*, c. 40, § 4.

[287] TENN. CONST. 1834, Art. XI § 10.

[288] Tenn. Acts. 1853-54, c. 81.

[289] Tenn. Acts 1865-66, c. 40, § 4.

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authorities noted that ante-bellum practice apparently had restricted the benefits of the school system to white children; but approved these provisions because, in sum, they provided a sufficient guarantee for the support and enjoyment of common schools for the equal benefit of all the people without distinction on the basis of race or color.[290]

The Governor convened the legislature in special session on July 4, 1866 to consider the Fourteenth Amendment. In urging its adoption, he summarized Section 1, and said that its practical effect was to protect the civil rights of Negroes and to "prevent unjust and oppressive discrimination" in the exercise of these citizenship rights.[291] A joint resolution to ratify was introduced in the upper house; and a resolution to amend it with a proviso that the proposed Amendment should not be construed to confer upon a person of color rights to vote, to hold office, to sit on juries or to intermarry with whites or to "prevent any state from enacting and enforcing such laws" was voted down.[292] Then the Senate approved the joint resolution and the House concurred.[293]

After ratification, a group in the lower house formally protested its confirmation of the Amendment on the ground that it invaded state rights "and obliterates all distinctions in regard to races, except Indians not taxed."[294] A similar protest was filed in the upper house.[295] Such of the debates as were reported in the press indicate that the legislators understood the Amendment to force absolute equality[296] and that under the inhibitions of Section 1 "distinctions in

[290] Rep. U. S. Commr. Educ. 1867-68, 101 (18).

[291] Tenn. House J., Called Sess. 3, 26-27 (1866); Tenn. Sen. J., Called Sess. 8 (1866).

[292] Tenn. Sen. J., Called Sess. 26 (1866).

[293] *Id.* at p. 24; Tenn. House J., Called Sess. 24 (1866).

[294] Tenn. House J., Called Sess. 38 (1866).

[295] Tenn. Sen. J., Called Sess. 41-42 (1866).

[296] Nashville Dispatch, July 12, 1866.

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schools cannot be made, and the same privileges the one has cannot be denied the other. . . ." [297]

Tennessee was readmitted July 24, 1866. 15 Stat. 708-711. After readmission, a school law was passed on March 5, 1867 whereby boards of education were "authorized and required to establish . . . special schools for colored children, when the whole number by enumeration exceeds twenty-five." [298] It also provided for the discontinuance of these separate schools when the enrollment fell below fifteen. The law, however, did not forbid non-segregated schools. But it was repealed in 1869 and replaced with a requirement that racial separation in schools be observed without exception.[299] Finally, the constitution was amended in 1870 to secure the same result.[300]

In summary, therefore, as to these eleven states the evidence clearly reveals that the Fourteenth Amendment was understood as prohibiting color distinctions in public schools.

B. The Majority of the Twenty-two Union States Ratifying the 14th Amendment Understood that it Forbade Compulsory Segregation in Public Schools.

Other than the states already treated, twenty-six Union States considered the Amendment. Twenty-two of them ratified it. The evidence adduced here is of a somewhat less uniform character than that from the states which formed the late Confederacy for the simple reason that the legislatures in the North were unfettered by any congressional surveillance, and they did not experience the imperative necessity of re-examining their constitutions and laws at the time the proposed Fourteenth Amendment was con-

[297] *Id.*, July 25, 1866.

[298] Tenn. Laws 1867, c. 27, § 17.

[299] Tenn. Laws 1870, c. 33, § 4.

[300] TENN. CONST. 1870, Art. XI, § 12.

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sidered by them. Thus, it is to be expected that some of these legislatures deferred attuning their school laws with the keynote of the Amendment until several years after it had become the law of the land. In other states, the legislatures adjusted their school laws almost simultaneously with their ratification of the Amendment. Still others, because existing laws and practices conformed with their basic understanding with respect to the impact of the Amendment, were not required to act. In the end, nevertheless, we submit that the overwhelming majority of the Union States ratified or did not ratify the Fourteenth Amendment with an understanding or contemplation that it commanded them to refrain from compelling segregated schools and obliged them to conform their school laws to assure consistency with such an understanding.

West Virginia and Missouri.

West Virginia, a state created during the Civil War when forty western counties refused to follow Virginia down the road to secession, and Missouri, a former slaveholding state comprised the small minority of states which ratified the Fourteenth Amendment and perpetuated laws requiring segregated schools without any subsequent enactment consistent with a discernment that such laws and the Amendment were incompatible.

Both states required separate schools for the two races prior to the submission of the Amendment.[301] These laws were continued after the Amendment was proclaimed as ratified;[302] and both states subsequently strengthened the requirement of separate schools in the 1870's by amending their constitutions to specifically proscribe racial integration in public schools.[303]

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[301] W. Va. Laws 1865, p. 54; Mo. Laws 1864, p. 126.

[302] W. Va. Laws 1867, c. 98; W. Va. Laws 1871, p. 206; Mo. Laws 1868, p. 170; Mo. Laws 1869, p. 86.

[303] W. Va. Const. 1872, Art. XII, § 8; Mo. Const. 1875, Art. IX.

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THE NEW ENGLAND STATES.

Segregated schools also existed in some of the strongly abolitionist New England states prior to their consideration and ratification of the Amendment. But their reaction to the prohibitions of Section 1 was directly contrary to the course taken in West Virginia and Missouri.

In Connecticut, prior to the adoption of the Amendment, racial segregation was not required by state law but segregated schools were required in some cities and communities, e.g., in Hartford pursuant to an ordinance enacted in 1867 and in New Haven by administrative regulation.[304] On August 1, 1868, four days after the Amendment was proclaimed, however, the legislature expressly forbade separate schools.[305] Interestingly, during the course of debate on this bill, amendments which would have required segregation or permitted separate "equal" schools were introduced and rejected.[306]

Similarly, racial separation in schools was never required by the constitution or laws of Rhode Island, but segregated schools existed at least in Providence, Newport and Bristol.[307] Here, too, the same legislature which

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[304] MORSE, THE DEVELOPMENT OF FREE SCHOOLS IN THE UNITED STATES AS ILLUSTRATED BY CONNECTICUT AND MICHIGAN 127, 144, 192 (1918); WARNER, NEW HAVEN NEGROES 34, 71-72 (1940).

[305] Conn. Acts 1866-68, p. 206. See Conn. House J. 410 (1866); Conn. Sen. J. 374 (1866).

[306] Conn. Sen. J. 247-48 (1868); Conn. House J. 595 (1868). See New Haven Evening Register, June 17, 1868.

[307] BARTLETT, FROM SLAVE TO CITIZEN, c. 6 *passim.* (unpub. ms., pub. expected in Dec. 1953). See Ammons v. School Dist. No. 5, 7 R. I. 596 (1864).

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ratified the Amendment enacted a law prohibiting racial segregation in public schools.[308]

In Maine, there was no racial separation in public schools prior to the adoption of the Amendment.[309] However, the leading supporter of ratification extolled in the broadest terms its equality provisions and indicated that the proponents expected it to compel in the other states the same equality in civil and political rights as existed in Maine, itself.[310]

Massachusetts too, had already made unlawful any racial segregation in schools prior to the submission of the Amendment.[311] Thus, since Massachusetts had already considered state required racial segregation completely inconsistent with a system of laws and government which treats all persons alike irrespective of color,[312] there was

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[308] R. I. Laws 1866, c. 609.

The Committee on Education recommended passage of this act, saying: "The great events of the time are, also, all in favor of the elevation of the colored man. They are all tending to merge the distinctions of race and of class in the common brotherhood of humanity. They have already declared the Negro and the white man to be equal before the law; and the privileges here asked for by these petitioners, are simply a necessary result of this recognized equality." It went on to say, "We have no right to withhold it from him in any case", and asked, "With what consistency can we demand that these colored people shall be equal before the law in other states or the territories, while we, ourselves, deprive them of one of their most important civil rights?" Report of Committee on Education, Pub. Doc. No. 4 (1896).

[309] See CHADBOURNE, A HISTORY OF EDUCATION IN MAINE (1936).

[310] Speech of Senator Crosby in the Maine Senate, January 16, 1867, reported in Kennebec Journal, January 22, 1867, p. 1.

[311] Mass. Acts & Res. 1854-1855, p. 650; Mass. Acts & Res. 1864-1865, pp. 674-75.

[312] This was precisely the fundamental proposition underlying the enactment of the Act of 1855 prohibiting racial segregation in public schools. Report of the Committee on Education, Mass. House Doc. No. 167, March 17, 1855.

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no subsequent legislative action interpretative of the impact of the Amendment on segregation.

The deliberations of the legislature on the proposed Amendment opened with its reference to the body by the governor. He recommended ratification and his speech indicates that he understood Section 1 of the Amendment to be a reinforcement of the Civil Rights Act of 1866 and observed: "Whatever reasons existed at the time for the enactment of that bill, apply to the incorporation of its provisions into the state law." [313] Surprisingly, strong opposition to ratification developed. A majority of the joint committee recommended rejection on the ground that the proposed Amendment neither specifically guaranteed Negro suffrage nor added anything to what was already in the constitution "possibly excepting the last clause" of Section 1. Of this, is concluded: [314]

> "The denial by any state to any person within its jurisdiction, of the equal protection of the laws, would be a flagrant perversion of the guarantees of personal rights. . . . [But] such denial would be equally possible and probable hereafter, in spite of an indefinite reiteration of these guarantees by new amendments."

The minority reported that: [315]

> "Without entering into any argument upon the merits of the amendment, they would express the opinion that its ratification is extremely important in the present condition of national affairs."

When these reports were presented in the lower house of the legislature, a motion was passed to substitute the

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[313] Mass. Acts and Res. 1867, pp. 789, 820; Boston Daily Advertiser, January 5, 1867, Sat. Supp.

[314] Mass. House Doc. 149, pp. 23-24 (1867).

[315] *Id.,* at 25.

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minority report.[316] Suffrage had claimed much of the strident debate on the motion. But a speech of one of the last members to speak for the motion was reported as follows: [317]

> "To the first article of this amendment, there had been no objection brought by those who favored rejection. . . . The speaker felt that this was a most important article; by it the question of equal rights was taken from the supreme courts of the States and given to the Supreme Court of the United States for decision; the adoption of the article was the greatest movement that the country had made toward centralization, and was a serious and most important step. This was taken solely for the reason of obtaining protection for the colored people of the South; the white men who do not need this article and do not like it, sacrifice some of their rights for the purpose of aiding the blacks."

The upper house considered the motion several days later, re-echoed the theme of the speeches previously made in the lower house, and voted for ratification.[318]

The New Hampshire legislature took up the proposed Amendment in June of 1866. The governor's message urged ratification but its brief comment was not revealing.[319] The majority report of the house committee with respect to the Amendment merely offered a resolution to modify.[320] But the minority reported a number of reasons

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[316] Boston Daily Advertiser, March 13, 1867, p. 2; *Ibid.,* March 14, 1867, p. 1.

[317] *Id.,* March 14, 1867, p. 1 (Speech of Richard Henry Dana, Jr.).

[318] Mass. Acts and Res. 1867, p. 787; Mass. Leg. Doc. Sen. Doc. No. 25 (1867); Boston Daily Advertiser, March 21, 1867, p. 1.

[319] N. H. House J. 137 (1866).

[320] *Ibid.,* p. 174.

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for rejection which, *inter alia*, criticized section 1 on the grounds of ambiguity and furthermore:[321]

> "Because said amendment is a dangerous infringement upon the rights and independence of all the states, north as well as south, assuming as it does, control their legislation in matters purely local in their character, and impose disabilities upon them for regulating, in their own way [such matters]."

The same set of objections was presented by a minority of the special committee of the upper house.[322] Both chambers voted for ratification, however, within a month after the Amendment was offered to the state.[323]

Laws governing public schools in New Hampshire appear to have never been qualified on the basis of race or color at any time after its organic law obligated the legislature to stimulate public education.[324] Similarly, Vermont seems to have no history of segregated schools. Neither did its laws sanction such a policy.[325] When the legislature convened in 1866, the Governor's opening message discussed the proposed Fourteenth Amendment at some length. He urged that it be ratified to secure "equal rights and impartial liberty", otherwise a small number of whites in the South and the entire colored race would be left unprotected. In concluding, he said Vermont welcomed "such a reorganization of the rebellious communities, as would have given the people, white and black, the equal civil and political rights secured to the people of the State, by our Bill of Rights and Constitution, and under which peace,

[321] *Id.* at 176.

[322] N. H. Sen. J. 70 (1866).

[323] *Id.* at 94, N. H. House J. 231-33 (1866).

[324] N. H. CONST. 1792, § LXXXIII.

[325] VT. CONST. 1777, c. II, § XXXIX; VT. CONST. 1786, c. II, § XXXVIII; VT. CONST. 1793, c. II, § 41. See Report of the Indiana Department of Public Instruction 23-28 (1867-68).

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order, civilization, *education,* contentment, Christianity and liberty have shed their benign and blessed influence alike upon every home and household in our beloved Commonwealth."[326] Thereupon, both houses routinely voted for ratification.[327]

THE MIDDLE ATLANTIC STATES.

Three Mid-Atlantic States, New York, New Jersey and Pennsylvania ratified the Amendment. The Pennsylvania evidence is in some detail because it was one of the few states to preserve the full discussions and debates of its legislature. Furthermore, its statutes, previous to the adoption of the Amendment, authorized segregation in schools;[328] and public carriers had regulations which excluded or segregated Negroes. See *West Chester & Phila. R. Co.* v. *Miles,* 5 Smith (55 Pa.) 209 (1867).

On January 2, 1867, the Governor transmitted the Fourteenth Amendment to the Legislature. He called for its adoption primarily upon political grounds but strenuously urged that every citizen of the United States had certain rights that no state had a right to abridge and the proposed Amendment asserted "these vital principles in an authoritative manner, and this is done in the first clause of the proposed amendments [sic]."[329]

The resolution recommending ratification was introduced in the Pennsylvania Senate by its floor leader. He urged that one of the reasons why it had to be adopted was because Mississippi had enacted a law requiring segregation on railroads and the Amendment was necessary to

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[326] Vt. Sen. J. 28 (1866); Vt. House J. 33 (1866). (Emphasis added.)

[327] Vt. House J. 139 (1866); Vt. Sen. J. 75 (1866).

[328] Act of May 8, 1854, Pa. L. 617 § 24.

[329] Pa. Sen. J. 16 (1867).

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overcome all state legislation of this character.[330] In summary of his concept of the purpose of section 1, he said:

> "The South must be fenced in by a system of positive, strong, just legislation. The lack of this has wrought her present ruin; her future renovation can come only through pure and equitable law; law restraining the vicious and protecting the innocent, making all castes and colors equal before its solemn bar, that, sir, is the *sine qua non*. . . ."

The pith of the speeches of both the proponents and opponents of ratification are as follows:

Senator Bingham, a leading supporter of the resolution, noted that "it has been only a question of time how soon all legal distinctions will be wiped out."[331]

Another announced, "I shall vote for it with satisfaction for my own conscience and gratitude to Congress for squarely meeting the universal demand of the loyal states to destroy all legal caste within our borders."[332]

The leading opponent of ratification interpreted the Amendment as follows:[333]

> "By the first section it is intended to destroy every distinction founded upon a difference in the caste, nationality, race or color of persons . . . which has found its way into the laws of the Federal or State Governments which regulate the civil relations or rights of the people. No law shall be made or executed which does not secure equal rights to all. *In all matters of civil legislation and administration there shall be perfect equality in the advantages and securities guaranteed by each state to everyone here declared a citizen, without distinction of race or color,* every one being equally entitled to demand from the

[330] 2 Pa. Leg. Rec., app., p. III (1867).

[331] *Id.* at XVI.

[332] *Id.* at XXII (speech of Senator Taylor).

[333] *Id.* at XLI (speech of Mr. Jenks).

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> state and state authorities full security in the enjoyment of such advantages and securities." (Emphasis supplied).

The legislature ratified the Amendment on January 17, 1867.[334]

About two weeks later, on February 5th, a bill was introduced making it unlawful for public conveyances to exclude or segregate Negroes.[335] In introducing this bill, its sponsor announced that the doctrine of equality before the law required the passage of this bill. Both he and another supporter of the bill pointed out that these practices were pursuant to carrier regulations and policies and had to be eradicated by legislative action. It was also pointed out that the bill did not effect social equality because that is regulated solely by the personal tastes of each individual.[336] The bill was overwhelmingly enacted into law the following month.[337]

The school law authorizing separate schools was not specifically repealed until 1881 when the legislature made it unlawful for any school official to make any distinction on account of race or color in students attending or seeking to attend any public school.[338]

It appears, however, that when the state constitution was amended in 1873, the 1854 school law was viewed as having been brought into conformity with the adoption of a provision for a school system "wherein all children of this Commonwealth above the age of six years shall be educated. . . ." [339] The Secretary of State, official reporter

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[334] Pa. Laws 1867, 1334.

[335] 2 Pa. Leg. Rec., app. p. LXXXIV (1867).

[336] Id. at pp. LXXXIV *et seq.* (Remarks of Senators Lowery and Brown.)

[337] Act of March 22, 1867, Pa. Laws 1867, pp. 38-39.

[338] Act of June 8, 1881, Pa. L. 76, § 1, Pa. Laws 1881, p. 76.

[339] Pa. Const. 1873, Art. X, § 1.

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of the Convention, states particular attention was paid to "that part which confers authority on the subject of education." And he noted that the new article was formulated to conform with the policy of protest against all racial discrimination and, specifically, to remove the "equivocal and indivious provision." [340] These purposes are further borne out when the sponsor of the 1881 bill stated: [341]

> "In proposing the repeal of the act of 1854, which in terms would be prohibited by the present State and Federal Constitutions, it seems a matter of surprise that an act so directly in conflict with the Fourteenth and Fifteenth Amendments of the Constitution of the United States should have been permitted to have remained in the statute book until this time."

New Jersey, as early as 1844, enacted general legislation for the establishment and support of a public school system "for the equal benefit of all persons. . . ." [342] In 1850, special legislation was enacted which enabled Morris Township to establish a separate colored school district if the local town meeting voted to do so.[343] The state superintendent of schools construed this act and concluded that it in combination with the earlier law of 1844 permitted any local school system to maintain separate schools provided both schools offered the same advantages and no child was excluded.[344]

The New Jersey Legislature convened in a special session and hastily ratified the Amendment on September 11, 1866.[345] The dispatch with which this was done was made

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[340] JORDAN, OFFICIAL CONVENTION MANUAL 44 (1874).

[341] Pa. Sen. J. (entry dated May 26, 1881).

[342] N. J. CONST. 1844, Art. IV § 7(6); N. J. REV. STATS., c. 3 (1847).

[343] N. J. Laws 1850, pp. 63-64.

[344] ANNUAL REPORT OF THE STATE SUPERINTENDENT OF SCHOOLS 41-42, (1868).

[345] N. J. Sen. J., Extra Sess., 1866, p. 14; MINUTES OF THE ASSEMBLY, Extra Sess., 1866, p. 8.

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