a focal issue in the following elections. The Republicans broadly defended the Amendment as "forbidding class legislation, or the subjecting of one class of people to burdens that are not equally laid upon all." [346] The Democrats more specifically contended that their candidates opposed the Amendment because they were "against Negro suffrage and the attempt to mix negroes with workingmen's children in public schools." [347] When the Republicans captured the governorship and elected a radical congressional delegation, the Democrats captured the state legislature and immediately proceeded to rescind New Jersey's ratification.[348]

When the Republicans recaptured control of the legislature in 1870 the school law was amended to require "a thorough and effective system of public schools for the instruction of all children. . . ." [349] And this was later reinforced by an enactment which made it unlawful to exclude any child from any public school on account of color.[350] As a result of this law, separate schools soon disappeared except in a few counties where Negro citizens generally accepted them. When Negroes chose not to accept these segregated schools the school authorities were required to admit them to the white schools pursuant to the prohibition of the 1881 school law.[351]

New York, like the other Middle-Atlantic states, had ante-bellum constitutions which merely authorized the legis-

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[346] Newark Daily Advertiser, October 25, 1866; Trenton State Gazette, November 3, 1866.

[347] Trenton Daily True American, November 3, 1866.

[348] N. J. Sen. J. 198, 249, 356 (1868); Minutes of the Assembly; 309, 743 (1868). See KNAPP, NEW JERSEY POLITICS DURING THE PERIOD OF CIVIL WAR AND RECONSTRUCTION 167 (1924).

[349] N. J. Laws 1874, p. 135.

[350] N. J. Laws 1881, p. 186.

[351] See Pierce v. Union Dist. School Trustees, 17 Vroom (46 N. J. L.) 76 (1884).

lature to establish a common school fund.[352] There was never any general legislation on the subject of racial separation in schools sharing in the common school fund. The legislature, however, granted charters to Brooklyn, Canandaigua, Buffalo and Albany which permitted these cities to maintain segregated schools as early as 1850.[353] The Common School Act of 1864 was in the same vein. It only permitted school boards in certain political subdivisions to establish and maintain segregated schools "when the inhabitants of any school district shall so determine, by resolution at any annual meeting called for that purpose, establish a separate school or separate schools for the instruction of such colored children. . . ." [354] Communities exercising the option under this law comprised the exception rather than the rule.[355]

Shortly after New York ratified the Amendment,[356] a constitutional convention was held and it adopted a new constitution which provided for free instruction of all persons of school age.[357] The convention approved a committee report which contained a ringing declaration that Negroes

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[352] N. Y. CONST. 1821, Art. VII; N. Y. CONST. 1846, Art. IX.

[353] N. Y. Laws 1850, c. 143; N. Y. Laws 1852, c. 291. See Dallas v. Fosdick, 50 How. Prac. 249 (1869); People v. Easton, 13 Abb. Prac. N. S. 159 (1872).

[354] N. Y. Laws 1864, c. 555.

[355] ANNUAL REPORT OF THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION 131, 159, 163, 166, 170, 233, 323 (1866).

[356] N. Y. Sen. J. 33 (1867); N. Y. Ass. J. 77 (1867). The Governor's message upon transmission of the Amendment leaves little doubt that he considered it as a "moderate proposition" containing "just the conditions for safety and justice indispensible to a permanent settlement." N. Y. Sen. J. 6 (1867); N. Y. Ass. J. 13 (1867).

[357] N. Y. CONST. 1868, Art IX. See PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 1867-68 (1868).

should have full equality in the enjoyment of all civil and political rights and privileges.[358]

Subsequently, in 1873, the legislature passed an "Act to Provide for the Protection of Citizens in Their Civil and Public Rights."[359] The Act made it unlawful for any person to exclude any other person on the ground of race or color from the equal enjoyment of any place of public accommodation, place of public amusement, public conveyance, "*common schools and public instruction* [sic] of learning. . . ." (emphasis supplied). It also annulled the use of the word "white" or any other discriminatory term in all existing laws, statutes, ordinances and regulations.[360] The New York Court of Appeals did not give vitality to this act in the case of *People ex rel. King* v. *Gallagher,* 92 N. Y. 438 (1883). But cf. *Railway Mail Association* v. *Corsi,* 326 U. S. 88.

The Western Reserve States.

The five states in the Western Reserve all ratified the Fourteenth Amendment. Each of them had rather well established public school systems prior to the Civil War. In Ohio, the first public school legislation expressly denied

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[358] "First. Strike out all discriminations based on color. Slavery, the vital source and only plausible ground of such invidious discrimination, being dead, not only in this State, but throughout the Union, as it is soon to be, we trust, throughout this hemisphere, we can imagine no tolerable excuse for perpetuating the existing proscription. Whites and blacks are required to render like obedience to our laws, and are punished in like measure for their violation. Whites and blacks are indiscriminately drafted and held to service to fill our State's quotas in a war whereby the Republic was saved from disruption. We trust that we are henceforth to deal with men according to their conduct, without regard to their color. If so, the fact should be embodied in the Const." Documents of the Convention of the State of New York, 1867-68, Doc. No. 15 (1868).

[359] N. Y. Laws 1873, c. 186 § 1.

[360] *Id.,* § 3.

Negroes the benefit of free schools.[361] Twenty years later, in 1847, this act was amended to permit the maintenance of separate schools for colored children if the residents of a school district objected to their admission into the white schools.[362] At its next session, the legislature repealed the provision in an earlier law that had prohibited the application of taxes paid by white residents toward the support of colored schools.[363] And in 1853 the school law was revised to require the allocation of public school funds in proportion to the number of children of school age regardless of color.[364]

Separate schools, however, were still maintained except in Cleveland, Oberlin and other northern cities despite the general feeling that this act had relaxed the stringent restrictions of the antecedent laws. Furthermore, the State Supreme Court held this law not to entitle colored children, as of right, to admission into white schools. *Van Camp* v. *Board of Education,* 9 Ohio St. 406 (1859).

After ratification of the Amendment,[365] the legislature did not immediately modify the schools laws. In fact, it did nothing until after the Ohio Supreme Court upheld compulsory segregated schools in *State ex rel. Garnes* v. *McCann,* 21 Ohio St. 198 (1872). Then the legislature enacted a statute which permitted rather than required seg-

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[361] Ohio Laws 1828-29, p. 73.

[362] Ohio Laws 1847-48, pp. 81-83.

[363] Ohio Laws 1848-49, pp. 17-18.

[364] Ohio Laws 1852, p. 441.

[365] Ohio Sen. J. 9 (1867); Ohio House J. 13 (1867). The Amendment was ratified within two days of its submission to the legislature by the Governor. He observed that the Amendment had four provisions; the first of which was "the grant of power to the National Government to protect the citizens of the whole country . . . should any state attempt to oppress classes or individuals, or deprive them of equal protection of the laws . . ." Ohio Exec. Doc., Part I, 282 (1867).

regated schools.[366] Later, it denied local school authorities the power to exercise their discretion in the premises.[367] By this act, all public schools were opened to all children without distinction on account of race or color. *State* v. *Board of Education*, 2 Ohio Cir. Ct. Rep. 557 (1887).

Indiana's pre-Fourteenth Amendment school law provided for the support of public schools but exempted "all Negroes and mulattoes" from the assessment.[368] This law was interpreted as excluding colored children from public schools wherever the parents of white children objected. *Lewis* v. *Henley*, 2 Ind. 332 (1850).

On January 11, 1867, Governor Morton submitted the Fourteenth Amendment to the legislature. His message urged ratification but suggested that schools should be provided for Negroes and that they be educated in separate schools to relieve any friction which could arise if they were required to be admitted to white schools.[369] A resolution to ratify the Amendment was introduced on the same day and referred to a joint committee. Five days later the resolution was reported out favorably with a recommendation of prompt ratification.[370] A minority report was made which objected to the Amendment primarily because it conferred civil and political equality upon Negroes, including the same rights that were then enjoyed by the white race.[371]

The resolution was adopted on the same day in the Senate.[372] No speeches were made in support of the resolution in this chamber but two senators spoke at length against it.[373] In the House, the main contention of the opponents was that the Amendment would impose Negro equality,[374]

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[366] Ohio Laws 1878, p. 513.

[367] Ohio Laws 1887, p. 34.

[368] Ind. Rev. Stats. 314 (1843).

[369] Ind. Doc. J., Part I, p. 21 (1867).

[370] Ind. House J. 101 (1867).

[371] *Id.* at 102.

[372] Ind. Sen. J. 79 (1867).

[373] Brevier, Legislative Reports 44-45 (1867).

[374] *Id.* at 79.

seat Negroes on juries, grant them suffrage and admit them into the white schools.[375] The proponents only denied that the Amendment conferred suffrage.[376] And the lower chamber adopted the resolution on January 23, 1867.[377]

Two years after ratification of the Fourteenth Amendment, the legislature revised its law to require the organization of separate schools.[378] The act also authorized the maintenance of non-segregated schools in areas where there were insufficient Negro children residing within a reasonable distance to justify a separate school. In 1874, the compulsory segregation section of this law was declared valid in the case of *Cory* v. *Carter,* 48 Ind. 327 (1874).

The legislature, however, revised the school laws at its next session to permit (*not require*) segregated schools.[379] The revised law, furthermore, required that colored children be admitted to the regular schools if a separate school was not maintained. This provision was applied in sustaining mixed schools in *State* v. *Grubbs,* 85 Ind. 213 (1883).

Illinois statutes never specifically required separate schools. But the ante-bellum school statute provided that school districts with Negro populations should allow these residents a portion of the school fund equal to the amount of taxes collected from them.[380] As construed by the state superintendent of schools, this law was applied to require segregated schools.[381]

The Illinois legislature received the governor's message endorsing ratification of the Fourteenth Amendment on

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[375] *Id.* at 80, 88-89, 90.

[376] *Id.* at 90.

[377] Ind. House J. 184 (1867).

[378] Ind. Laws 1869, p. 41.

[379] Ind. Laws 1877, p. 124.

[380] Ill. Stats. 1858, p. 460.

[381] SIXTH BIENNIAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ILLINOIS, 1865-66, pp. 27-29; 2 REPORTS MADE TO THE GENERAL ASSEMBLY AT ITS TWENTY-FIFTH SESSION, pp. 35-37.

January 7, 1867. Both chambers then ratified it on the same day with virtually no discussion or debate.[382] About one year later, in December 1869, Illinois called a constitutional convention. It adopted the present organic law which provides for a free public school system for the education of "all children".[383] This provision stems from a resolution in which the convention directed the Education Committee to submit an article which would call for the establishment of a public school system for the education of every "susceptible child—without regard to color or previous condition".[384] Furthermore, the convention rejected two resolutions which would have directed the establishment of a compulsory segregated school system.[385]

Of all the states of the Western Reserve, Michigan was most deeply affected by the tide of abolitionism which swept this section during the pre-war years. By its Constitution of 1850 the word "white" was eliminated from the section establishing voting qualifications [386] and slavery was declared intolerable.[387] Neither this constitution nor the general law of the state recognized any racial distinctions in the enjoyment of public education. But as early as 1842 and as late as 1866, special statutes were passed granting school boards in certain of the larger cities discretionary power to regulate the apportionment of school funds and distribution of pupils among the several schools under their

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[382] Ill. House J. 40, 154 (1867); Ill. Sen. J. 40, 76 (1867).

[383] ILL. CONST. 1870, Art. VIII, § 1.

[384] JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS, Convened at Springfield, December 13, 1869, p. 234.

[385] *Id.* at 429-431, 860-861.

[386] Compare MICH. CONST. 1850, Art. VII, § 1 with MICH. CONST. 1835, Art. II, § 1.

[387] Art. XVIII, § 11.

jurisdiction. Pursuant to this authority some school boards, e.g., in Detroit and Jackson, established separate schools.[388]

The Amendment was submitted to the legislature on January 6, 1867. On January 12th, a resolution was adopted in the Senate instructing the Committee on Public Instruction to report out a bill "to prevent the exclusion of children from the primary or graded or other public schools of this state on account of race or color." And four days later the general school law was amended to provide that "all residents of any district shall have an equal right to attend any school therein. . . ." [389] The Fourteenth Amendment was subsequently ratified on February 16, 1867.[390]

The legislative record of Michigan during the next several years is replete with more blows against segregation and other distinctions based on race or color. In 1869, insurance companies were prohibited from making any distinction between white and Negro insureds.[391] The ban against interracial marriages was removed in 1883.[392] Then in 1885, the civil rights law was enacted prohibiting racial separation on public conveyances, in places of public accommodation, recreation, and amusement.[393]

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[388] See People ex rel. Workman v. Board of Education of Detroit, 18 Mich. 400 (1869) for reference to these special statutes and notice of separate schools in these two cities. Since the decision in this case, there have been no segregated schools maintained by state authorities.

[389] 1 Mich. Laws 42 (1867); Mich. Acts 1867, Act 34 § 28.

[390] The journals of the Michigan legislature indicate that both houses promptly ratified the Amendment without reference to a committee. Mich. Sen. J. 125, 162 (1867); Mich. House J. 181 (1867).

[391] Mich. Acts 1869, Act 77 § 32. See Mich. Comp. Laws § 7220 (1897).

[392] Mich. Acts 1883, Act 23, p. 16.

[393] Mich. Acts 1885, Act 130 § 1. See Mich. Comp. Laws § 11759 (1897).

Wisconsin, since 1848, provided for a public school system free to all children.[394] Moreover, during the crucial years, its Negro population was insignificant—less than two-tenths of one percent,[395] Thus, it seems obvious why segregation in schools or elsewhere never merited the attention of the legislature at the time of its ratification of the Amendment or thereafter.[396]

The Wisconsin legislature met on January 3, 1867 and was addressed by the Governor. His speech suggests that in his thinking the Fourteenth Amendment which he asked them to ratify was designed to apply solely to the South and required that "they must assent to the proposed amendment with all of its guarantees, securing to all men equality before the law. . . ." [397] A joint resolution was introduced to ratify the Amendment and referred to a committee of three, two of whom reported a recommendation to adopt. The report filed by the minority member condemned the Amendment at some length. "The apparent object," to him, was to allow Congress to enfranchise Negroes, legislate generally on civil rights, "give to the federal government the supervision of all the social and domestic relations of the citizen of the state and to subordinate state governments to federal power." [398]

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[394] WIS. CONST. 1848, Art. X, § 3; WIS. REV. STATS. Title VII (1849).

[395] LEGAL STATUS OF THE COLORED POPULATION IN RESPECT TO SCHOOLS AND EDUCATION, SPECIAL REPORT OF THE COMMISSIONER OF EDUCATION, 400 (1871).

[396] Wis. Sen. J. 119, 149 (1867); Wis. Ass. J. 224-226, 393 (1867). The entire series of Journals covering the War and Reconstruction years shows but a single reference to color in connection with education. This was a proposal to amend an 1863 bill so as to limit certain educational privileges to children of "white parentage". The amendment failed and the matter was never revived. Wis. Ass. J. 618 (1863).

[397] Wis. Sen. J. 32 (1867); Wis. House J. 33 (1867).

[398] *Id.* at 96, 98 *et seq.* (Report filed by Sen. Garrett T. Thorne).

It appears that this understanding of the Amendment was not disputed. Rather, one supporter of the Amendment is reported as stating: "If the states refuse to legislate as to give all men equal civil rights and equal protection before the laws, then, sir, there should be supervisory power to make them do that, and a consolidation of that kind will be a benefit instead of an injury.[399] And, another answered:[400]

> "We therefore need such a provision in the Constitution so that if the South discriminates against the blacks the United States courts can protect them. I know it is objected that this is an enlargement of the power of the United States Supreme Court. But it is a power given on the side of liberty—power to protect and not power to oppress. For the appeal will come up to this court from the aggrieved individual against the aggressing state. . . ."

The Western States.

Of the states west of the Mississippi which ratified the Amendment, Nebraska is quite significant because it was admitted to the Union during the life of the 39th Congress and conditions were imposed upon its admission which demonstrate that the Congress which prepared the Amendment intended to eradicate all distinctions based upon race. Nebraska won statehood without having ratified the Amendment. But the enabling Act provided that "this act shall take effect with the fundamental and perpetual condition that there shall be no abridgement or denial of the exercise of the elective franchise, *or any other right,* to any person by reason of race or color. . . ." Act of February 9, 1867, ch. 9, sec. 3, 14 Stat. 377 (emphasis supplied). The Act, furthermore, required Nebraska to publicly proclaim

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[399] Wisconsin State Journal, Feb. 7, 1867 (Reporting speech of Assemblyman C. B. Thomas).

[400] Daily Wisconsin Union, Feb. 7, 1867 (Reporting speech of Assemblyman H. C. Hobart).

this fundamental condition "as a part of the organization of this state."

While the enabling Act was still being considered by Congress, the territorial legislature forthwith passed a "Bill to remove all distinctions on account of race or color in our public schools" [401] since the existing school law restricting the enumeration of pupils to white youths [402] had heretofore been administratively construed to exclude colored children from the public schools. This bill failed to enter the statute books for lack of gubernatorial endorsement.[403]

The same session of the legislature by an appropriate resolution recognized the enabling Act's "fundamental condition" on February 20, 1867 and on March 1st Nebraska was proclaimed the 37th state. Two months later, a special session of the legislature was called to ratify the Amendment and to enact legislation to "render Nebraska second to no other state in the facilities offered to all her children, irrespective of sex or condition. . . ." [404] The Amendment was ratified in June 1867,[405] and the school law was amended to require the enumeration of "all the children" in the school census.[406] The new school law did not in specific language prohibit segregation, but colored children entered the public schools on a non-segregated basis at the next school term in September, 1867.[407]

Another school law was enacted in 1869 which provided an increase in the taxes for the support of public schools

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[401] Neb. House J., 12th Terr. Sess. 99, 105 (1867). See Omaha Weekly Republican, January 25, 1867, p. 2; *Id.*, February 8, 1867.

[402] Neb. Comp. Laws 1855-65, pp. 92, 234, 560, 642 (1886).

[403] MESSAGES AND PROCLAMATIONS OF THE GOVERNORS OF NEBRASKA. COLLECTED IN PUBLICATIONS OF THE NEBRASKA STATE HISTORICAL SOCIETY, 249 (1942).

[404] *Id.* at 274.

[405] Neb. House J. 148 (1867); Neb. Sen. J. 174 (1867).

[406] 2 Neb. Comp. Laws 1866-77, p. 351 (1887).

[407] See Nebraska City News, August 26, 1867, p. 3; *Id.*, September 4, 1867, p. 3.

"affording the advantages of a free education to all youth;" [408] and thereafter no school law has contained any language describing the system of public schools operated by the state.

Prior to its ratification of the Amendment, Kansas, a loyal border state, had adopted a policy of permissive segregation whereby boards of education were authorized, but not required, to establish separate schools.[409] The legislature ratified the Amendment on January 16, 1867,[410] and changed the school law on February 26th by an act which made it illegal for "any" school board to refuse to admit "any" child.[411] In 1868, it reenacted the earlier permissive school segregation law.[412] Subsequently, an 1876 revision of the school laws omitted any authorization for segregation in cities of the first class and specifically forbade segregated schools in cities of the second class.[413] The same session also passed a civil rights act which is still the law and proscribes any distinction on account of race or color in "any state university, college, or other school of public instruction" or in any licensed place of public accommodation or amusement, or on any means of public carriage.[414] In 1879, the legislature reenacted the law permitting racial

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[408] 2 Neb. Comp. Laws 1866-77, pp. 451, 453 (1887).

[409] Kan. Laws 1862, c. 46, Art. 4 §§ 3, 18; Kan. Laws 1864, c. 67, § 4; Kan. Laws 1865, c. 46, § 1.

[410] The Amendment was ratified without reference to a committee within three days after it was submitted to the legislature. Kan. Sen. J. 43, 76, 128 (1867); Kan. House J. 62, 79 (1867).

[411] Kan. Laws 1867, c. 125, § 1; KAN. GEN. STATS., c. 92, § 1 (1868). The punitive feature of this statute directed county superintendents to withhold school funds from any offending schools.

[412] Kan. Gen. Stats., c. 18, Art. V § 75, c. 19, Art. V § 57 (1868).

[413] Kan. Laws 1876, 238.

[414] Kan. Laws 1874, c. 49, § 1. See KAN. REV. STATS. § 21-2424 (1935).

separation in schools but limited it to cities of the first class.[415]

Minnesota ratified the Fourteenth Amendment on January 16, 1867.[416] Its legislature was not obliged to contemplate whether the Amendment nullified segregated schools because such practices had been made a penal offense in 1864.[417] However, in submitting the Amendment to the legislature, the governor urged that its adoption was necessary because of the failure of the former seceding states "to reorganize their civil government on the basis of equal . . . rights, without distinction of color. . . ."[418] In 1873, the legislature rephrased the school law so as to specifically prohibit segregated schools.[419]

In Nevada, the school law in existence prior to its consideration of the Amendment excluded Negroes from public schools and prescribed a penalty against any school which opened its doors to such persons.[420] However, the statute provided that school authorities might, if they deemed it advisable, establish a separate school for colored children and maintain it out of the general school fund. While the legislature took no affirmative action after it ratified the Amendment on January 22, 1867,[421] it similarly remained

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[415] Kan. Laws 1879, c. 81, § 1. This is the current law in Kansas. KAN. REV. STATS. § 27-1724 (1935).

[416] The governor laid the proposed Amendment before the legislature with the observation that it would secure equal civil rights to all citizens and both houses voted at once to ratify the Amendment without further reference. Minn. Exec. Doc. 26 (1866); Minn. House J. 26 (1866); Minn. Sen. J. 22, 23 (1866).

[417] Minn. Laws 1864, c. 4, § 1, amending Minn. Laws 1862, c. 1, § 33.

[418] Minn. Exec. Docs. 25 (1866).

[419] Minn. Stats., ch. 15 § 74 (1873).

[420] Nev. Laws 1864-65, p. 426.

[421] The governor presented the Amendment to the legislature with an admonition that they were expected to ratify it and the ratification was accomplished three days later. The journals indicate virtually no opposition or advocacy of the Amendment. Nev. Sen. J. 9, 47 (1867); Nev. Ass. J. 25 (1867).

inactive after the decision in *State* v. *Duffy,* 7 Nev. 342 (1872), which vitiated the first section of the school law. There is no subsequent reference to the subject of separate schools in the statute books and the segregatory statute itself was dropped from subsequent compilations of laws.[422]

The Oregon evidence is singularly meager. There were no laws requiring or permitting racial separation in schools either prior or subsequent to ratification of the Amendment on September 9, 1866. What the ratifying legislature understood as to the force of the Amendment and the significance of the abortive attempt to withdraw its ratification in 1868 on this subject is unavailable from the bare notations contained in the legislative journals.[423] The contemporary newspapers are also barren of information on this point.[424] What evidence there is, indicates that separate schools did exist at least in Portland as late as 1867 and that they were discontinued in 1871.[425]

Almost two years after the Amendment was submitted to the states, Iowa ratified on April 3, 1868.[426] Neither the state constitution nor laws required or in any manner au-

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[422] See Nev. Comp. Laws (1929).

[423] Ore. Sen. J. 25, 34-36 (1866); *Id.,* at 271-272 (1868); Ore. House J. 273 (1868); Ore. Laws 1868, 114; *Id.,* "Joint Resolutions and Memorials" 13.

[424] The Oregonian, the state's leading newspaper, purportedly carried all the legislative happenings in full. See The Oregonian, September 14, 1866. None of its 1866 issues indicate more than that the legislature considered the Amendment dealt with "equality" and that the primary controversy was with respect to suffrage. *Ibid.,* September 21, 1866.

[425] See REYNOLDS, PORTLAND PUBLIC SCHOOLS, 1875, 33 ORE. HIST. Q. 344 (1932); W. P. A. ADULT EDUCATION PROJECT, HISTORY OF EDUCATION IN PORTLAND 34 (1937).

[426] Ratification was almost perfunctorily effected. Iowa Sen. J. 265 (1868) Iowa House J. 132 (1868).

thorized racial separation in schools at that time.[427] Instances of exclusion and segregation were being quickly remedied without recourse to the courts.[428] Where the courts were called upon, local practices of segregation in schools were never sustained as lawful. *Clark* v. *School Directors,* 24 Iowa 266 (1868); *Smith* v. *Directors of Independent Schools Dist.,* 40 Iowa 518 (1875); *Dove* v. *Independent School Dist.,* 41 Iowa 689 (1875). The state supreme court also forbade segregation by a common carrier in its dining facilities, predicating its decision squarely upon the Fourteenth Amendment. *Coger* v. *N. W. Union Packet Co.,* 37 Iowa 145 (1873).

In sum, the legislatures in all of the Union States which ratified the Fourteenth Amendment, except three, understood and contemplated that the Amendment proscribed State laws compelling segregation in public schools.

C. The Non-Ratifying States Understood that the Fourteenth Amendment Forbade Enforced Segregation in Public Schools.

Four states did not ratify the Amendment, three specifically withholding endorsement and the other being unable to arrive at any definitive position. Delaware, in the anomalous position of a former slave state which sided with the Union, rejected it on February 7, 1867 with a resolution which declared that "this General Assembly believes the adoption of the said proposed amendment to the Constitution would have a tendency to destroy the rights of the States in their Sovereign capacity as states, would be an attempt to establish an equality not sanctioned by the laws

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[427] Iowa Const. 1857, Art. IX, § 12; Iowa Laws 1866, p. 158, reinforcing the Acts of 1860 and 1862 which required the instruction of all children without regard to race. Schaffter, The Iowa Civil Rights Act, 14 Iowa L. Rev. 63, 64-65 (1928).

[428] Dubuque Weekly Herald, January 30, 1867, p. 2; Des Moines Iowa State Register, January 29, 1868, p. 1; *Id.,* February 19, 1868, p. 1.

of nature or God. . . ." [429] Again, in 1873, the state legislators denounced

> ". . . all other measures intended or calculated to equalize or amalgamate the Negro race with the white race, politically or socially, and especially do they proclaim unceasing opposition to making Negroes eligible to public office, to sit on juries, and to their admission into public schools where white children attend, and to the admission on terms of equality with white people in the churches, public conveyances, places of amusement or hotels, and to any measure designed or having the effect to promote the equality of the Negro with the white man in any of the relations of life, or which may possibly conduce to such result." [430]

Then, shortly thereafter, the General Assembly in a series of discriminatory statutes demonstrated that it fully understood that equality before the law demanded non-segregation. It passed laws permitting segregation in schools,[431] places of public accommodation, places of public amusement and on public carriers.[432] Delaware, however, deferred sanctioning compulsory racial separation in public schools until after this Court handed down the *Plessy* decision.[433]

Maryland.

Maryland was also a loyal former slave-holding state. It rejected the Amendment on March 23, 1867.[434] The

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[429] 13 Del. Laws 256. See Del. Sen. J. 76 (1867); Del. House J. 88 (1867) for speech of Governor Saulsbury recommending rejection on the ground that it was a flagrant invasion of state rights.

[430] Del. Laws 1871-73, pp. 686-87.

[431] Del. Rev. Stats. c. 42 § 12 (1874); Del. Laws 1875, pp. 82-83; Del. Laws 1881, c. 362.

[432] Del. Laws 1875-77, c. 194.

[433] Del. Const. 1897, Art. X, § 2.

[434] Md. Sen. J. 808 (1867); Md. House J. 1141 (1867).

establishment of universal free public education here coincided with the Reconstruction Period. Although Maryland has always maintained a dual school system, it has never enacted a law specifically forbidding racial integration in its public schools. Rather, separate and parallel provisions were made for the education of white and colored children.[435]

Kentucky.

The third of the states which rejected the Amendment was Kentucky, a state with a slaveholding background and generally sympathetic with the South with regard to the status of Negroes although it did not secede. It was the first to refuse ratification: its rejection was enrolled on January 10, 1867.[436] While Negroes were denied or severely limited in the enjoyment of many citizenship rights at that time, including exclusion from juries,[437] the legislature was silent on the specific question of compulsory segregated schools.[438] Like its Maryland brothers, it passed two discrete series of laws, one for the benefit of white children and the other for colored children. But no definite compulsory education statute was enacted until 1904[439] although the constitution had been previously amended so as to support such legislation.[440]

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[435] Md. Laws 1865, c. 160, tit. i-iv; Md. Rev. Code §§ 47, 60, 119 (1861-67 Supp.); Md. Laws 1868, c. 407; Md. Laws 1870, c. 311; Md. Laws 1872, c. 377; Md. Rev. Code, tit. xvii §§ 95, 98 (1878).

[436] Ky. House J. 60 (1867); Ky. Sen. J. 63 (1867).

[437] Ky. Laws 1865-66, pp. 38-39, 49-50, 68-69.

[438] Ky. Laws 1869, c. 1634; 1 Ky. Laws 1869-70, pp. 113-127; Ky. Laws 1871-72, ch. 112; Ky. Stats., c. 18 (1873); Ky. Gen. Stats., c. 18, pp. 371 *et seq.* (1881).

[439] Ky. Laws 1904, pp. 181-82.

[440] Ky. Const. 1891, § 187.

CALIFORNIA.

California was the only state whose legislature considered the Amendment and yet did not reach an official stand on the matter.[441] Before the Fourteenth Amendment was proclaimed the law of the land, the legislature in 1866, relaxed the pattern of compulsory segregation when the school law was revised to permit Negro children to enter "white" schools, provided a majority of the white parents did not object.[442] This provision survived changes made in the school laws in 1870 and 1872; and, in 1874, a bill to eliminate segregated schools led to the adoption of a law which required the admission of colored children "into schools for white children" if separate schools were not provided.[443] Later in this same year the state supreme court upheld segregated schools despite the petitioner's claim that this practice violated the Amendment. *Ward* v. *Flood,* 48 Cal. 36 (1874). The legislature then revised the school laws and eliminated the provisions which had been held to require separate schools for Negro children.[444]

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[441] The Committee on Federal Relations in the Assembly and Senate, respectively, recommended rejection and ratification of the Amendment and no further action was taken. Cal. Ass. J., 17th Sess., p. 611 (1867-68); Cal. Sen. J., 17th Sess., p. 676 (1867-68), p. 676. See FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 207 (1908).

[442] Cal. Stats. 1866, p. 363. Purusant to this statute a number of "white" schools admitted colored children without untoward incident. CLOUD, EDUCATION IN CALIFORNIA 44 (1952).

[443] Cal. Stats. 1873-74, p. 97.

[444] Cal. Stats. 1880, p. 48. See Wysinger v. Crookshank, 82 Cal. 588 (1890). The laws segregating Chinese children remained on the books probably because it was the general impression that only discriminatory laws aimed at Negroes were forbidden by the Fourteenth Amendment. Debates of the California Constitutional Convention of 1873, pp. 631, 642, 649 (1880).

The evidence from the non-ratifying states also indicates that their legislatures understood or contemplated that the Fourteenth Amendment forbade legislation which enforced the separation of white and colored children in public schools.

CONCLUSIONS OF PART II

There is, therefore, considerable evidence and, we submit, conclusive evidence that the Congress which submitted and the state legislatures and conventions which considered the Fourteenth Amendment contemplated and understood that it would proscribe all racial distinctions in law including segregation in public schools. A part of this evidence consists of the political, social and legal theories which formed the background of the men who framed the Fourteenth Amendment and the Radical Republican majority in Congress at that time.

Congressional debates following the Civil War must be read and understood in the light of the equalitarian principles of absolute and complete equality for all Americans as exemplified throughout the Abolitionist movement prior to the Civil War.

Many of the members of Congress, in debating the bill which became the Civil Rights Act of 1875, made it clear in no uncertain terms that it was generally understood in the 39th Congress that the Fourteenth Amendment was intended to prohibit all racial distinctions, including segregation in public school systems.

Running throughout the 39th Congress was a determination of the Radical Republican majority to transform these equalitarian principles into federal statutory and constitutional law. They realized that these high principles could not be achieved without effective federal legislation. The infamous Black Codes were demonstrative proof that the southern states were determined to prevent the newly freed Negroes from escaping from an inferior

status even after the Thirteenth Amendment. The Radical Republican majority realized that in the status of American law at that time, the only way to achieve fulfillment of their determination to remove caste and racial distinctions from our law would be for them to effect a revolutionary change in the federal-state relationship.

After many drafting experiments, the Committee of Fifteen introduced in Congress the proposed amendment to the Constitution which was to become the Fourteenth Amendment. The broad and comprehensive scope of the bill was clearly set forth by Senator Howard, Chairman of the Judiciary Committee. An appraisal of the Congressional debates during the period the Fourteenth Amendment was being considered show conclusively that in so far as section 1 was concerned, there could be no doubt that it was intended to not only destroy the validity of the existing Black Codes, but also to deprive the states of power to enact any future legislation which would be based upon *class* or *caste* distinctions. It is likewise clear that the Fourteenth Amendment was intended to be even more comprehensive than the scope of the original bill which, subsequently weakened by amendment, became the Civil Rights Act of 1866.

Throughout the debates in the 39th Congress and subsequent Congresses, the framers of the Amendment, the Radical Republican majority in Congress, over and over again, made it clear that: (1) future Congresses might in the exercise of their power under section 5 take whatever action they might deem necessary to enforce the Amendment; (2) that one of the purposes of the Amendment was to take away from future Congresses the power to diminish the rights intended to be protected by the Amendment; and (3) they at all times made it clear that the Amendment was meant to be self-executing and that the judiciary would have the authority to enforce the provisions of the Amendment without further implementation by Congress. All of

the decisions of this Court, without exception, have recognized this principle.

Other Congressional debates, including those on the readmission of certain states, the amnesty bills and other legislation give further evidence of the intent of Congress in regard to the broad scope of the Fourteenth Amendment. The debates in Congress on legislation which was later to become the Civil Rights Act of 1875 made it clear that efforts of states to set up segregated school systems violated the Fourteenth Amendment. These debates were more specific on the question of segregation in public education because some states were already beginning to violate the Fourteenth Amendment by setting up segregated systems.

A study of the statements and actions of those responsible for state ratification of the Amendment remove any doubt as to their understanding that the Fourteenth Amendment was intended to prohibit state imposed racial segregation in public schools.

After addressing ourselves to questions 1 and 2 propounded by this Court, we find that the evidence not only supports but also compels the conclusions reached in Part One hereof. Wherefore, we respectfully submit, this Court should decide that the constitutional provisions and statutes involved in these cases are in violation of the Fourteenth Amendment and therefore unconstitutional.

PART THREE

This portion is directed to questions four and five of the Court's Order:

> *4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment,*
>
> *(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or*
>
> *(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?*
>
> *5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),*
>
> *(a) should this Court formulate detailed decrees in these cases;*
>
> *(b) if so what specific issues should the decrees reach;*
>
> *(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;*
>
> *(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?*

I.

This Court should declare invalid the constitutional and statutory provisions here involved requiring segregation in public schools. After careful consideration of all of the factors involved in transition from segregated school systems to unsegregated school systems, appellants know of no reasons or considerations which would warrant postponement of the enforcement of appellants' rights by this Court in the exercise of its equity powers.

The questions raised involve consideration of the propriety of postponing relief in these cases, should the Court declare segregation in public schools impermissible under the Constitution. The basic difficulty presented is in the correlation between a grant of effective relief and temporary postponement. After carefully addressing ourselves to the problem, we find that difficulty insurmountable.

A. The Fourteenth Amendment requires that a decree be entered directing that appellants be admitted forthwith to public schools without distinction as to race or color.

"It is fundamental that these cases concern rights which are personal and present". *Sweatt* v. *Painter,* 339 U. S. 629, 635; see also *Sipuel* v. *Board of Regents,* 332 U. S. 631, 633. These rights are personal because each appellant [445] is asserting his individual constitutional right to grow up in our democratic society without the impress of state-imposed racial segregation in the public schools. They are present because they will be irretrievably lost if their enjoyment is put off. The rights of the adult students in the *Sipuel, Sweatt,* and *McLaurin* cases required, this Court held, vindication forthwith. *A fortiori,* this is true of the rights of

[445] As used herein "appellant" includes the respondents in No. 10.

children to a public education that they must obtain, if at all while they are children. It follows that appellants are entitled to be admitted forthwith to public schools without distinction as to race and color.

B. There is no equitable justification for postponement of appellants' enjoyment of their rights.

Even if the Court should decide that enforcement of individual and personal constitutional rights may be postponed, consideration of the relevant factors discloses no equitable basis for delaying enforcement of appellants' rights.

Appellants have no desire to set precise bounds to the reserve discretion of equity. They concede that, as a court of chancery, this Court has power in a proper case to mold its relief to individual circumstances in ways and to an extent which it is now unnecessary to define with entire precision. But the rights established by these appellants are far outside the classes as to which, whether for denial or delay, a "balance of convenience" has been or ought to be struck.

These infant appellants are asserting the most important secular claims that can be put forward by children, the claim to their full measure of the chance to learn and grow, and the inseparably connected but even more important claim to be treated as entire citizens of the society into which they have been born. We have discovered no case in which such rights, once established, have been postponed by a cautious calculation of conveniences. The nuisance cases, the sewage cases, the cases of the overhanging cornices, need not be distinguished. They distinguish themselves.

The Fourteenth Amendment can hardly have been intended for enforcement at a pace geared down to the mores of the very states whose action it was designed to limit. The balance between the customs of the states and the personal rights of these appellants has been struck by that

Amendment. "[A] court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable jurisdiction." *Youngstown Co.* v. *Sawyer,* 343 U. S. 579, 610 (concurring opinion).

Affirming the decree of one of the few judges still carrying the traditional title and power of Chancellor, the highest Court of Delaware epitomized equity in one of the cases now before this bar when it declared in *Gebhart* v. *Belton,* 91 A. 2d 137, 149 that

> "To require the plaintiffs to wait another year under present conditions would be in effect partially to deny them that to which we have held they are entitled."

Appellants, in the main, are obliged to speculate as to factors which might be urged to justify postponement of the enforcement of their rights. Hitherto, appellees have offered no justification for any such postponement. Instead they have sought to maintain a position which is, essentially, that a state may continue governmentally enforced racism so long as the state government wills it.

In deciding whether sufficient reason exists for postponing the enjoyment of appellants' rights, this Court is not resolving an issue which depends upon a mere preponderance of the evidence. It needs no citation of authority to establish that the defendant in equity who asks the chancellor to go slow in upholding the vital rights of children accruing to them under the Constitution, must make out an affirmative case of crushing conviction to sustain his plea for delay.

The problem of effective gradual adjustment cannot fairly arise in three of the five cases consolidated for argument. In the Kansas case, there was a frank concession on oral argument that elimination of segregation would not have serious consequences. In Delaware, court-compelled desegregation in this very case has already been accomplished. The case from the District of Columbia is here

on a dismissal of the complaint on motion. In the oral argument the counsel for respondents implied that he foresaw no difficulties in enforcing a decree which would abolish segregation. Surely it would be curious as well as a gratuitous assumption that such a change cannot be expeditiously handled in this nation's capital. Cf. *District of Columbia* v. *John R. Thompson Co.,* 346 U. S. 100.

We can, however, put out of the case what is not in dispute. We concede that there may well be delays of a purely administrative nature involved in bringing about desegregation. Any injunction requires time for compliance and we do not ask the impossible. We strongly urge, however, that no reason has been suggested and none has been discovered by us that would warrant denying appellants their full rights beyond the beginning of the next school year.

But we do not understand that the "effective gradual adjustment" mentioned in this Court's fourth and fifth questions referred to such conceded necessities. We proceed then, to consider possible grounds that might be put forth as reasons for added delay, or for the postponement of relief to appellants.

It has been suggested that desegregation may bring about unemployment for Negro teachers. (Appellees' Brief in *Davis* v. *County School Board,* p. 31; *Transcript of Argument* in the same case, p. 71) If this is more than a remote possibility, it undoubtedly can be offset by good faith efforts on the part of the responsible school boards.[446] On the other hand, if appellees' suggestion is based upon an unexpressed intention of discriminating against Negro teachers by wholesale firings, it is not even worthy of notice in a court of equity.

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[446] In view of the nationwide shortage of teachers, it is doubtful that any unemployment would be more than transitory. See *e.g.,* New York Times, August 19, 1953, 31:8 (S. M. Bouthardt puts elementary teachers shortage at 116,000; August 24, 1953, 21:1 (Comm. Thurston and NEA on shortage); 22 J. Neg. Ed. 95 (1953).

It has been bruited about that certain of the states involved in this litigation will cease to support and perhaps even abolish their public school systems, if segregation is outlawed. (*Davis* v. *County School Board, Transcript of Argument,* pp. 69-70; *Gebhart* v. *Belton, Transcript of Argument,* p. 17; *Briggs* v. *Eliott, Record on Appeal,* p. 113.) We submit that such action is not permissible. *Cf. Rice* v. *Elmore,* 165 F. 2d 387 (CA 4th 1947), *cert. denied,* 333 U. S. 875. Any such reckless threats cannot be relevant to a consideration of effective "gradual adjustment"; they are based upon opposition to desegregation in any way, at any time.

Finally, there are hints and forebodings of trouble to come, ranging from hostility and deteriorated relations to actual violence. (Appellees' brief in *Briggs* v. *Eliott,* p. 267; Appellees' brief in *Davis* v. *County School Board,* p. 17) Obviously this Court will not be deterred by threats of unlawful action. *Buchanan* v. *Warley,* 245 U. S. 60, 81.

Moreover, there are powerful reasons to confirm the belief that immediate desegregation will not have the untoward consequences anticipated. The states in question are inhabited in the main by law-abiding people who up to now have relied upon what they believe—erroneously, as we have demonstrated—to be the law. It cannot be presumed that they will not obey the law as expounded by this Court. Such evidence as there is lends no support to defendants' forebodings. Note, *Grade School Segregation: The Latest Attack on Racial Discrimination,* 61 Yale L. J. 730, 739, 743 (1952).

A higher public interest than any yet urged by appellees is the need for the enforcement of constitutional rights fought for and won about a century ago. Public interest requires that racial distinctions proscribed by our Constitution be given the fullest protection. Survival of our country in the present international situation is inevitably tied to resolution of this domestic issue.

The greatest strength of our democracy grows out of its people working together as equals. Our public schools are "[d]esigned to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people...." Mr. Justice Frankfurter, concurring in *Illinois ex rel. McCollum* v. *Board of Education,* 333 U. S. 206, 216-217.

C. Appellants are unable, in good faith, to suggest terms for a decree which will secure effective gradual adjustment because no such decree will protect appellants' rights.

Question 5 assumes that the Court, having decided that segregation in public schools violates the Fourteenth Amendment, will, nevertheless, in the exercise of its equity powers, permit an effective gradual adjustment from segregated schools to systems not operated on the basis of color distinctions. This necessarily assumes further that reasons might be produced to justify consideration of postponement of the enforcement of the present and personal rights here involved. As we have pointed out immediately hereinbefore we are unable to identify any such reason.

Appellants obviously are aware of the existence of segregated school systems throughout the South similar to those presently before this Court. Similarly, appellants realize that the thrust of decisions in these cases may appear to present complex problems of adjustment because segregated schools have existed for nearly a century in many areas of this country. Generalizations, however, as to the scope and character of the complexities which might arise from immediate enforcement of appellants' rights would be unwarranted. This is demonstrated in part by the fact that even in the five cases joined for hearing, there appears to be no uniformity in the extent of the task of adjustment from segregated to non-segregated schools.

Necessarily, consideration of the specific issues which decrees should reach on the basis of the assumptions of Question 5 likewise requires the assumption that reasons will be adduced to warrant consideration of postponement of enforcement of appellants' rights.[447]

Though no cogent reasons were offered to support them, two suggestions of methods of postponement of relief to appellants were made to this Court in the original brief for the United States. The first of these was "integration on a grade basis," i.e., to integrate the first grades immediately, and to continue such integration until completed as to all grades in the elementary schools (Brief, pp. 30-31). The second was integration "on a school-by school" basis (Brief, p. 31).

The first suggestion is intolerable. It would mean the flat denial of the right of every appellant in these cases. The second plan is likewise impossible to defend because it would mean the deliberate denial of the rights of many of the plaintiffs. If desegregation is possible in some schools in a district, why not in all? Must some appellants' rights be denied altogether so that others may be more conveniently protected?

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[447] It follows that there is no need for this Court to appoint a Master. Since repeal in 1948 of the 1805 statute, 28 U. S. C., § 863 (1946), forbidding the introduction of new evidence at an appellate level, there would appear to be no reason why such master could not be appointed. Certainly respected authorities have recommended the practice of appellate courts' taking evidence. See 1 WIGMORE, EVIDENCE 41 (3d ed., 1940); POUND, APPELLATE PROCEDURE IN CIVIL CASES pp. 303, 387 (1941); Note, 56 HARV. L. REV. 1313 (1943), and in other times and jurisdictions it has been respected practice. See SMITH, APPEALS OF THE PRIVY COUNCIL FROM AMERICAN PLANTATIONS 310 (1950); Rules of the Supreme Court of Judicature, Order 58, Rules 1, 2; cf. New Mexico, Stat. 1949, c. 168, § 19. However, taking of evidence by a Master is undoubtedly a departure from normal practice on appeal and it may result in loss of time to the prejudice of plaintiffs' rights.

Whether any given plan for gradual adjustment would be effective would depend on the showing of reasons valid in equity for postponement of enforcement of appellants' rights. In accordance with instructions of this Court we have addressed ourselves to all of the plans for gradual adjustment which we have been able to find. None would be effective. We recognize that the appellees, as school officials and state officers, might offer reasons for seeking postponement of the effect of decrees in these cases. Therefore, we submit, affirmative answers to questions 4(b) and 5 can come only from appellees since they alone can adduce reasons for postponement of enforcement of appellants' rights.

In the absence of any such reasons the only specific issue which appellants can recommend to the Court that the decrees should reach is the substantive one presented here, namely, that appellees should be required in the future to discharge their obligations as state officers without drawing distinctions based on race and color. Once this is done not only the local communities involved in these several cases, but communities throughout the South, would be left free to work out individual plans for conforming to the then established precedent free from the statutory requirement of rigid racial segregation.

In the very nature of the judicial process once a right is judicially declared proposals for postponement of the remedy must originate with the party desiring that postponement.

We submit that it would be customary procedure for the appellees to first produce whatever reasons they might urge to justify postponement of relief. Appellants then would be in a position to advise the Court of their views with respect to the matter.

Conclusion

Under the applicable decisions of this Court the state constitutional and statutory provisions herein involved are clearly unconstitutional. Moreover, the historical evidence surrounding the adoption, submission and ratification of the Fourteenth Amendment compels the conclusion that it was the intent, understanding and contemplation that the Amendment proscribed all state imposed racial restrictions. The Negro children in these cases are arbitrarily excluded from state public schools set apart for the dominant white groups. Such a pratice can only be continued on a theory that Negroes, *qua* Negroes, are inferior to all other Americans. The constitutional and statutory provisions herein challenged cannot be upheld without a clear determination that Negroes are inferior and, therefore, must be segregated from other human beings. Certainly, such a ruling would destroy the intent and purpose of the Fourteenth Amendment and the very equalitarian basis of our Government.

WHEREFORE, it is respectfully submitted that the judgments in cases No. 1, 2 and 4 should be reversed and the judgment in No. 10 should be affirmed on the grounds that the constitutional and statutory provisions involved in each of the cases violate the Fourteenth Amendment.

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SUPPLEMENT

An Analysis of the Political, Social, and Legal Theories Underlying the Fourteenth Amendment

The first Section of the Fourteenth Amendment did not spring full blown from the brow of any individual proponent. Primitive natural rights theories and earlier constitutional forms were the origins of its equal protection-due process-privileges and immunities trilogy. The occasion for the metamorphosis of moral premises to full-fledged constitutional status was the attack on the American system of slavery. During the long antislavery crusade, the trilogy became a form of shorthand for, and the spearhead of, the whole of the argument against distinctions and caste based on race.

Section One of the Fourteenth Amendment thus marks the "constitutionalization" of an ethico-moral argument. The really decisive shifts occurred before the Civil War, and the synthesis was made, not by lawyers or judges, but by laymen. Doctrines originally worked out and propagated by a dissident minority became, by 1866, the dominant constitutional theory of the country.

In both language and form, Section One was the distillation of basic constitutional and legal theories long understood and voiced by leaders in a Congress upon which history had cast both the opportunity and the obligation to amend the Constitution to regulate relationships profoundly altered by the abolition of slavery.[1] None can doubt that the thrust of the Amendment was equalitarian and that it was adopted to wipe out the racial inequalities that were the legacies of that system. But beyond this, the majestic generalities of the Section can be seen to have

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[1] Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment,* 1950 WIS. L. REV. 479-507, 610-661, hereinafter cited *Early Antislavery Backgrounds.*

evolved naturally and logically in the minds of the anti-slavery generation.[2]

At the outset we point out that we do not set forth the arguments of pamphleteers, or even of lawyers or congressmen, to justify the validity of their constitutional theories. We do not say that these theories were universally held, or deny that they were vigorously challenged. Nor do we urge that the pre-Civil War Constitution contained the sweeping guarantees that the Abolitionists claimed for Negroes. These are beside our present point. What we do undertake in this section is illumination of the constitutional language—the moral and ethical opinions that were the matrix of the Amendment, the development under terriffic counter-pressures of the principal texts and forms, the meaning of "equal protection" and "due process" as understood and contemplated by those who wrote those phrases into the Amendment.

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[2] Basic monographs and articles on the Fourteenth Amendment and its major clauses are: 2 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES cc. 31-32 (1953); FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908); THE JOURNALS OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION (Kendrick ed. 1914); tenBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951) hereinafter cited ANTISLAVERY ORIGINS; WARSOFF, EQUALITY AND THE LAW (1938); Boudin, *Truth and Fiction About the Fourteenth Amendment,* 16 N. Y. U. L. Q. REV. 19 (1938); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding,* 2 STAN. L. REV. 5 (1949); Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COL. L. REV. 131 (1950); Graham, *The "Conspiracy Theory" of the Fourteenth Amendment,* 47 YALE L. J. 371, 48 YALE L. J. 171 (1938); McLaughlin, *The Court, The Corporation, and Conkling,* 46 AM. HIST. REV. 45 (1940).

1. The Declaration of The "Self-Evident Truths"

The roots of our American equalitarian ideal extend deep into the history of the western world. Philosophers of the seventeenth and eighteenth centuries produced an intellectual climate in which the equality of man was a central concept. Their beliefs rested upon the basic proposition that all men were endowed with certain natural rights, some of which were surrendered under the so-called "social contract." The state, in return, guaranteed individual rights, and owed protection equally to all men. Thus, governments existed, not to give, but to protect rights; and allegiance and protection were reciprocal. For his allegiance, the citizen was guaranteed his rights and the equal protection of the law.[3]

This doctrine was the core of the first great statement of American principles. To Jefferson and the other draftsmen of the Declaration of Independence, it was "self-evident" that "all men are created equal," and "are endowed by their Creator with certain unalienable Rights," among which are "Life, Liberty and the pursuit of Happiness," and that "to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."[4]

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[3] LOCKE, SECOND TREATISE ON GOVERNMENT c. 2 (1698). See also BECKER, THE DECLARATION OF INDEPENDENCE (1926); SMITH, AMERICAN PHILOSOPHY OF EQUALITY (1927); WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW (1931); Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 365 (1928); Graham, *Early Antislavery Backgrounds, supra* note 1, at 610-611; Hamilton, *Property According to Locke*, 41 YALE L. J. 864 (1932).

[4] It is interesting to note in this context that Jefferson's original draft of the Declaration, accepted by Franklin and Adams, the other members of the sub-committee responsible for the drafting, contained severe strictures on the King because of the slave trade. See BECKER, *op. cit. supra* note 3, at 212-213.

Abhorrence of arbitrariness—the central element of due process—and the ideal of a general and equal law—the core of equal protection—both were implicit in the Lockean-Jeffersonian premises. Slavery—with its theories of racial damnation, racial inferiority, and racial discrimination—was inherently repugnant to the American creed and the Christian ethic. This fact was being rapidly and increasingly sensed. As men sensed it, they had to fit it into the only political theory they knew: Governments existed, not to give, but to *protect* human rights; allegiance and protection were reciprocal—i.e., *ought to be reciprocal;* rights and duties were correlative—i.e., *had to be correlative* if Americans ever were to live with their consciences and to justify their declared political faith.

Long before the Revolution, Quakers and Puritans attacked slavery as a violation of the social compact and Christian ethic.[5] After 1776, Jefferson's "self-evident truths" put a cutting edge on all such pleas—made them the broadswords in every attack. Idealists demanded that America live up to her Declaration. "All men" must mean all men. "Unalienable Rights . . . of Life, Liberty and the pursuit of Happiness" must be given its full human, not merely a restricted racial, application. Race and color were arbitrary, insubstantial bases for accord or denial of natural, human rights. Sensitive leaders soon found themselves confronted with what Gunnar Myrdal

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[5] German Quakers of Pennsylvania had argued as early as 1688, "Though they are black, we cannot conceive there is more liberty to have them slaves [than] . . . to have other white ones. . . . We should do to all men like as we will be done ourselves, making no difference of what descent or colour they are. . . . Here is liberty of conscience, which is right and reasonable; here ought to be likewise liberty of body. . . ." MOORE, NOTES ON THE HISTORY OF SLAVERY IN MASSACHUSETTS 75 (1866). In 1700, in his antislavery tract, THE SELLING OF JOSEPH, the great Puritan elder, Judge Samuel Sewall, declared, "All men, as they are . . . Sons of Adam, are co-heirs, and have equal Right unto Liberty." *Id.* at 83-87. See also Graham, *Early Antislavery Backgrounds, supra* note 1, at 614-615.

treated recently as *An American Dilemma.*[6] Having pledged their "Lives . . . Fortunes, and sacred Honor" to the causes of liberty and freedom, either Americans endeavored to live up to their creed or stultified themselves before the world.

After the Revolution, the "self-evident truths" and the provisions of the state Bills of Rights were employed as weapons against slavery and against racial distinctions.[7] Down through the Civil War, moreover, the "self-evident truths" constituted precisely what Jefferson declared them to be—political axioms—except in the South after the invention of the cotton gin.[8] They were on every tongue as rhetorical shorthand, and were popularly regarded as the marrow of the Constitution itself. In justifying one

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[6] 2 vols. (1944).

[7] In 1783, Chief Justice Cushing, pointing to the "All men are born free and equal" clause of the Massachusetts Bill of Rights, declared that ". . . slavery is inconsistent with our conduct and Constitution, and there can be no such thing as perpetual servitude of a rational creature." MOORE, *op. cit. supra* note 5, at 209-221. Four years later, Congress passed the Northwest Ordinance outlawing slavery in the territories. 2 THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 957-962 (1909). Vermont effected abolition by constitutional clause; other northern states by prospective legislative action. Graham, *Early Antislavery Backgrounds, supra* note 1, at 617.

[8] While early southern leaders in Virginia accepted Jeffersonian concepts of natural rights, contract, and equality, later leaders and theorists defended the slave society on the basis of Greek concepts. Man had no rights save those created by the state. Men were inherently unequal, and the end of the state was not equality but justice. Each man would have status in accordance with his ability. Such theorists posited the inherent inferiority of the Negro. Their theory was broad enough to justify slavery for any man, irrespective of race or color. See THE PRO-SLAVERY ARGUMENT, AS MAINTAINED BY THE MOST DISTINGUISHED WRITERS OF THE SOUTHERN STATES (1853). See also 1 THE WORKS OF JOHN C. CALHOUN 393-394, 6 *id.* at 182-183 (Crallé ed. 1854-1855); SPAIN, THE POLITICAL THEORY OF JOHN C. CALHOUN c. 8 (1951).

revolution, Jefferson no less than Locke had laid the groundwork for another. The dominating premise that governments were instituted for protection and that they derived their just powers from the consent of the governed had begun to make slavery, and with it race distinctions, untenable. What slowly took shape was an ethical interpretation of American origins and destiny.

2. The Moral Suasion Campaign and Its Rejection

The Age of Enlightenment of the seventeenth and eighteenth centuries gave birth to a world-wide antislavery movement. A wave of humanitarianism, embracing quests for abolition of slavery, suffrage for women, and penal, land, and other reforms, swept across the United States of the early nineteenth century. Because of its dramatic qualities, the American antislavery movement assumed even larger proportions and eventually overshadowed the other phases.[9] Like them, it was based fundamentally on Judeo-Christian ethic and was formulated in terms of equalitarianism and natural rights.

The early antislavery movement was a campaign of moral suasion. Rational men appealed to other rational men to square precept with practice. Proponents of equality, who were by that definition opponents of slavery, sought to persuade slaveholders of the error of enslaving other men, i.e., of denying equality to those held as slaves. That campaign bore early fruit in Virginia, in the uplands of the Carolinas, and even in the deeper South. The appeal to the South ultimately broke on the hard rock of economic self-interest after invention of the cotton gin. Geography and migrations tended further to sectionalize the institution. Quakers and Scotch-Irish yeomen from Virginia and the Carolinas, unable to arrest spread of a labor system they detested, and others from the deeper South, fled *en masse,* settling generally in Ohio and Indiana. There

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[9] NYE, FETTERED FREEDOM 2, 10-11, 217-218, and *passim* (1949).

they were joined by staunch Puritan and Calvinist stocks from New York and New England. Thus, the antislavery movement became sectionalized with important centers in Ohio, western New York, and Pennsylvania.

Spearheading the movement was the American Anti-Slavery Society, founded in 1833 and headed by the wealthy Tappan brothers. Recruited and led by Theodore Weld,[10] a brilliant orator and organizer, and by his co-leader, James G. Birney,[11] a converted Alabama slaveholder and lawyer, whole communities were abolitionized in the years 1835-1837. Appeals were aimed at influential leaders; lawyers in particular were sought out and recruited by the score.

This appeal was an ethico-moral-religious-natural rights argument. It was addressed by the revivalists to their countrymen as patriots, Christians, and "free moral agents." "The law of nature *clearly teaches the natural* republican equality of all mankind. *Nature* revolts at human slavery. . . . The Law of God renders all Natural Rights inalienable. . . . Governments and laws are estab-

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[10] See THOMAS, THEODORE WELD (1950); LETTERS OF THEODORE DWIGHT WELD, ANGELINA GRIMKE WELD AND SARAH GRIMKE, 1822-1844, 2 vols. (Barnes and Dumond ed. 1934) cited hereinafter as WELD-GRIMKE LETTERS. See also BARNES, THE ANTI-SLAVERY IMPULSE, 1830-1844 (1933). Weld was a tireless speaker and pamphleteer who turned out documents that became guide posts in the antislavery movement: SLAVERY AS IT IS (1839); THE POWER OF CONGRESS OVER THE DISTRICT OF COLUMBIA (1838); THE BIBLE AGAINST SLAVERY (1837). Such persons as William Jay, John Quincy Adams and Senator Robert C. Winthrop relied on Weld for legal research. See 2 WELD-GRIMKE LETTERS 748, 956-958. The evangelical character of the antislavery movement helps account for the flood of arguments that poured from it. It was even organized on an analogy drawn from early Christian evangelists with its Seventy and its Council of Twelve.

[11] See BIRNEY, JAMES G. BIRNEY AND HIS TIMES (1890); LETTERS OF JAMES G. BIRNEY, 1831-1857, 2 vols. (Dumond ed. 1938), referred to hereinafter as BIRNEY LETTERS.

lished, not to give, but to protect . . . rights.'' [12] Negroes, they continued, were ''not naturally inferior.'' They simply had been degraded by slavery. They were persons, endowed by God with all the attributes of personality. Their enslavement could no more be justified than could chattelization of men with red hair. Slavery rested on a capricious, discredited classification.[13] It simply was institutionalized false imprisonment. White men were protected against enslavement and against false imprisonment. ''What abolitionists demand as naked justice is that the benefit and protection of these just laws be extended to all human being alike . . . without regard to color or any other physical peculiarities.'' [14]

Racial discrimination, in short, was repugnant both as a breach of equality and as a breach of protection. Because it was a breach of protection, it also was a breach of equality; and because it was a breach of equality, it was thereby an even greater breach of protection. This was the outcome of Americans' triple-barreled major premise which posited the purpose of *all* government to be the protection of inalienable rights bestowed upon *all* men by their Creator. Once that compound premise was granted—and in the generations since 1776 virtually all Americans

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[12] OLCOTT, TWO LECTURES ON THE SUBJECT OF SLAVERY AND ABOLITION 24-29 (1838).

[13] The idea that race and color were arbitrary, capricious standards on which to base denial of human rights was implicit in all anti-slavery attacks on discrimination and prejudice. Yet it was when the constitutional-legal attack began to reinforce the religious one that such arguments became explicit, and the concept of an arbitrary classification developed. Lawyers like Ellsworth, Goddard, Birney (Philanthropist, Dec. 9, 1836, p. 3, cols. 4-5), Gerrit Smith (see AMERICAN ANTI-SLAVERY SOCIETY, 3 ANNUAL REPORTS 16-17 (1836)) and Salmon P. Chase (SPEECH . . . IN THE CASE OF THE COLORED WOMAN, MATILDA . . . 32 (1837)) helped to formulate the concept and linked it with the principles of equality, affirmative protection, and national citizenship.

[14] OLCOTT, *op. cit. supra* note 12, at 44.

outside the South had *spoken* as if they granted it—the abolitionists' conclusions were unassailable. The heart of it was that these basic ideals of liberty, equality, and protection were deemed to be paramount by reason of their place in the Declaration and determinative by reason of the place of the Declaration in American life and history.

The issue had to be resolved within the framework of the constitutional system. Appeals to ethico-moral concepts and to natural rights were good enough to argue as to what ought to be. Reality was something else again. Constitutional reality was that the status of inhabitants of the United States, white or Negro, was fixed by the Constitution. Social reality was that the great mass of Negroes were slaves.

Inevitably, then, the first skirmishes as to the rights claimed for Negroes had to be fought out in the case of free Negroes.[15] The targets here were northern black laws—the laws in Ohio and Connecticut; the techniques were persuasion, conversion, and demonstration. It was in the course of this campaign that what presently became the constitutional trinity of the antislavery movement received its decisive synthesis.

The first comprehensive crystallization of antislavery constitutional theory occurred in 1834 in the arguments of W. W. Ellsworth and Calvin Goddard, two of the outstanding lawyers and statesmen of Connecticut, on the appeal[16] of the conviction of Prudence Crandall for viola-

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[15] For characteristic references to plans for bettering the lot of the free Negro, see 1 WELD-GRIMKE LETTERS, *op. cit. supra* note 10, at 132-135, 262; AMERICAN ANTI-SLAVERY SOCIETY, 4 ANNUAL REPORTS 32-35, 105-111 (1837), 5 ANNUAL REPORTS 127 (1838). For evidence of how large the condition of the free Negroes, and plans for their betterment, figured in the early A. A. S. S. strategy, see *The Condition of Free People of Color in the United States,* The Anti-slavery Examiner #13a (1839), apparently written by Judge William Jay, reprinted in his MISCELLANEOUS WORKS 371-395 (1853).

[16] Crandall v. State, 10 Conn. 339 (1834).

tion of an ordinance forbidding the education of non-resident colored persons without the consent of the civil authorities.[17] They reveal this theory as based on broad natural rights premises and on an ethical interpretation of American origins and history. Four ideals were central and interrelated: the ideal of human equality, the ideal of a general and equal law, the ideal of reciprocal protection and allegiance, and the ideal of reason and substantially as the true bases for the necessary discriminations and classifications by government. Race as a standard breached every one of these ideals, as did color. What was attacked was denial of human equality and denial of protection of the laws—denials inherent in any racial discrimination backed by public authority. Slavery was the arch evil in this respect, and the primary one, both because of the magnitude of its denials and deprivations and abridgments, and because these necessarily established a whole pattern of discrimination based upon race and color alone. It was this pattern of public discrimination that was combatted no less than slavery. It had to be combatted because it was deemed a part of slavery.

Although neither slavery nor segregated schools was the issue in the case, the Ellsworth-Goddard argument is one of the classic statements of the social and ethical case for equality of opportunity irrespective of race. It gave immense impetus to the emerging concept of American nationality and citizenship. Fully reported and widely cir-

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[17] REPORT OF THE ARGUMENTS OF COUNSEL IN THE CASE OF PRUDENCE CRANDALL, PLFF. IN ERROR, VS. STATE OF CONNECTICUT, BEFORE THE SUPREME COURT OF ERRORS, AT THEIR SESSION AT BROOKLYN, JULY TERM, 1834. The arguments are printed in condensed form in the official report, Crandall v. State, *supra* note 16, at 349-353 (1834). See also JAY, MISCELLANEOUS WRITINGS ON SLAVERY 34-51 (1853); STIENER, HISTORY OF SLAVERY IN CONN. 45-52 (1893); VON HOLST, CONSTITUTIONAL HISTORY 1828-1846 98, 99 (1881); McCarron, *Trial of Prudence Crandall,* 12 CONN. MAG. 225-232 (1908); NYE, *op. cit. supra* note 9, at 83.

culated as a tract, it soon became one of the fountainheads of antislavery constitutional theory. It figured prominently in Abolitionist writings throughout the 'thirties. In the spring of 1835, Judge William Jay, Abolitionist son of the first Chief Justice and one of the founders and vice-presidents of the American Anti-Slavery Society, devoted fifteen pages of his *Inquiry into the Character and Tendency of the Colonization and Anti-Slavery Societies* [18] to a slashing attack on the trial court's decision.

The due process element of our modern trilogy was introduced in the course of a determined attack made in 1835 by the Weld-Birney group upon Ohio's black laws. Enacted in 1807, these laws embodied prohibtions against Negro immigration, employment, education, and testimony. A report [19] prepared at Weld's direction by a committee of the newly formed Ohio Anti-Slavery Society appealed to the American and Christian conscience. Notwithstanding the affirmative duty of all government to "promote the happiness and secure the rights and liberties of man," and despite the fact that American government was predicated on the "broad and universal principle of equal and unalienable rights," these statutes had singled out a "weak and defenseless class of citizens—a class convicted of no crime —no natural inferiority," and had invidiously demanded their exclusion from "the rights and privileges of citizenship." This, it was argued, the Constitution forbade. "Our Constitution does not say, *All men* of a *certain color* are entitled to certain rights, and are born free and independent. . . . The expression is unlimited. . . . *All* men are so born, and have the *unalienable* rights of life and liberty —the pursuit of happiness, and the acquisition and possession of wealth."

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[18] Reprinted in JAY, MISCELLANEOUS WRITINGS ON SLAVERY 36 (1853).

[19] PROCEEDINGS OF THE OHIO ANTI-SLAVERY CONVENTION HELD AT PUTNAM 17-36 (April 22-24, 1835).

These were the doctrinal cornerstones.[20] They were the heart of the ethico-moral-historical-natural rights argument which the American Anti-Slavery Society broadcast in the mid- and late-'thirties. They were broadcast particularly throughout Ohio, western New York and Pennsylvania,

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[20] It is not implied that these arguments were without antecedents. Earlier (1819-21) in the controversy over Missouri's admission, the provision in its Constitution prohibiting immigration of free Negroes prompted antislavery arguments based on the republican form of government and comity clauses. See BURGESS, THE MIDDLE PERIOD, 1817-58 c. 4 (1897); MCLAUGHLIN, CONSTITUTIONAL HISTORY OF THE UNITED STATES c. 29 (1935); WILSON, RISE AND FALL OF THE SLAVE POWER cc. 11-12 (1872), especially at 154.

Later, the Horton episode, and the protracted controversy over southern seamen's laws whereunder northern and British free Negro seamen were confined to quarters or jailed while in southern ports, gave further impetus to theories of *national* or *American* citizenship. The former was a *cause célèbre* of 1826-1827 involving a statute of the District of Columbia which authorized sale for jail fees of *suspected* fugitive slaves. Horton, a free Negro of New York, who had been arrested and threatened with sale, was saved by timely aid of Abolitionist friends who capitalized the incident. See JAY, MISCELLANEOUS WRITINGS ON SLAVERY 48, 238-242 (1853); TUCKERMAN, WILLIAM JAY AND THE CONSTITUTIONAL MOVEMENT FOR ABOLITION OF SLAVERY 31-33 (1893); 3 CONG. DEB. 555 (1826). Regarding the seamen's controversy, see Hamer, *Great Britain, the United States and the Negro Seamen Acts, 1822-1848,* 1 J. OF SO. HIST. 1-28 (1935); H. R. REP. No. 80, 27th Cong., 3rd Sess. (1843).

Later, in 1844, the Hoar incident occurred, in which Judge Samuel Hoar of Massachusetts, proceeding to Charleston to defend imprisoned Negro seamen, was expelled from South Carolina by legislative resolution. See Hamer, *supra,* and the elaborate documentation in STATE DOCUMENTS ON FEDERAL RELATIONS: THE STATES AND THE UNITED STATES 237-238 (Ames ed. 1904).

The Hoar expulsion and the numerous laws, both North and South, excluding free Negroes and mulattoes, were cited repeatedly in the debates of the 'fifties and in 1866. See, for example, CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866) (Remarks of Sen. Trumbull).

Rhode Island, and Massachusetts.[21] Weld was the director and master strategist; Birney, the forensic quartermaster and attorney general. The "Twelve" and the "Seventy" were the chosen instruments. These were the two dedicated hand-picked groups of trained teachers, ministers, divinity students, self-named after the early Christian Apostles. Their revivals converted thousands before funds ran out and southern antagonism crippled the movement. Numerous anti-slavery newspapers and coordinated pamphlet and petition campaigns were reinforcing media.

The trouble, of course, was that northerners were still largely indifferent to or unreached by this program, while the South rejected it almost without a hearing. Coincidence played a great part here. Alarmed lest educated Negroes foment slave insurrections, the South further tightened its controls.[22] Fortuitously, the Vesey and Turner uprisings had seemed to offer frightening confirmation of fears in this regard. Meanwhile, cotton profits and politics had begun to rationalize slavery as "a positive good." The insidious belief spread that the South must insulate herself, safeguard her "peculiar institutions," and remove them even from discussion and criticism.[23] In the Pinckney Report of 1836,[24] pro-slave theorists sought to implement these convictions. To reinforce Calhoun's defensive doctrines of concurrent majority and state interposition, and in a de-

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[21] See especially BARNES, *op. cit. supra* note 10, cc. 2, 3, 4, and WELD-GRIMKE LETTERS and BIRNEY LETTERS, *op. cit. supra* notes 10, 11.

[22] See EATON, FREEDOM OF THOUGHT IN THE OLD SOUTH c. 5 (1940) and statutes there cited; SYDNOR, DEVELOPMENT OF SOUTHERN SECTIONALISM 1819-1848 (1948).

[23] See JENKINS, PROSLAVERY THOUGHT IN THE OLD SOUTH (1935); and the histories of Eaton and Sydnor, *op. cit. supra* note 22; and WILTSIE, JOHN C. CALHOUN, NULLIFIER, 1828-1839 c. 20, esp. 283-286 (1949); *cf.* Corwin, *National Power and State Interposition, 1787-1861,* 10 MICH. L. REV. 535 (1912).

[24] H. R. REP. No. 691, 24th Cong., 1st Sess. (1836).

termined attempt to protect slavery in the Federal District from possible interference or abolition by Congress under its sweeping powers over the District and territories, Pinckney and his colleagues in the House employed the due process clause of the Fifth Amendment and "the principles of natural justice and of the social compact." [25]

3. The Political Action Campaign

A. Systemization

Thus, the antislavery campaign was set back, its piecemeal conversion and demonstration program was frustrated at the outset by barriers that held slavery to be a positive good—untouchable even where Congress had full powers over it. Antislavery men were denied the use of the mails. Their antislavery petitions were throttled by Congressional "gags". They were forced to defend even their own rights to speak and write and proselytize. In consequence, the antislavery leaders had to reorient their whole movement and strategy.[26]

This reorientation, greatly accelerated by the Pinckney Report, was marked by rapid "constitutionalization" of the higher law argument. There was a shift from an overwhelming faith in moral suasion to a reluctant resort to political action, from efforts to convince Americans of the expediency and justice of freeing their slaves, to a search for constitutional power to free them.[27]

These tendencies may be traced today in the pages of the *Weld-Grimke* and *Birney Letters,* in a vast pamphlet literature, in annual reports of the state and national

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[25] *Id.* at 14.

[26] DUMOND, THE ANTISLAVERY ORIGINS OF THE CIVIL WAR (1938); NYE, *op. cit. supra* note 9.

[27] DUMOND, *op. cit. supra* note 26, especially cc. 5-6; T. C. SMITH, THE LIBERTY AND FREE SOIL PARTIES IN THE NORTHWEST (1897); NYE, *op. cit. supra* note 9. *Cf.* CRAVEN, THE COMING OF THE CIVIL WAR (1943); NEVINS, ORDEAL OF THE UNION (1947).

societies,[28] but most satisfactorily in the columns of Birney's *Philanthropist.*[29] Calhoun and "positive good" theorists had fashioned a constitional system that promised absolute protection for slavery and ignored the constitutional reference to slaves as "persons," referring to them whenever possible as "property." These theorists also employed the "compact" and "compromises" of 1787 as a device that removed slavery from the reach not merely of state and federal legislatures but from adverse discussion and criticism.

Birney and his colleagues now formulated a counter-system, one which exalted liberty and exploited the founding fathers' use of "persons." Denying all limiting force to the "compact" or "compromises," this group hailed the spirit of the Declaration, of the Constitution, and American institutions generally. They seized on the leading provisions of the state and federal bills of rights as affirmative guarantees of the freedom of the slaves.[30]

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[28] Read straight through, the six ANNUAL PROC. AND REP. OF AMERICAN ANTISLAVERY SOCIETY (1833-1839) and the five ANNIVERSARY PROC. OF THE OHIO ANTISLAVERY SOCIETY (1836-1840) reveal the shift from confident evangelism to determined self-defense and political action. Not until after the Pinckney Report (*supra* note 24), the "Gags" denying antislavery petitions, and the refusal of the South to countenance discussion of the issue, does one find serious interest in political movements and tactics. The THIRD ANNUAL REPORT OF THE A. A. S. S. (May 10, 1836) signed by Elizur Wright is thus the turning point and a catalog of the factors that had reoriented opinion. By the SIXTH ANNUAL REPORT OF THE A. A. S. S. (1839), the "imperative necessity of political action" caused Wright to devote much of his space to convincing the still hesitant and divided membership.

[29] Birney's career as an editor can be followed in the BIRNEY LETTERS, *op. cit. supra* note 11 (see index entries "Philanthropist"), and in his pamphlet NARRATIVE OF THE LATE RIOTOUS PROCEEDINGS AGAINST THE LIBERTY OF THE PRESS IN CINCINNATI (1836).

[30] Sometimes Abolitionists, in desperation, appealed to a higher law beyond the Constitution, but this was not a consistent argument or one possible within the legal framework.

In his earlier writings,[31] Birney's ethical interpretation of American origins and history was essentially that of the *Crandall* argument and the Ohio Anti-Slavery Society reports. The natural rights creed of the Declaration, the universality of guarantees of the state bills of rights, the Signers' and the Fathers' known aversion to slavery, the "color blindness" of the Articles of Confederation, the outright prohibition of slavery in the territories by the Northwest Ordinance, and above all, the silence, the euphemisms, the circumlocutions of the Constitution—these were the recurrent and expanding points. Not merely slavery, but *all public race discrimination* was ethically and morally wrong. It was so because it was a denial of the rights and protections that governments were established to secure.

After the Pinckney Report, however, and especially after the growing mob action against Abolitionists began to make it clear that state bills of rights were not self-executing but rested on local enforcement, Birney re-examined his position. Everywhere there was this anomaly: the great natural and fundamental rights of conscience, inquiry and communication, secured *on paper* in every constitution, nevertheless were denied and abridged daily for want of sanctions. All men by nature "possessed" these indispensable rights; all constitutions "declared" and "secured" them. It was the bounden duty of all governments "created for the purposes of protection" to safeguard and enforce them. Yet the hard fact was that state and local governments were flagrantly, increasingly derelict. Nothing, southerners argued, could be done about it.

Challenged in this manner, Birney and his aides shifted their ground. They advanced from the old position that

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[31] BIRNEY LETTERS, *op. cit. supra* note 11. For a fuller and documented summary, see Graham, *Early Antislavery Backgrounds, supra* note 1, at 638-650.

the Federal Constitution was neutral—"or at least not pro-slavery"—to the stand that the document was anti-slavery. Constitutionalization of the natural rights agrument proceeded at a much more rapid pace. No longer was the fight waged merely defensively in behalf of the right to proselytize, or counter-defensively to support sweeping Federal powers over the District and territories; more and more the antislavery forces took the offensive against slavery itself.[32]

Thus, by December 1836, the Abolitionists' argument was recrystallizing around three major propositions:

First, the great natural and fundamental rights of life, liberty, and property, long deemed inherent and inalienable, were now held to be secured by *both* state and national constitutions.

Second, notwithstanding this double security, and in disregard of the obligation of governments to extend protection in return for allegiance, these rights were being violated with impunity both on national soil and in the states, (a) by the fact of slavery itself, (b) by mob action directed against those working for abolition, (c) by flagrant discriminations against free Negroes and mulattoes.

Third, race and color—"grades and shades"—whenever and wherever employed as criteria and determinants of fundamental rights, violated both the letter and spirit of American institutions; race *per se* was not only an ignoble standard; it was an irrational and unsubstantial one.

The problems of implementing this theory, Birney worked out in several series of articles during 1837. Rescrutinizing the document, he began to make the same rigorous use of the Federal Bill of Rights that previously

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[32] See Graham, *Early Antislavery Backgrounds, supra* note 1, at 650-653.

he and others had made of Ohio's. Ultimately, he focused on the due process clause employed in Pinckney's Report:[33]

> "The Constitution contains provisions which, if literally carried out, would extinguish the entire system of slavery. It guarantees to every state in the union a republican form of government, Art. IV, Sec. 4th. A majority of the people of South Carolina are slaves; can she be said properly to have a republican form of government? It says, that 'the right of the people to be secure in their *persons,* houses, papers and effects . . . against unreasonable searches and *seizures,* shall not be violated.' Slaves, Sir, are men, constitute a portion of the people: Is that no 'unreasonable seizure,' by which the man is deprived of all his earnings [effects?]—by which in fact he is robbed of his own person? Is the perpetual privation of liberty 'no unreasonable seizure'? Suppose this provision of the Constitution were literally and universally enforced; how long would it be before there would not be a single *slave* to mar the prospect of American liberty? Again, '*no* person shall be held to answer for a capital or otherwise infamous crime unless on the presentment or indictment of a grand jury, except in cases arising in the land or naval forces, [sic] nor shall any person be compelled in any case to witness against himself; nor be deprived of life, liberty or property without due process of law.' Art. V Amendments.
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> "Are slaves ever honored with indictment by a grand jury? Are they never compelled 'to witness against themselves'? never tortured until they lie against their own lives? never deprived of life without 'due process of law'? By what 'due process of law' is it, that two millions of 'persons' are deprived every year of the millions of dollars produced by their labor? By what due process of law is it that

[33] Philanthropist, Jan. 13, 1837, p. 2. Birney continued his "Reply to Judge L" in the Jan. 20 and 27, 1837 numbers, and in the former demonstrated his forensic powers by brilliant caricature of the South's efforts to suppress discussion of slavery.

> 56,000 'persons,' the annual increase of the slave population, are annually deprived of their 'liberty'? Such questions may seem impertinent, to Mr. L., but when he shall feel that the slave is a 'person,' in very deed, and has rights, as inalienable as his own, he will acknowledge their propriety. Again 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of Counsel for his defense.' Art. VI of the Amendments. Take all the above provisions in connection with that clause under Art. VI, which declares that 'This Constitution and the laws of the United States which shall be made in pursuance thereof' etc., 'shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding'—and then carry them out to their full extent, and how long would it be ere slavery would be utterly prostrated? I do not say they were inserted with a specific view toward this end, but I do say, that so long as they shall stand, the Constitution of these U[nited] States will be a perpetual rebuke to the selfishness and injustice of the whole policy of the slaveholder. The provisions embody principles which are at entire enmity with the spirit and practice of slavery. How an instrument, containing such principles, can be tortured to express a *sanction* to slavery, I am yet to learn.'' [34]

Reassimilation of the old theory into the Bill of Rights now proceeded rapidly.[35] The various clauses restraining the powers of Congress began to be popularly regarded as *sources* of Congressional power. The initial premise in

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[34] *Ibid.*

[35] Resolutions and petitions still were the chief media in evolving this system of constitutional shorthand. Similarity of the revivalists' lectures from place to place, their widespread circulation of the Philanthropist and printed tracts, Birney's own speaking tours, all contributed to resulting stereotypes.

this regard was that the provisions of the Bill of Rights were not *rights,* they were *guarantees,* and guarantees customarily presumed the intent and capacity, as well as the duty, to make them good.[36] An open letter [37] to his Congressman from an unnamed Abolitionist in Batavia [38] reveals the hold and spread and reach of these ideas:

> "The very Constitution of the United States is attempted to be distorted and made an ally of domestic slavery. That Constitution was established, not by the *citizens* or *voters,* but by '*the people*' of the United States to secure the blessings of *liberty* and establish *justice.* The Union . . . was formed for the same great purposes, . . . yet we have been told that petitioning for *liberty* endangers this Union, that the partnership will be dissolved by extending to all the very right it was intended to secure.
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> "Slavery in the District of Columbia violates the most important and sacred principles of the Constitution. . . . I speak not of the mere *letter,* but of the *principles* . . . —of the *rights* it guarantees, of the *form,* in which the guarantee is expressed. The 5th Amendment declares 'no person shall be deprived of life, *liberty* or property without due process of law.' This petition informs you free men in the District . . . have been first imprisoned, and then sold for their jail fees. [Suppose, he continued, this had happened to American seamen in a foreign port]. Would not Congress upon petition enquire into the fact and redress the wrong if it existed? Would not you, Sir, be one of the foremost in repelling the insult to our seamen and punishing the aggressor? Would you not consider it your *duty*—your *official* duty to do so? And yet you have no power to dis-

[36] For a striking statement of this theory in 1866 see CONG. GLOBE, 39th Cong., 1st Sess. 1270 (Rep. Thayer, later a distinguished Philadelphia judge).

[37] Graham, *Early Antislavery Backgrounds, supra* note 1, at 655.

[38] Perhaps John Joliffe, a local antislavery lawyer, who was a close friend of Birney. See Graham, *Early Antislavery Backgrounds, supra* note 1, at 655, n. 256.

> criminate in the object of your protection—a colored sailor is entitled to the *protection* of his country's laws, and Constitution, and flag, and honor, as well as a white one,—he is as much entitled to that protection in Washington city beneath the flag of his country and while he reposes under the tower of the Capitol as he is at *Qualla Balloo* or Halifax, or anywhere on the face of the earth. And all should be protected with equal and exact justice, whether sailors or laborers—citizens or soldiers: if so, you are bound to enquire into the alleged abuses, and if they exist to redress them.''

Thus, by October, 1837, the date of Birney's retirement as editor of the Philanthropist, the motivating premise of Abolitionism already was coming to be this: Americans' basic civil rights were truly national, but in practice their basic civil liberty was not. By acts in support and in toleration of slavery and by failure to protect the friends of the enslaved race, the states and the federal government all abridged, and all allowed to be abridged, the dearest privileges and immunities of citizenship. Humanitarianism had attempted to soften race prejudice and meet this challenge squarely but had been frustrated. Failure left no alternative but political action and the instinctive answer that government had the power to do what the governed had the job to do. The answer to denied power and to defective power was the concept of an inherent power derived from the standing duty to protect. The gist of it was that because allegiance and protection were reciprocal—i.e., ought to be reciprocal—because the government protected its citizens abroad without discrimination, and because the text of the Federal Bill of Rights gave no warrant for discrimination, Congress was duty bound *not* to discriminate. It must do ''equal and exact justice'' irrespective of race. It had no other choice. It lacked power to discriminate between those persons who were equally entitled to protection. It was duty bound also to remove such discrimination as existed. Implicitly, and morally, these same obligations rested on

the states; yet respect for the constitutional division of power here introduced conflict. Few were yet ready for the extreme proposition that Congress might *constitutionally* abolish slavery *in the states.* The original form, as shown by the Batavian communication, was more often that Congress was duty bound to hear petitions to abolish slavery, or that slavery had been abolished in federal territory by the force of the Preamble and Declaration. Because the great natural rights were now also national constitutional rights, they began to generate and carry with them—*even into the states*—the power for their enforcement.

B. Popularization

Four routes and media of political action "constitutionalizing" the antislavery argument are to be noted.

First were the countless petitions, resolutions, declarations, letters, editorials, speeches, and sermons broadcast by the original antislavery proponents and converts—uniformly men and women of influence and position whose idealism was extraordinary and undoubted. One has to read only the *Weld-Grimke* and the *Birney* [39] *Letters,* or the

[39] The legal and constitutional argument in the BIRNEY LETTERS is remarkable both in range and interest. Note especially the due process arguments at 293, 647, 805-806, 835; the declaration that colored people are "citizens" at 815, and "persons" at 658 and 835; the exceptionally strong references to "natural equality of men" at 272; the composite synthesis of all these elements in the Declaration of 1848 drafted by William Goodell at 1048-1057; the various references to major law cases at 386-387 (Nancy Jackson v. Bulloch, 12 Conn. 38 (1837)), at page 658, 667-670 (Birney's arguments in The Creole, 2 Moore, Digest of International Law 358-361 (1906), for which Weld did much of the research), at 758 (Jones v. Van Zandt, 46 U. S. 215 (1846)) in which Salmon P. Chase was of counsel). By contrast, the legal argument in the WELD-GRIMKE LETTERS is more limited, but see page 798 for the letter of Ebenezer Chaplin, an Athol, Massachusetts physician, to Weld, dated October 1, 1839, urging greater emphasis on the unconstitutionality of slavery and less on its cruelties, and specifically mentioning the Declaration of Independence, the common law, the Ordinance of 1787, the Preamble, and the due process clause of the Fifth Amendment.

monographs of Barnes,[40] Dumond[41] and Nye[42]—and Nevins' great history[43]—to realize the appeal of these peoples' character and of their example and argument. Moreover, many of them were southerners, and of the proudest type who practiced what they preached—Birney alone freeing slaves to the value of thousands of dollars,[44] and the Grimke sisters doing likewise with those they inherited. Every antislavery society was a band of disciples, workers, petitioners, writers, and "free moral agents" committed to the spread of doctrine that had immense intrinsic appeal.

In consequence, simply as an incident of the intense revival campaigns, the equal protection-due process-privileges and immunities theory became the core of thousands of abolitionist petitions, resolutions, and lectures. Now one, now another of the elements was accented, depending on the need and circumstances, but in an astonishing number of cases two or three parts of the trilogy were used. The whole thus became, even before 1840, a form of popular constitutional shorthand.

After that date even stronger forces enter the picture. First, were the compilers and synthesizers—pamphleteers and journalists like Tiffany[45] and Goodell[46] and Mellen[47]

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[40] *Op. cit. supra* note 10.

[41] *Op. cit. supra* note 26.

[42] *Op. cit. supra* note 9.

[43] THE ORDEAL OF THE UNION, 2 vols. (1947).

[44] 1 BIRNEY LETTERS, *op. cit. supra* note 11, at 52, 494, 498, 500-501.

[45] TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY (1849).

[46] GOODELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW IN ITS BEARING UPON AMERICAN SLAVERY (1844).

[47] MELLEN, AN ARGUMENT ON THE UNCONSTITUTIONALITY OF SLAVERY . . . (1841).

who wrote the articles and treatises on the "Unconstitutionality of Slavery" which Dr. tenBroek analyzes so well.[48] Others annotated copies of *Our National Charters*[49] setting down after each clause or phrase of the Constitution and the Declaration (much as Birney had done in his early articles) antislavery arguments and doctrines gleaned "both from reason and authority." Such materials, broadcast by the thousand, reprinted, condensed and paraphrased, were themselves powerful disseminators.

It was the minority party platform that gave antislavery theory its most concise, effective statement. Drafted generally by Salmon P. Chase or Joshua R. Giddings, these documents, first of the Liberty and Free Soil parties in the 'forties, then of the Free Democracy and Republican parties in the 'fifties, and in 1860, all made use, in slightly varying combination, of the cardinal articles of faith: human equality, protection, and equal protection from the Declaration, and due process both as a restraint and a source of congressional power. Such consistent repetition testifies both to the nature and extent of previous distillations and to the power and significance of current ones:

1. Liberty Party Platform (adopted in 1843 for the 1844 campaign):

> "*Resolved,* That the fundamental truth of the Declaration of Independence, that all men are endowed by their Creator with certain unalienable rights, among which are life, liberty, and the pursuit of happiness, was made the fundamental law of our national government by that amendment of the Constitution which declares that no person shall

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[48] TENBROEK, ANTISLAVERY ORIGINS, *op. cit. supra* note 2, c. 3 and pp. 86-91.

[49] (Goodell ed. 1863).

be deprived of life, liberty, or property without due process of law."[50]

2. Free Soil Party Platform, 1848:

"*Resolved,* That our fathers ordained the Constitution of the United States in order, among other great national objects, to establish justice, promote the general welfare, and secure the blessings of liberty, but expressly denied to the federal government, which they created, all constitutional power to deprive any person of life, liberty, or property without due legal process.

"*Resolved,* that, in the judgment of this convention, Congress has no more power to make a slave than to make a king; no more power to institute or establish slavery than to institute or establish a monarchy. No such power can be found among those specifically conferred by the Constitution, or derived by any just implication from them."[51]

3. Free Democracy Platform, 1852:

"1. That governments deriving their just powers from the consent of the governed are instituted among men to secure to all those unalienable rights of life, liberty, and the pursuit of happiness with which they are endowed by their Creator, and of which none can be deprived by valid legislation, except for crime.

"4. That the Constitution of the United States, ordained to form a more perfect Union, to establish justice, and secure the blessings of liberty, expressly

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[50] The full platform is in STANWOOD, HISTORY OF THE PRESIDENCY 216-220 (1904). In addition to the plank quoted, it contains numerous references to "equality of the rights among men," "the principle of equal rights with all its practical consequences and applications," the "higher law" and "moral law," and the sacredness of rights of speech, press and petition.

[51] *Id.* at 240. This platform was drafted by Salmon P. Chase. See SMITH, THE LIBERTY AND FREE SOIL PARTIES IN THE NORTHWEST 140 (1897).

denies to the general government all power to deprive any person of life, liberty, or property without due process of law; and, therefore, the government, having no more power to make a slave than to make a king, and no more power to establish slavery than to establish a monarchy, should at once proceed to relieve itself from all responsibility for the existence of slavery wherever it possesses constitutional power to legislate for its extinction."[52]

4. Republican Party Platform, 1856:

"*Resolved,* That with our republican fathers we hold it be a self-evident truth, that all men are endowed with the unalienable rights to life, liberty, and the pursuit of happiness, and that the primary object and ulterior designs of our federal government were to secure these rights to all persons within its exclusive jurisdiction; that, as our republican fathers, when they had abolished slavery in all our national territory, ordained that no person should be deprived of life, liberty, or property without due process of law, it becomes our duty to maintain this provision of the Constitution against all attempts to violate it for the purpose of establishing slavery in any Territory of the United States, by positive legislation prohibiting its existence or extension therein; that we deny the authority of Congress, of a territorial legislature, of any individual or association of individuals, to give legal existence to slavery in any Territory of the United States, while the present Constitution shall be maintained."[53]

5. Republican Party Platform, 1860:

"8. That the normal condition of all the territory of the United States is that of freedom; that

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[52] STANWOOD, *op. cit. supra* note 50, 253-254. This platform was drafted by Salmon P. Chase (see WARDEN, LIFE OF CHASE 338 (1874)) and Joshua R. Giddings (see SMITH, *op. cit. supra* note 51, 247-248).

[53] STANWOOD, *op. cit. supra* note 50, at 271. This platform was drafted by Joshua R. Giddings. JULIAN, THE LIFE OF JOSHUA R. GIDDINGS 335-336 (1892).

> as our republican fathers, when they had abolished slavery in all our national territory, ordained that no person should be deprived of life, liberty, or property without due process of law, it becomes our duty, by legislation whenever such legislation is necessary, to maintain this provision of the Constitution against all attempts to violate it; and we deny the authority of Congress, of a territorial legislature, or of any individual, to give legal existence to slavery in any Territory of the United States.
>
> "14. That the Republican party is opposed to any change in our naturalization laws, or any state legislation by which the rights of citizenship hitherto accorded to immigrants from foreign lands shall be abridged or impaired; and in favor of giving a full and efficient protection to the rights of all classes of citizens, whether native or naturalized, both at home and abroad."[54]

True, these were party platforms, but these were the platforms of parties to which leaders in the Congress that would frame the Fourteenth Amendment had given their allegiance.[55]

Many Congressmen whose names later loomed large in the formulation of and debates on the Thirteenth and Fourteenth Amendments and the Civil Rights Acts were men of anti-slavery backgrounds[56] which, it will be recalled, had sought out community leaders, particularly

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[54] STANWOOD, *op. cit. supra* note 50, at 293.

[55] See *infra* pp. 27-36, and notes 56-69.

[56] Among them the following members of the Joint Committee on Reconstruction: George H. Williams, Oregon; Henry W. Grimes, Iowa; William Pitt Fessenden, Maine; Henry T. Blow, Missouri; John A. Bingham, Ohio; George S. Boutwell, Massachusetts; Justin S. Morrill, Vermont; Roscoe Conkling, New York; Elihu B. Washburne, Illinois; and Thaddeus Stevens, Pennsylvania. Two others, Jacob M. Howard of Michigan and Ira Harris of New York, invariably voted with the so-called Radicals. See KENDRICK *op. cit. supra* note 2, at 155-195.

lawyers.[57] Even in the 'forties, antislavery Whigs, Liberty Party-Free Soilers, and later, members of the Free Democracy, converted by the Weld-Birney group, began to enter Congressmen like Joshua R. Giddings,[58] E. S. Hamlin,[59] the Wade brothers,[60] Horace Mann,[61] Philomen Bliss,[62] A. P. Granger,[63] Thaddeus Stevens,[64] Gerrit Smith,[65]

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[57] Among Weld's converts were Reps. Edward Wade, and Philemon Bliss, and John H. Paine, Liberty Party leader. See 1 WELD-GRIMKE LETTERS, *op. cit. supra* note 10, at 236-240.

[58] 1795-1864; represented Ohio's Ashtabula and Jefferson Counties (Western Reserve) in House, 25th-34th Congresses, 1838-1859; with John Quincy Adams one of the original antislavery leaders in the House. 7 DICT. AM. BIOG. 260 (1931).

[59] 1808-1894; represented Lorain County district in 28th Cong. 1844-45; one of the political lieutenants of Salmon P. Chase in the 'fifties. See 2 BIRNEY LETTERS, *op. cit. supra* note 11, at 1025.

[60] Edward Wade, 1803-1862, elected as a Free Soiler from Cleveland, 1853-55, and as a Republican, 1855-61; Ben Wade, 1800-1878, law partner of Giddings, and Radical Senator, 1851-1869. See 2 BIRNEY LETTERS, *op. cit. supra* note 11, at 710. 19 DICT. AM. BIOG. 303 (1936).

[61] 1796-1859; one of the organizers of the American public school system; elected as a Whig to succeed J. Q. Adams, Mass. district; re-elected as Free Soiler, served 1848-53; President, Antioch College, 1852-59. 12 DICT. AM. BIOG. 240 (1933).

[62] 1813-1889; Ohio Circuit Judge, 1848-51; elected as a Republican from Elyria-Oberlin district, Ohio, served 1855-59; Chief Justice of Dakota Territory, 1861; Assoc. Justice Missouri Supreme Court, 1868-72; Dean of Univ. of Missouri Law School, 1872-1889. 2 DICT. AM. BIOG. 374 (1929).

[63] 1789-1866; antislavery Whig from Syracuse, N. Y.; served 1855-59. BIOG. DIR. AM. CONG., H. R. Doc. No. 607, 81st Cong., 2d Sess. 1229 (1950).

[64] 1792-1868; elected as a Whig from Lancaster, Pa. district, 1849-53; as a Republican, 1859-68; Radical Republican leader in the House. 17 DICT. AM. BIOG. 620 (1935).

[65] 1797-1874; elected from Peterboro, N. Y. district, one of the regions converted by Weld; served 1853-1854, resigned. 17 DICT. AM. BIOG. 270 (1935).

William Lawrence,[66] James M. Ashley[67] (who introduced the Thirteenth Amendment in the House), Samuel Galloway[68] (a former member of the "Seventy") and John A. Bingham.[69] All were either associates, converts, or disciples of the Weld-Birney group; and after 1854, all were Republicans.

In addition to the western group of antislavery leaders, there was an equally strong and determined group with its focus in New England. From this group emerged Charles Sumner, Wendell Phillips, and Henry Wilson. Sumner later became one of the most intransigent leaders of the Republican party during and after the Civil War.[70] Wilson was also in Congress during the Reconstruction period; and became Vice-President and voted with the Radicals on important tie votes.[71] Other New Englanders who served in Congress, and were members of the Joint Committee on Reconstruction, include William Pitt Fessenden of Maine, Justin Morrill of Vermont, and George S. Boutwell of Massachusetts.[72]

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[66] 1819-1899; grad. Franklin College, New Athens, Ohio, 1838; Cincinnati Law School, 1840; Supreme Court Reporter, 1851; Judge, 1857-64; elected as a Republican, served 1865-71, 1873-77. 11 DICT. AM. BIOG. 52 (1933).

[67] 1824-1896; elected as a Republican from Scioto County, 1859-69. See 1 WELD-GRIMKE LETTERS, *op. cit. supra* note 10, at 333. 1 DICT. AM. BIOG. 389 (1928).

[68] 1811-1872, elected as a Republican from Columbus, 1855-57. See WELD-GRIMKE LETTERS, *op. cit. supra* note 10, at 228.

[69] For eight terms (1855-63, 1865-73) Bingham represented the 21st Ohio District, composed of Harrison, Jefferson, Carroll and Columbiana Counties, including the Quaker settlements along Short Creek and the Ohio. See 3 BRENNAN, BIOGRAPHICAL ENCYCLOPEDIA . . . OF OHIO 691 (1884).

[70] 18 DICT. AM. BIOG. 208 (1936).

[71] 20 DICT. AM. BIOG. 322 (1936).

[72] Fessenden was the son of General Samuel Fessenden, the leading Abolitionist of Maine, who was one of the national vice-presidents of the American Anti-Slavery Society, 6 DICT. AM. BIOG. 348 (1931); on Morrill, see 13 DICT. AM. BIOG. 198 (1934); on Boutwell, see 2 DICT. AM. BIOG. 489 (1929).

Because Bingham is known to have drafted Sections One and Five of the Fourteenth Amendment, his speeches are of special interest. From 1855-63 and from 1865-73, he represented the Twenty-first Ohio District, which included the Cadiz-Mt. Pleasant Quaker settlements, antislavery strongholds. Furthermore, as a youth he had attended Franklin College at New Athens in 1837-38. At that date Franklin was second only to Oberlin as an antislavery stronghold;[73] the Weld-Birney crusade was at its height. Indeed, in Birney's Philanthropist, 1836-37, we find various antislavery petitions and resolutions from the Cadiz and Mt. Pleasant societies.[74] These are couched in the very phraseology for which Bingham in 1856-66 manifested his decisive preference.

Four of Bingham's speeches are of particular significance:

I. In his maiden speech in the House, March 6, 1856, attacking laws recently passed by the Kansas pro-slavery legislature which declared it a felony even to agitate against slavery, Bingham argued:

> "These infamous statutes . . . [contravene] the Constitution of the United States. . . . [A]ny territorial enactment which makes it a felony for a citizen of the United States, within the territory of the United States 'to know, to argue and to utter freely', according to conscience is absolutely void. . . . [A] felony to utter there, in the hearing of a slave, upon American soil, beneath the American flag . . . the words of the Declaration 'All men are born free and equal, and endowed by their Creator with the inalienable rights of life and liberty;' . . . [A] felony to utter . . . those other words. . . . 'We, the people of the United States, in order to

[73] See Graham, *Early Antislavery Backgrounds, op. cit. supra* note 1, at 624, n. 150.

[74] For an example see Philanthropist, Mar. 10, 1837, p. 3, col. 4.

> establish justice,' the attribute of God, and 'to secure liberty,' the imperishable right of man, do 'ordain this Constitution'. . . . It is *too late* to make it a felony to utter the self-evident truth that life and liberty belong of right to every man. . . . This pretended legislation . . . violates the Constitution in this—that it abridges the freedom of speech and of the press, and deprives persons of liberty without due process of law, or any process but that of brute force, while the Constitution provides that Congress shall make no law abridging the freedom of speech or of the press; and it expressly prescribes that 'no person shall be deprived of life, liberty, or property without due process of law.'' [75]

II. On January 13, 1857, Bingham spoke in support of Congress' power over slavery in the territory and attacked President Buchanan's recent defense of the Kansas-Nebraska Act of 1854 repealing the Missouri Compromise. After a long analysis of the provisions of the Federal Bill of Rights, of the Northwest Ordinance, the enabling acts and constitutions of the states carved from the Ohio Territory—emphasizing especially the Federal due process clause and the ''all men are born equally free and independent'' clauses of the state constitution, he said:

> ''The Constitution is based upon EQUALITY of the human race. . . . A State formed under the Constitution and pursuant to its spirit, must rest upon this great principle of EQUALITY. Its primal object must be to protect each human being within its jurisdiction in the free and full enjoyment of his natural rights. . . .

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[75] CONG. GLOBE, 34th Cong., 1st Sess. app. 124 (1856). Three other antislavery Republicans representing constituencies converted in the Weld-Birney crusade also used all the old rhetoric and theory including due process: Rep. Granger (N. Y.) *id.* at 295-296; Reps. Edward Wade (*id.* at 1076-1081) and Philemon Bliss (*id.* at 553-557), both Ohioans and among Weld's early converts. See also the speech of Rep. Schuyler Colfax (Ind.), *id.* at 644.

> "It must be apparent that the absolute equality of all, and the equal protection of each, are principles of our Constitution, which ought to be observed and enforced in the organization and admission of new States. The Constitution provides . . . that *no person* shall be deprived of life, liberty, or property, without due process of law. It makes no distinction either on account of complexion or birth—it secures these rights to all persons within its exclusive jurisdiction. This is equality. It protects not only life and liberty, but also property, the product of labor. It contemplates that no man shall be wrongfully deprived of the fruit of his toil any more than of his life." [76]

III. On January 25, 1858, attacking "The Lecompton Conspiracy"—the proposed pro-slave constitution of Kansas declaring that only "All *freemen,* when they form a compact, are equal in rights,"—and absolutely barring free Negroes from the state, Bingham declared:

> "The [Federal] Constitution . . . declares upon its face that no person, whether white or black, shall be deprived of life, liberty, or property, but by due process of law; and that it was ordained by the people to establish justice! . . . [By sanctioning these provisions] we are asked to say, that the self-evident truth of the Declaration, 'that ALL MEN ARE CREATED EQUAL' is a self-evident lie. . . . We are to say . . . to certain human beings in the Territory of Kansas, though you were born in this Territory, and born of free parents, though you are human beings, and no chattel, yet you are not free to live here . . .; you must be disseized of your freehold liberties and privileges, without the judgment of your peers and without the protection of law. Though born here, you shall not, under any circumstances, be permitted to live here." [77]

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[76] CONG. GLOBE, 34th Cong., 3rd Sess. app. 135-140 (1857).

[77] CONG. GLOBE, 35th Cong., 1st Sess. 402 (1858).

IV. On February 11, 1859, Bingham attacked the admission of Oregon because its constitution forbade immigration of free Negroes and contained other discriminations against them:

> "[T]his constitution . . . is repugnant to the Federal Constitution, and violative of the *rights of citizens of the United States*. . . .
>
> "Who *are citizens of the United States?* They are those, and those only, who owe allegiance to the Government of the United States; not the base allegiance imposed upon the Saxon by the Conqueror . . .; but the allegiance which requires the citizen not only to obey, but to support and defend, if need be with his life, the Constitution of his country. All free persons born and domiciled within the jurisdiction of the United States; all aliens by act of naturalization, under the laws of the United States."

"The people of the several States", who according to the Constitution are to choose the representatives in Congress, and to whom political powers were reserved by the Tenth Amendment, were to Bingham "the same community, or body politic, called by the Preamble . . . 'the people of the United States' ". Moreover, certain "distinctive political rights"—for example the right to choose representatives and officers of the United States, to hold such offices, etc.—were conferred only on "citizens of the United States."

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

pensation.' And this guarantee *applies* to all citizens within the United States.''

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

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

''. . . This provision [excluding free Negroes and mulattoes] seems to me . . . injustice and oppression incarnate. This provision, sir, excludes from the State of Oregon eight hundred thousand of the native-born citizens of the other States, who are, therefore, *citizens of the United States.* I grant you that a State may restrict the exercise of the elective franchise to certain classes of citizens of the United States, to the exclusion of others; but I deny that any State may exclude a law abiding citizen of the United States from coming within its territory, or abiding therein, or acquiring and enjoying property therein, or from the enjoyment therein of the 'privileges and immunities' of *a citizen of the United States.* What says the Constitution:

'' 'The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

Art. 4, Section 2.'

''Here is no qualification. . . . The citizens of each State, all the citizens of each State, *being citizens of the United States,* shall be entitled to 'all privileges and immunities of citizens of the several States.' Not to the rights and immunities of the several States; not to those constitutional rights and immunities which result exclusively from State

authority or State legislation; but to 'all privileges and immunities' of citizens of the United States in the several States. *There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident that it is 'the privileges and immunities of citizens of the* United States . . .' that it guaranties. . . .

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

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

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

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

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

> *before the law, are equal in respect of those rights of person which God gives* and *no man or State may rightfully take away,* except as a forfeiture for crime. Before your Constitution, sir, *as it is,* as I trust it ever will be, all men are sacred, whether white or black. . . .'' [78]

Several points must here be emphasized. It will be noted that Bingham disavows the color line as a basis for citizenship of the United States; that he regards Milton's rights of communication and conscience, including the *right to know,* to *education,* as one of the great fundamental natural ''rights of person which God gives and no man or *state* may *rightfully* take away,'' and which hence are ''embodied'' also within, and secured by, ''the great democratic idea that all men before the law are equal.'' In short, the concept and guarantee of the equal protection of the laws is already ''embodied'' in the Federal Constitution as of 1859; this same concept, moreover, embraces ''*the equality of all . . . to the right to know*''; and above all, there is no color line in the Constitution, even of 1859.

Conclusions

From this consideration of the historical background against which the Fourteenth Amendment was written, submitted by Congress, and ratified by the requisite number of states, these important facts develop:

1. To the opponents of slavery, equality was an absolute, not a relative, concept which comprehended that no legal recognition be given to racial distinctions of any kind. Their theories were formulated with reference to the free Negro as well as to slavery—that great reservoir of prejudice and evil that fed the whole system of racial distinctions and caste. The notion that any state could

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[78] CONG. GLOBE, 35th Cong., 2nd Sess. 981-985 (1859) (emphasis added throughout).

impose such distinctions was totally incompatible with antislavery doctrine.

2. These proponents of absolute equalitarianism emerged victorious in the Civil War and controlled the Congress that wrote the Fourteenth Amendment. Ten of the fifteen members of the Joint Committee on Reconstruction were men who had antislavery backgrounds.

3. The phrases—"privileges and immunities," "equal protection," and "due process"—that were to appear in the Amendment had come to have specific significance to opponents of slavery. Proponents of slavery, even as they disagreed, knew and understood what that significance was. Members of the Congress that formulated and submitted the Amendment shared that knowledge and understanding. When they translated the antislavery concepts into constitutional provisions, they employed these by now traditional phrases that had become freighted with equalitarian meaning in its widest sense.