Equality under the Constitution

Baer, Judith A.

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Reconstruction Congress

Anyone who approaches the legislative history of the Fourteenth Amendment in order to glean new interpretations must do so with unease. The warnings I mentioned in Chapter I still apply; it is impossible to state with much assurance what any measure "intended." Scholars can trace the amendment to antislavery jurisprudence, identify abolitionists among the framers, and find the phrase "equal protection" in antislavery argument, but it is no more possible to prove that the Fourteenth Amendment enacted the Declaration of Independence than it is to validate either Carl Becker's or Garry Wills's interpretation of the Declaration itself. Showing that people said certain things or were in certain places at certain times, or that they read certain books or had certain associates, is not conclusive proof of any line of intellectual influence. Identifying Thaddeus Stevens, for example, among the second generation of Theodore Weld's disciples does not prove that he thought exactly as Weld, Birney, or anyone else did. Certainly he had a different task. This kind of information does, however, tell us what kinds of forces may have influenced the framers' thought, and permits qualified inferences about the roots of their ideas. If the authors of the amendment had been the lawyers who argued Prigg and Dred Scott before the Court, the amendment would have a different history.

Not only do we not know quite how members of the Joint Committee of Fifteen on Reconstruction, such as Bingham and Stevens in the House or William Pitt Fessenden and Jacob Howard in the Senate, connected their ideas to their amendment, but we know still less about what the quieter members of Congress who voted for it and the state
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legislators who ratified it thought they were enacting. The legislative history makes it clear that even the articulate members of Congress did not mean the same thing by those provisions. That is one reason why it is so hard to determine whether a given practice was or was not meant to be forbidden. It is important to remember that legislators are often less interested in interpreting a bill than in either passing or defeating it. Their remarks tend to be positive or negative arguments, not authoritative glosses. Legislative debates are not Socratic dialogues; good points go unanswered, and arguments get made imperfectly. The debates on the Fourteenth Amendment in particular are frustrating not only because of these factors but because Section 1 got relatively little attention; Sections 2 and 3, pertaining to representation, suffrage, and the treatment of former Confederates, provoked far more debate.1

Another reason for caution in this task has to do with the secondary sources on the Fourteenth Amendment. This is a topic on which much excellent work has already been done.2 The justification for yet an-


2The primary source here is the legislative debates. They have been compiled in Alfred Avins, ed., The Reconstruction Amendments’ Debates (hereafter, Avins). Benjamin B. Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction (1914) (New York: Negro Universities Press, 1969), reproduces the journal and gives a history of the deliberations. Two classic general histories are Horace F. Flack, The Adoption of the Fourteenth Amendment (Baltimore: Johns Hopkins Press, 1908), and Joseph B. James, The Framing of the Fourteenth Amendment (Urbana: University of Illinois Press, 1951). A major interpretive work is William Winslow Crosskey, Politics and the Constitution (Chicago: University of Chicago Press, 1951), vol. 2. The two studies that I consider definitive are Graham, Everyman’s Constitution, and ten Broek, Equal under Law. A divergent view is provided by Berger, Government by Judiciary. Cover, Justice Accused, also appears to disagree, but his argument applies more to the antislavery movement itself than to the effect of certain segments of it on Reconstruction.

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other try is that most of this scholarship predates the developments that concern us here. That which is recent is often simply wrong. But because so much work has been done, my exploration of the subject will be limited to questions that bear on the new developments.

The equal-protection clause cannot be read in isolation from the rest of the Fourteenth Amendment. As the debates suggest, "the three clauses of Section 1 are mostly but not entirely duplicatory. . . . [They] refer to the protection or abridgement of natural rights." The amendment, in its turn, can usefully be studied only in the wider context of Reconstruction laws. "Viewed as a unit," Richard Kluger has written, "the decade of legislation beginning with the adoption of the Thirteenth Amendment in 1865 and culminating in passage of the Civil Rights Act of 1875, may reasonably be said to have closed the gap between the promise of the Declaration and the tactful tacit racism of the Constitution." These acts and amendments were all linked. In particular, to begin with, "the one point on which historians of the Fourteenth Amendment agree, and, indeed, which the evidence places beyond cavil, is that [it] was designed to place the constitutionality of the Freedmen's Bureau and civil rights bills, particularly the latter, beyond doubt. . . . The doubt related to the capacity of the Thirteenth Amendment to sustain this far-reaching legislative program." The Thirteenth Amendment, passed by Congress in January 1865 and ratified in December, had abolished slavery. Congress had established the Freedmen's Bureau in March of that year with broad powers as the temporary guardian of former slaves.

On January 5, 1866, Senator Lyman Trumbull of Illinois introduced amendments to this law and a new civil rights bill. The original version of this bill provided that "there shall be no discrimination in civil rights or immunities among the inhabitants of any state or territory of the United States on account of race, color, or previous condition of slavery." The Senate did pass this version, but later the broad "no discrimination" language was dropped, partly because some legislators felt it exceeded the Thirteenth Amendment's grant of power and

3 Most notoriously, Berger, Government by Judiciary, and Graglia, Disaster by Decree.
4 Ten Broek, Equal under Law, p. 239. See also Harris, Quest for Equality, pp. 35–36.
6 Ten Broek, Equal under Law, p. 201.
7 Congressional Globe, January 12, 1866, Senate, p. 211 (hereafter Globe); Avins, p. 104.
partly because John Bingham and others apparently thought the Fourteenth Amendment would fill the gap.8

As passed, both the civil rights and amended Freedmen's Bureau bills contained identical lists of guaranteed rights. Section 1 of the Civil Rights Bill provided "that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory of the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, sell, hold, and convey real and personal property, to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."9 Each bill met, but survived, a stronger threat than judicial review: a veto by President Andrew Johnson. While the Fourteenth Amendment was in preparation, the vetoes had not yet been overridden.

The scope of the Fourteenth Amendment is of course not identical to or limited by these two laws.10 It is closely related to them; to the Thirteenth Amendment; and, since the suffrage question would come up during the debates, to the Fifteenth Amendment. It is also connected to the Ku Klux Klan Act of 1871, Charles Sumner's ill-fated civil rights bill of 1874, and the weakened version of that bill which became the 1875 act; the debates on these bills include extensive discussions of the meaning of the amendment they were designed to enforce. Therefore, my analysis will draw not simply on the Fourteenth Amendment's legislative history, but on the whole body of Reconstruction debates.

Some chronology will be helpful at this point.11 A joint congressional committee was appointed in December 1865, primarily at the insistence of the famous Radical Republican from Pennsylvania, Thaddeus Stevens. This step was a victory for Stevens over the president, whose Reconstruction plans were more moderate, or at least less aggressive. Stevens and John Bingham of Ohio were the most promi-

914 Stat. 27, chap. 31 (April 9, 1866); cf. 14 Stat. 176–77, sec. 14, chap. 200 (July 16, 1866).
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ent congressmen on the committee. In the Senate, Jacob Howard of Michigan shared many of their views, but Fessenden of Maine, the committee's chairman, who may have assumed this task to keep Sumner off the committee, exerted a powerful moderating influence. The "real moderating force," however, was probably "that anything more extreme than the Fourteenth Amendment as it is would not be sustained by the people." The committee accomplished two tasks: it held hearings on the condition of freed slaves in the South, and it wrote the Fourteenth Amendment.

The effective authors of Section 1 were Bingham, Stevens, Sumner, and Trumbull. The equal-protection language was derived in part from Sumner's argument as counsel for the plaintiff in Roberts v. Boston, an early school segregation case. There Sumner derived from the Massachusetts Constitution, the French Constitution of 1793, and various classical and Enlightenment writers the notion that "according to the spirit of American institutions, all men, without distinction of color or race, are equal before the law." In the Thirty-eighth Congress, Sumner had drafted a constitutional amendment declaring that "all persons are equal before the law, so that no person can hold another as a slave," but this language was not incorporated into the Thirteenth Amendment.

Bingham drew on both Sumner's ideas and Trumbull's laws in drafting Section 2. The phrase "equal protection," however, was his own. It first appears in a speech before the House in 1857: "It must be apparent that the absolute equality of all, and the equal protection of each, are principles of our Constitution." He included the phrase in each of his drafts of the amendment, with one exception. His first, on December 6, 1865, read: "Congress shall have power to pass all necessary and proper laws to secure to all persons in every state of the Union equal protection in their rights, life, liberty, and property." This wording was considered along with an alternative draft by Stevens: "All national and state laws shall operate impartially and equally on all persons without regard to race or color." 17

12 See David Donald, Charles Sumner and the Rights of Man (New York: Alfred A. Knopf, 1970), chap. 6; James, Framing of the Fourteenth Amendment, chap. 3.
14 5 Cushing (59 Mass.) 198, 201 (1849).
16 Donald, Charles Sumner, p. 149.
17 Ten Broek, Equal under Law, p. 205.
Stevens' draft appears on its face, and was intended, to include Negro suffrage.18 Bingham was willing to support this idea, but not everyone on the committee was. A subcommittee draft of January 20, 1866, combined the crucial elements of both versions: “Congress shall have the power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty, and property.” 19

A week later there occurred a change for which no historian has found an explanation. Bingham, for the subcommittee, reported this version: “Congress shall have the power to make all laws which shall be necessary and proper to secure to all persons in every State full protection in the enjoyment of life, liberty, and property, and to all citizens in the United States in any State the same immunities and also equal political rights and privileges.” 20 The most significant difference is the substitution of “full” for “equal.” This draft lasted only a week. Some scholars have suggested that “equal” and “full” are synonymous here.21 That reading is not without difficulties; as Raoul Berger has pointed out, if several people get half a glass of something, everybody gets an equal serving but nobody gets a full serving.22 If everyone gets a full glass, however, all get an equal serving; full protection for all is equal protection even though the converse is not necessarily true. Bingham may well have used the two adjectives interchangeably.

The January 27 draft was rejected by the full committee. On February 3, a fourth Bingham draft was voted out. This version gave Congress “the power to make all laws necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several states equal protection in the rights of life, liberty, and property.” 23 Later that month, this draft was introduced by Fessenden in the Senate and by Bingham in the House.24

Before the senators got to it, they were claimed by other business: the presidential vetoes, first of the Freedmen’s Bureau Bill on February 19 and then of the Civil Rights Bill on March 27. The House had some objections to the committee bill. On February 27 and 28, several mod-

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18 See James, Framing of the Fourteenth Amendment, p. 81.
21 See, e.g., ten Broek, Equal under Law, pp. 222, 237.
24 Globe, February 13, 1866, S., p. 806, and February 26, 1866, H., pp. 1033–54; Avins, pp., 147, 150–51.
erate Republicans worried that the amendment would give Congress too much power. Giles Hotchkiss of New York recommended that it be redrafted as a limitation on state powers, making, perhaps disingenuously, an argument that appealed to the Radicals: "... your legislation upon the subject would depend upon the political majority of Congress. ... But now, when we have the power in the Government, the power in this Congress, and the power in the States to make the Constitution what we desire it to be, I want to secure those rights against accidents, against the accidental majority of Congress." The House voted to postpone decision. "The Amendment was left to brew for six weeks." Stevens had not given up on suffrage. He took advantage of the postponement; in April he sent the committee a draft prepared by Robert Dale Owen, which restated the ban on racial discrimination and provided for suffrage by 1876. Bingham offered a friendly amendment: "nor shall any State deny to any person within its jurisdiction the equal protection of the laws nor take private property for public use without just compensation." This draft was defeated. Bingham then introduced this version, which was reported out by the committee on April 30: "Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." This version passed, with a sentence clarifying state and national citizenship inserted at the beginning. Section 5 effectively put in most of what Hotchkiss had gotten out: "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." This version was passed by the Senate on June 8 and by the House on June 13. Just over two years later, on July 27, 1868, the amendment was ratified.

What questions can be asked of this voluminous material that will help us deal with the claims of the 1980s? Three questions, I think, are crucial. First, what emerge as the foundations of the guarantee of equality? Put another way, why did Congress want to ensure equal protection? Second, what people, or groups, did the guarantee include, and whom did it exclude, and why? Third, can anything new

25 *Globe*, February 28, 1866, H., p. 1095; Avins, p. 160
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be learned about what rights or interests the amendment did or did not protect? This third question is another version of a large question that has dominated much twentieth-century scholarship: what might be called the desegregation or Brown I question, or, still earlier, the incorporation or Adamson v. California question.\(^3\) (I exclude, as tangential to this study, a fourth significant problem: the “state action” or Shelley v. Kraemer question.\(^4\)

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The first question is the largest and most complex of the three. If the original Stevens draft had been the one approved by Congress and the states, we would know what kinds of state action were forbidden: any that were based on race or color. The Bingham version is not so specific. Therefore, to find out who and what were included, we need to know something about the principles behind the amendment.

The present doctrine implies that the equal-protection clause was meant to forbid two kinds of legal classifications. First, those that are arbitrary and irrational are precluded. Second, those that are “suspect” are presumed to be invalid; that is, either those based on permanent characteristics that the individual cannot control and that have little connection with individual abilities, or those directed against disadvantaged minorities, or both. If this interpretation were accurate, we might expect to find statements in the debates to that effect. But in fact there are very few such statements. We find several instances of arguments of another sort entirely.

The best interpretation of the Fourteenth Amendment grew around and out of Brown I. Dating from the 1950s and 1960s, this interpretation was the work primarily of Jacobus ten Broek, Howard Jay Graham, and Alfred H. Kelly, a group that nicely joins law, political science, and history.\(^5\) These scholars maintained that the Reconstruction amendments were intended to write into the Constitution the principles of equality and natural rights contained in the Declaration.

\(^3\) 332 U.S. 46 (1947).
\(^4\) 334 U.S. 1 (1948).
\(^5\) Ten Broek, who died in 1968, had both a law degree and a doctorate in political science; he was professor of political science at the University of California at Berkeley. Graham, now retired, was librarian of the Los Angeles County Law Library. Kelly, who died in 1976, was professor of history, Wayne State University. Respectively, their major works are Equal under Law; Everyman’s Constitution, especially chaps. 1, 2, 4, 5, 7, and 14; and “Fourteenth Amendment Reconsidered.”
The clause on equal protection of the laws had almost exclusively a substantive content. . . . Protection of men in their fundamental or natural rights was the basic idea of the clause; equality was a modifying condition. The clause was a confirmatory reference to the affirmative duty of government to protect men in their natural rights. This established its absolute and substantive character, though the use of the word “equal” would seem to give the clause a comparative form. Equal denial of protection, that is, no protection at all, is accordingly a denial of equal protection. The requirement of equal protection of the laws cannot be met unless the protection of the laws to men in their natural rights was the sole purpose in the creation of government. This being so, the phrase “No State shall . . . deny” becomes a simple command: “Each state shall supply,” and the whole clause is thus understood to mean: “Each State shall supply the protection of the laws to men in their natural rights, and the protection shall always be equal to all men.” It was because the protection of the laws was denied to some men that the word “equal” was used. The word “full” would have done as well.33

These conclusions might, under some circumstances, be suspect, since two of these writers, Graham and Kelly, were involved in preparing the historical brief for the plaintiffs in Brown. But none of their published work partakes of “law-office history,” and the argument made goes far beyond what was required to overturn segregation. My own examination of the primary sources convinces me that ten Broek, Graham, and Kelly were right; and this conclusion has profound implications for the problems I deal with.

Even those who did not reach such sweeping conclusions—Alexander M. Bickel, for example, who as Justice Frankfurter’s law clerk researched a long memorandum for him on this issue—found the amendment’s language flexible enough to bear such an interpretation. “May it not be that the Moderates and the Radicals reached a compromise permitting them to go to the country with language which they could, where necessary, defend against damaging alarms raised by the opposition, but which at the same time was sufficiently elastic to permit reasonable future advances?” 34 Raoul Berger’s study, published in 1977, rejects the natural rights thesis, but its argument is confused and ultimately wrong. Berger has two theses, which he does not clearly distinguish. Through much of his book he seems to argue that the scope of the Fourteenth Amendment is limited to those rights that its authors explicitly included and those practices they explicitly forbade. Therefore, Berger insists, since no one argued in 1866 that

33 Ten Broek, Equal under Law, p. 237.
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de jure segregation was prohibited, it is constitutional. This is a basic misunderstanding of the nature of constitutional interpretation.35

But lurking behind this argument is a more subtle one, which deserves more attention. Berger insists that Congress intended to enact not the principles of the Declaration, but a specified set of rights derived from Blackstone, from Corfield v. Coryell, an 1823 case construing the privileges-and-immunities clause of Article IV, section 2, and from the Civil Rights Act of 1866.36 Probably because Berger does not separate his two arguments, this one is never fully explored. But it, too, is fallacious.

His dismissal of the natural rights argument depends primarily on his assessment of the characters of its proponents: Bingham was a “muddled thinker,” Sumner was widely regarded as a fool, and Stevens was roundly hated; the really influential framers were such moderates as Trumbull.37 It is true that, to put it mildly, the Radicals had their detractors—none of what Berger says is new to anyone acquainted with this history—and that the moderates’ votes were necessary to pass the amendment. But it is also true that Bingham and Stevens got the amendment written; that Bingham was in Sumner’s intellectual debt; that Bingham and Jacob Howard were the provision’s floor leaders; and that the debates are shot through with the sort of language Berger discounts.38 The argument is intriguing, but it is not supportable.

“Slavery is so odious a concept,” Graham wrote,

that we are apt to forget that essentially it was a system of race discrimination and a denial of the protection of law. Slavery rested on and sanctioned prejudice; it made race and color the sole basis for accord or denial of human rights. Human chattelization was the worst aspect of it, but the racial criterion affected every phase of life and human contact. The institution stigmatized even those who had been emancipated from it. This was the fundamental problem faced by the framers of the Fourteenth Amendment. Slavery had ended, but the roots and forms of prejudice and discrimination lay untouched.39

37 Government by Judiciary, pp. 145, 244, chap. 13.
38 For only a few examples see the speeches of Stevens and Bingham in Globe, May 8 and 10, 1866, H., pp. 2452, 2459–60, and of Jacob Howard of Michigan, ibid., May 23, 1866, S., pp. 2764–65; Avins, pp. 212–13, 217–22.
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The debates provide some support for Graham's statement, but for most speakers, what made the discrimination so odious was not that it based classification on race as opposed to some other characteristic, but that it deprived any persons of their rights. Only once, and then briefly, did a speaker articulate anything like the "permanent characteristics" version of suspect classification with respect to race. In 1868, Sumner, defending Negro suffrage, said:

Age, education, residence, property, all these are subject to change; but the Ethiopian cannot change his skin. On this last distinctive circumstance I take my stand. An insurmountable condition is not a qualification but a disfranchisement. Admit that a state may determine the 'qualifications' of electors, it cannot, under this authority, arbitrarily exclude a whole race.

Try this question by examples. Suppose South Carolina, where the blacks are numerous, should undertake to exclude the whites from the polls, on account of "color"; would you hesitate to arrest this injustice? . . . Suppose another State should gravely declare, that all with black eyes should be excluded from the polls; and still another should gravely declare that all with black hair should be excluded from the polls, I am sure that you would find it difficult to restrain the mingled derision and indignation which such a pretension must excite. But this fable pictures your conduct.  

But Sumner's congressional colleagues did not stress the immutability and alleged arbitrariness of racial classifications. Presumably they agreed with Sumner on the first point. But one of the most striking features of the debates is the lack of agreement on the second point. Indeed, if any consensus existed in this regard, it was that Negroes were inferior to whites. Berger is irrefutable on this point: "The North was shot through with Negrophobia . . . [and] the Republicans, except for a minority of extremists [sic], were swayed by the racism that gripped their constituents." 41 But Berger errs in concluding that this racism proves that the Republicans did not intend to enact a broad guarantee of equality. He has fallen into the trap of assuming that arguments for equality must rest on beliefs about merit; and, as we shall see, that was not how the Reconstructionists thought.

The record often juxtaposes the abolitionists' theory to Calhoun's antitheory. More than once Democrats expounded on the inherent in-

41 Government by Judiciary, p. 10. Even Sumner shared these feelings. In 1834 he visited Maryland and saw slaves for the first time in his life. He wrote his family, "My worst preconception of their appearance and ignorance did not fall as low as their actual stupidity" (Donald, Charles Sumner and the Coming of the Civil War (New York: Alfred A. Knopf, 1960), p. 29).
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feriority of Negroes. One of the clearest such statements comes from Representative Benjamin Boyer of Pennsylvania, in a debate over voting rights in the District of Columbia:

If the peculiarities I have mentioned [color, odor, skull volume, face] are the outward badges of a race by nature inferior in mental caliber, and lacking that vim, pluck, and poise of character which give force and direction to human enterprise . . . then the Negroes are not the equals of white Americans, and are not entitled by any right, natural or acquired, to participate in the Government of this country. They are but superficial thinkers who imagine that the organic differences of the races can be obliterated by the education of the schools. The qualities of races are perpetuated by descent.42

The Republicans could have answered these arguments in several ways. Two modes of response to charges of racial inferiority had been popular since the previous century: the argument from gifted individual Negroes and the environmentalist defense.43 The former argument does not appear in the debates, and the latter does so infrequently. It was made, interestingly, in response to Boyer by a fellow Pennsylvanian, Glenni Scofield.44 The most frequent counterargument, however, emphasized inherent rights, independent of capacity.

Bingham's speech on the admission of Oregon, from which I quoted in Chapter 3, is an example of this kind of argument. Just a year later, an exchange between Senator Jefferson Davis of Mississippi, later president of the Confederacy, and Henry Wilson of Massachusetts, later vice-president under Grant, illustrates the underlying argument and counterargument. The Senate was considering an appropriation for public schools in the District of Columbia, whose population, then as now, was predominantly black. The interchange proceeded like this:

DAVIS: . . . the inequality of the white and black races—stamped from the beginning, marked in degree and prophecy—[is] the will of God. . . .

WILSON: I believe in the equality of rights of all mankind. I do not believe in the equality of the African race with the white race, mentally or physically, and I do not think morally. I do not believe in the equality of the Indian race with us, but upon the questions simply of equality of rights I believe in the equality of all men of every race, blood, and kindred.

DAVIS: When the Senator says "equality of rights of all men," does he mean political and social rights—political and social equality?

WILSON: I believe that every human being has the right to his life and

43 See Chapter 2, pp. 49–50.
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to his liberty, and to act in this world so as to secure his own happiness. I believe, in a word, in the Declaration of Independence; but I do not, as I have said, believe in the mental or physical equality of some of the races, as against this white race of ours.

DAVIS: Then the Senator believes, and he does not believe. . . . He believes in the Declaration of Independence, and intimates that he means by that all men are equal; but he immediately announces that there is a difference between the two races.

WILSON: Well Mr. President, I believe there are a great many men in the world of the white race inferior to the Senator from Mississippi, and I suppose there are quite a number superior to him; but I believe that he and the inferior man and the superior have equal natural rights.45

As explanation of the Fourteenth Amendment, this argument might seem premature, except for the fact that later debates echo it, and Wilson used the same rhetoric in support of Reconstruction laws. On January 22, 1866, the Freedmen’s Bureau Bill produced this exchange between him and Edgar Cowan, a conservative Republican from Pennsylvania.

WILSON: We demand that by irreversible guarantees no portion of the population of the country shall be degraded or have a stain put upon them. . . .

COWAN: The honorable Senator from Massachusetts says that all men in this country must be equal. What does he mean by equal? Does he mean that all men in this country are to be six feet high, and that they shall all weigh two hundred pounds, and that they shall all have fair hair and red cheeks? Is that the meaning of equality? Is it that they all shall be equally rich and equally jovial, equally humorous and equally happy? What does it mean?

WILSON: . . . Why are these questions put? Does he not know precisely and exactly what we mean? Does he not know that we mean that the poorest man, be he black or be he white, that treads the soil of this Continent, is as much entitled to the protection of the law as the richest and proudest man in the land?

The Senator knows what we believe. He knows that we had advocated the rights of the black man because the black man was the most oppressed type of toiling man in this country.46

Throughout the debates, the Republicans argued from the notion that human beings were entitled to rights, regardless of their particular abilities. Notwithstanding Calhoun, and certain Democrats who followed him into Congress, equal rights did not have to be earned; they belonged to each individual, and government must secure and

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protect them. This assumption is illustrated by comments made in support of the various bills and amendments. Trumbull, for example, said that the purpose of his civil rights bill was to afford "protection to all persons in their constitutional rights of equality before the law without regard to race or color." The Senator echoed this theme in his response to the president's veto message.

Johnson had written, "... a perfect equality of the white and black races is attempted to be fixed by federal law in every state." Trumbull rejected this interpretation:

The bill neither confers nor abridges the rights of any one, but simply declares that in civil rights there shall be an equality among all classes of citizens, and that all alike shall be subject to the same punishment. Each state, so that it does not abridge the great fundamental rights belonging, under the Constitution, to all citizens, may grant or withhold such civil rights as it pleases; all that is required is that, in this respect, its laws shall be impartial.

The Fourteenth Amendment itself was defended as a necessary protection of these fundamental rights. In the House, John Farnsworth of Illinois asked, "How can [a person] have and enjoy equal rights of 'life, liberty and the pursuit of happiness' without 'equal protection of the laws'?" This argument bridges the gap between defenses of equal protection as an idea and as a constitutional guarantee. One reason it has been necessary to skip around so much in this analysis is that even those who agreed that the principles of the Declaration should be enacted into law had different notions about which provision was the appropriate vehicle for the purpose. The Fourteenth Amendment, as we have seen, was in part a response to those who feared that neither the original Constitution nor the Thirteenth Amendment gave Congress the power to grant equal rights, and who—realistically, as events proved—doubted the security of Trumbull's two bills. The foundations of the amendment thus had a pragmatic as well as a normative component, as Farnsworth's statement illustrates.

Investigations into the conditions of freedmen in the South added fuel to the arguments in favor of a constitutional amendment. The report of General Carl Schurz on the condition of the South in December 1865 and the Joint Committee's own hearing in the spring of 1866, for instance, revealed widespread brutality toward the former slaves and the use of "black codes" to go as far as possible toward reinsti-

48 *Globe*, March 27 and April 4, 1866, S., pp. 1680, 1760; Avins, pp. 194, 200.
tuting slavery in fact. Schurz, parodying Taney in *Dred Scott*, wrote: "The habit is so inveterate with a great many persons as to render, on the least provocation, the impulse to whip a negro almost irresistible. It will continue to be so until the southern people have learned, so as never to forget it, that a black man has rights which a white man is bound to respect." 

In June 1866, during the Senate debate on the amendment, John Henderson of Missouri argued for Negro suffrage in this way:

Nearly five million people, strong, vigorous, and innured to labor, are in your midst, partially without civil, wholly without political rights. What will you do with them? You have three alternatives before you, and only three. You must kill them, colonize them or ultimately give them a part of your political power. For this last alternative the country is not prepared. With the two former humanity and common sense will successfully struggle.

Not only was equality a necessary condition for securing inherent rights, but it was essential in order to grant the Negroes any freedom at all. The Reconstruction package was enacted not because its framers believed race was unrelated to ability, or because it was beyond the individual’s power to change. Rather, the guarantees were the result of the framers’ commitment to the conclusion that equal protection was necessary to secure those rights. The framers had little concern with race as an abstract category. Instead, they were trying to secure the rights of members of one oppressed race.

**Equal Protection Beyond Race**

Unlike the two laws the Thirty-ninth Congress passed at about the same time, the Fourteenth Amendment was not written in racial terms. It grants privileges and immunities to all citizens, and due process and equal protection to “any person.” That was not the reason Bingham’s language was substituted for Stevens’, but once the Bingham version

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51 Senate Executive Document no. 2, 39th Cong., 1st sess., p. 20; Avins, p. 89.

52 *Globe*, June 8, 1866, S., p. 3035; Avins, p. 236.
was accepted, there was some agreement that the amendment did speak to problems other than racism.

Sometimes the language used was sweeping, even lavish. The words of Ohio’s Representative William Lawrence about the Civil Rights Bill apply as well to the amendment written to secure it: “The bill, in that broad and comprehensive philanthropy which regards all men in their civil rights as equal before the law, is not made for any class or creed, or race or color, but . . . will, if it become a law, protect every citizen, including the millions of people of foreign birth who will flock to our shores to become citizens and to find here a land of liberty and law.”

Introducing the Fourteenth Amendment in the Senate, Howard, substituting for an ailing Fessenden, insisted that it “abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another.” He did not define “class” or “caste,” and his illustration does not help here because it is racial: “It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man.”

Some retrospective interpretations are as comprehensive as that of a Kentucky Democrat who, opposing the Fifteenth Amendment, declared that its predecessor “gives protection to . . . Negroes as well as Indians, Gypsies, Chinese, and all the Mongolian races born in the United States, men and women, young and old.” In debating what became the Civil Rights Act of 1875, Senator Oliver Morton, a Union Republican from Indiana, declared that the Fourteenth Amendment “forbids all discriminations of every character against any class of persons being citizens of the United States.”

_Every_ discrimination? Against _any_ class? What about restrictions on voting rights, or on the contractual rights of children and married women? Well, no: those broad statements were qualified. Morton himself immediately was challenged on single-sex schools, and backed down. “This Amendment,” he replied, “was intended to destroy caste, to put all races upon an equality. There is the point.”

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53 _Globe_, April 7, 1866, H., p. 1833; Avins, p. 206.
54 _Globe_, May 23, 1866, S., p. 2766; Avins, p. 220.
55 _Globe_, January 28, 1869, H., p. 691 (remarks of James B. Beck); ibid., May 21, 1874, S., app. p. 358; Avins, pp. 343, 683. Morton had consistently held to this position. As governor of Indiana during that State’s ratification debates, he declared that the due-process clause was “intended to throw the equal protection of law around every person . . . not only as to life and liberty, but also as to property” (James, _Framing of the Fourteenth Amendment_, p. 159).
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So how far did the amendment reach? Did its authors intend Section I to protect anyone other than blacks, and if so, whom? Did they intend to exclude any kinds of discrimination from the scope of the amendment, and if so, toward whom were those exclusions directed? Finally, did they have grounds for distinguishing between the groups covered and those not covered?

The answer to the first question is yes: there emerges from the debates a general agreement that the provision gave Chinese and Japanese immigrants the same protection it gave to blacks. The answer to the second question is also yes; there emerges some agreement that it did not cover women or children. The answer to the third question is yes, distinctions were made; but either they are explicitly written into the constitutional text and limited to specified claims or they do not withstand analysis.

Most of the time, supporters spoke in the familiar terms of black versus white. Howard's statement is typical. Thaddeus Stevens put it this way: "Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all." 57

But the country had another developing racial issue that was not ignored. Opponents kept bringing it up: did the amendment protect Orientals? A few speakers denied that it did, but their arguments are their own best refutations. Representative William Higby of California, for example, declared that the Chinese were excluded because they were pagans and foreigners, whereas the Negroes were Christians and natives. 58 That these were minority views is shown by the fact that in 1870 Congress used its enforcement power to secure to West Coast Chinese the rights to sue, give evidence, and make contracts. 59 Nevada's Senator William Stewart remarked, "Now while I am opposed to Asiatics being brought here, and will join in any reasonable legislation to prevent anybody from bringing them, yet we have got a treaty that allows them to come to this country," He continued:

For twenty years every obligation of humanity, of justice, and of common decency toward those people has been violated. . . . While they are

57 Globe, May 8, 1866, H., p. 2459; Avins, p. 212.
58 See, e.g., the remarks of Rep. William Niblack (D-Ind.), Globe, February 27, 1866, H., p. 1056; Avins, p. 152. See also the remarks of Senators Oliver Morton and Frederick Frelinghuysen, February 9, 1869, S., p. 1039; Avins, p. 382; and Representative James Johnson of California, May 23, 1870, H., p. 3878; Avins, p. 461.
59 Globe, 41st Cong., 2nd sess., passim; Avins, p. 437.
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here, I say it is our duty to protect them. . . . It is as solemn a duty as can be devolved upon this Congress to see that those people are protected, to see that they have equal protection of the laws, notwithstanding that they are aliens. . . . Justice and humanity and common decency require it.60

So the amendment protected the rights of other racial groups in addition to blacks. But what about women? The American feminist movement was almost twenty years old by that time, and it made its presence felt in the deliberations. The language of Section 1, on its face, was broad enough to protect women as well as racial minorities. Opponents of the amendment frequently pointed this out. But several of the supporters insisted that it did not apply to women. In these arguments, they tried to find distinctions between race-based legislation and sex-based legislation which would justify this interpretation. However hard they tried, they failed. Their arguments fall of their own weight—and not just with the hindsight provided by modern feminism. Even in their own time and on their own terms, most of the distinctions are specious.

During the February debates in the House, Robert Hale of New York, one of the Republicans who opposed the “necessary and proper” draft, challenged Bingham and Stevens on this point. Would the amendment strike down the legal disabilities imposed on married women? No, replied Stevens; not as long as all married women and all unmarried women were treated alike, “where all of the same class are dealt with in the same way, then there is no pretense of inequality.” This admission was fatal, and Hale saw it right away: “. . . then by parity of reasoning it would be sufficient if you extend to one negro the same rights you do to another, but not those you extend to a white man.”61 Stevens did not respond to this logic, and neither did anyone else.

Other efforts to distinguish between race and sex discrimination were made in discussions of voting rights. Typical antifeminist rhetoric does appear here, but it is not dwelt on. Howard’s introductory speech to the Senate on May 23 defended Section 2, which provided that “whenever, in any State, the elective franchise shall be denied to any portion of its male citizens not less than twenty-one years of age,” the basis of representation in the House would be proportionally reduced. He quoted from James Madison’s writings a statement in favor

60 Globe, May 20, 1870, S., p. 3658; Avins, p. 449.
of universal suffrage. Reverdy Johnson of Maryland, a leading opponent, asked whether this meant "females, as well as males." Howard replied:

I believe Mr. Madison was old enough and wise enough to take it for granted there was such a thing as the law of nature which has a certain influence even in political affairs, and that by that law women and children are not regarded as the equals of men. Mr. Madison would not have quibbled about the question of women's voting or of an infant's voting. He lays down a broad democratic principle, that those who are to be bound by the laws ought to have a voice in making them; and everywhere mature manhood is the representative type of the human race. 62

The defect of this argument, of course, is that it gives no basis for preferring the "law of nature" that regards only women and children as inferior to the version already encountered which also classifies blacks as inferior. The "representative" component of the argument, however, is repeated and expanded by others. The comments of Senator Luke Poland of Vermont on June 5 are typical. He himself was not hostile to women's suffrage: "We all know that many females are far better qualified to vote intelligently and wisely than many men who are allowed to vote; and the same is true of many males under twenty-one. . . . The theory is that the fathers, husbands, brothers, and sons to whom the right of suffrage is given will in its exercise be as watchful of the rights and interest of their wives, sisters, and children who do not vote as of their own." This theme was echoed in later discussions. Women are protected by their male relatives, and in any case are treated like human beings, but "the Negro is the object of that unaccountable prejudice against race which has its origin in the greed and selfishness of a fallen world." 63 Therefore Negro suffrage, or rather male Negro suffrage, was a necessity.

The notion that men will protect the interests of their relatives is analogous to Alexander Hamilton's statement in Federalist 35 that workers do not need a vote because their employers will safeguard their interests, and just as false. But we do not need to engage in the questionable tactic of using a twentieth-century insight to reject a nineteenth-century argument. It is necessary to say only this: Neither

children nor women are at all times assured of male relatives to protect them.\textsuperscript{64}

Most important, discussions of voting can have only limited application to an interpretation of Section 1. Voting was covered not in Section 1, but in Section 2 and in the Fifteenth Amendment. Both provisions stated explicitly who was to be included. Section 2 deprived states of representation only if they disfranchised adult male citizens. Minors, females, and aliens were omitted. The Fifteenth Amendment forbade the states to deny suffrage on the basis of three listed attributes: race, color, or previous servitude. Sex and age are omitted. Two later amendments, of course, deal with these attributes.

When Congress meant to limit the scope of guaranteed rights, it said so, enumerating the rights involved and the proscribed bases for discrimination. Section 1 of the Fourteenth Amendment contains no such limitations, and the text provides no basis for reading any into it. Indeed, if anything, the wording of the Civil War amendments tends to provide support for the inclusion of women and children in Section 1.

The debates suggest otherwise, but they do not disprove that statement. Often the framers spoke in broad terms that seem to encourage interpretations that go beyond racial equality. When we look to the record for guidance about which such interpretations are valid and which are not, however, we find only confusion. The debates do not answer this question, perhaps because it was not a crucial one to the lawmakers. But it became crucial very soon afterward, and has remained so.

Part of the problem inheres in Senator Howard's term "class legislation," paraphrased by Stevens and others. The debates never define this term. The examples given to illustrate it are always racial. Whenever members are pressed to reason by analogy to other traits, such as sex and age, their reasoning collapses. Apparently "class" is a class that includes but is not limited to "race"; the debates provide no guidance as to what other subclasses are included. The hypothetical policies mentioned by Howard and Stevens as species of "class legislation" are not much help. They speak of punishment; the law must not punish a member of one race more harshly than one of another. As we shall see later, this principle does not prohibit all racial discrimination. But differences in punishment are forbidden, and it may be useful to speculate about what this prohibition may mean.

Why would it be illegal to discriminate on the basis of race with

\textsuperscript{64} Avins makes this point in his introduction to the debates (p. xv).
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respect to punishment? Well, we punish people for crimes; that is, for specific acts of wrongdoing for which they are responsible. Race can neither increase nor diminish a person’s responsibility for a particular crime. The point is not that the person cannot help being black; rather, it is that blackness has no relation to the degree of guilt. What seems to be at issue here is classifying people according to some trait that has nothing to do with the issue at hand. We classify, of course, when we execute some murderers and not others; we establish a class of murderers put to death and murderers permitted to go on living. If we make this choice according to the particular depravity of the crime, for instance, we establish a class of depraved murderers, who are executed, and nondepraved murderers, who stay alive. This classification is legitimate (leaving aside the question of the acceptability of capital punishment) because it is related to the crime itself, and because it is based on individual responsibility and behavior. A racial classification presumes a priori that the “person” belongs to a group that is treated differently.

Another example of class legislation is given by Senator Timothy Howe of Wisconsin: a law taxing Negroes specifically for Negro education, in addition to a general tax for education. This is not precisely a punishment, but it is an imposition of an extra burden. Of course, even in the days before income taxes, differential tax burdens were imposed. On what basis? Well, property owners pay extra taxes, for example. Again there is a relationship between burden and behavior. And the classification is subsequent, not prior, to an individual determination.

This argument begins to sound somewhat like a tentative version of one concept of suspect classification. But it is of limited usefulness because it is only what classification might mean, not necessarily what it did mean. And it implies what the members of Congress disavowed: that sex-based discriminations were likewise class legislation. We are going to have to look further for the meaning of Section 1.

Do these statements forbid, and were they meant to forbid, all race or class discriminations, or just those imposed on blacks? The term “class legislation” sounds neutral, but it is not clear that Howard intended it that way. All the examples he gives refer to inferior treatment of blacks. Perhaps it did not occur to the leaders in the floor fights that there might be such a thing as legislation against whites as a class. In the light of their historical experience, failure to entertain such a possibility is understandable. It is not clear whether “class legislation”

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refers to all discriminations based on a given characteristic, or only to discriminations against a class that has been oppressed.

All this discussion reveals a difficult problem in constitutional interpretation. For once, the debates contain a statement of what a clause was meant to do—include blacks and Orientals—and what it was not meant to do—include women. If intent were the only guide to meaning, this definition would negate a whole line of decisions that have ruled that the equal-protection clause does restrict, though it does not forbid, discrimination based on sex. These decisions—through no lack of intellectual honesty, but for reasons that will become clear in Chapter 5—contain no references to the legislative history. If the Court had examined this history, it might have discovered what I have found: a specific distinction that contradicts the broad principles on which it is supposedly based. This would not have been the first time such a contradiction was found between general and specific recommendations. The same thing happened, of course, in the school desegregation cases. The result there was a judicial retreat from legislative history. This retreat continued in the sexual equality cases of the 1970s. But, as I shall argue, the Court need not have retreated. Both sets of decisions were compatible with, and help enforce, the principles of Reconstruction. Both text and history suggest that what Bickel said about two other issues may also apply to the rights of women and children: “It is not true that the Framers intended the Fourteenth Amendment to outlaw segregation or to make applicable to the states all restriction on government that may be evolved under the Bill of Rights; but they did not foreclose such policies and may indeed have invited them.”

The Scope of the Fourteenth Amendment

The last two sections have dealt with the “why” and “who” of Section 1, but the final question, the “what,” remains and perplexes. Just what rights and interests did the Fourteenth Amendment—not only the equal-protection clause but the privileges-and-immunities and due-process clauses as well—secure against the states? Some of the remarks I have quoted imply that it includes a right to be free from racial discrimination. Howard’s remarks about hanging do not suggest that the amendment forbids capital punishment; they do, however, indicate that it forbids inequalities with respect to specific interests.

66Least Dangerous Branch, p. 103.
The Civil Rights Bill, too, grants to all citizens in several interests “the same right” as a white citizen.

Does it follow, then, that all racial discrimination is proscribed? Apparently not; this intention is disavowed whenever the debates reach the touchiest of all racial issues, the question of miscegenation. In response to a question from Reverdy Johnson, Trumbull and Fessenden declared that the Civil Rights Bill would not invalidate antimiscegenation laws. “Where,” asked Fessenden, “is the discrimination against color in the law to which the Senator refers? A black man has the same right [i.e., none] to make a contract of marriage with a white woman that a white man has with a black woman.” Trumbull made a similar statement about the Freedmen’s Bureau Bill, and his argument is significant. These laws were constitutional, he declared, because “are not both races treated alike? . . . If the negro is denied the right to marry a white person, the white person is equally denied the right to marry the negro. I see no discrimination against either in this aspect that does not apply to both. Make the penalty the same on all classes of people for the same offense, and then no one can complain.”

So there is nothing wrong with distinctions based on race, so long as they do not treat one race as inferior to another. And it would seem that whatever applied to intermarriage would also apply to public accommodations and education. Only a specific kind of racial discrimination, that which treats one race unequally, is forbidden. The crucial question becomes whether Trumbull was right about what those laws did. In Chapter 5 I shall argue that Brown I embodies a fully justified conclusion that he was wrong, and that supposedly neutral discriminations are forbidden by the Fourteenth Amendment. But that was not how the Thirty-ninth Congress saw things, and that fact will have to be dealt with.

The House debates on the two bills produced another explanation for the exclusion of intermarriage from the scope of the Fourteenth Amendment. Samuel Moulton of Illinois insisted that

the right to marry is not strictly a right at all, because it rests in contract alone between the individuals, and no other person has a right to contract it. It is not a right in any legal or technical sense at all. No one man has any right to marry any woman he pleases. If there was a law making that a civil right, it might be termed a civil right in the sense in which it is used here. But there being no law in any State to that effect, I insist that marriage is not a civil right, as contemplated by the provisions of this bill.68

67 Globe, January 30 and 19, 1866, S., pp. 505, 322; Avins, pp. 128, 108.
68 Globe, February 3, 1866, H., pp. 632–33; Avins, p. 141.
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Efforts to use Congress’ Section 5 enforcement powers stimulated still more debate on the scope of the amendment, and revealed large disagreements among those of its framers who were still in office. In December 1871 an amnesty bill removing the disqualification of former Confederates from officeholding under Section 3 was introduced at President Grant’s request. Sumner then proposed an amendment to this bill which would have ended racial discrimination in jury selection, public accommodations, and public schools. He had introduced versions of this civil rights bill before, but it had always been buried in the Judiciary Committee. Now Congress could not get rid of it so easily.

Sumner insisted that separate education deprived blacks of their Fourteenth Amendment rights. This was “no question of taste; it is no question of society, . . . it is simply a question of equal rights.” In the same speech he invoked “the binding character of the Declaration of Independence in its annunciation of fundamental principles.” Why was separation a denial of equal rights? In a second speech after the Christmas recess, quoting extensively from letters he had received, he argued that separate accommodations were in fact inferior ones; the insult, inconvenience, and discomfort endured by black citizens constituted inferior treatment. As for schools, “the indignity offered to the colored child is worse than any compulsory exposure . . . he is trained under the ban of inequality. . . . He is pinched and dwarfed while the stigma of color is stamped upon him.” Therefore, the bill was a valid exercise of the enforcement power.

Sumner met strong, sustained, and ultimately successful opposition, much of it from Trumbull. The Illinois senator had spoken of the need to remove “incidents of slavery” and “badges of servitude,” but he did not agree that separate accommodations and schools were such badges. He argued that the bill was not within Congress’ power. He said of education, public accommodations, and jury service just what Moulton had said of marriage. They were not civil rights, and thus were not guaranteed by the Fourteenth Amendment. Trumbull’s version of civil rights was much narrower than some we shall examine. “I understand by the term ‘civil rights’, rights appertaining to the individual as a free, independent citizen; and what are they? The right to go and come; the right to enforce contracts; the right to convey his property; the right to buy property—those general rights that belong to man-

kind everywhere.” The real purpose of Sumner’s bill, “that has been misnamed a civil rights bill,” was to grant not legal equality but “social rights”; it was a “social equality” bill.\footnote{Globe, January 19, 1866, and May 8, 13, and 14, 1872, S., pp. 319, 3189–91, 3361, 3421; Avins, pp. 108, 641–42, 652.}

So two of the leading figures of the Thirty-ninth Congress had a fundamental difference of opinion about what the amendment they had enacted meant. But what did Trumbull mean by “social equality”? Arthur Boreman of West Virginia expanded on this theme: “... here it is proposed to require that ... all shall be allowed to associate together in the same schools.” Francis Blair, a Missouri Democrat, had invoked “those laws which are too high to be perverted by Radical legislation, those laws which separate the races and give to each one its appropriate place on the continent.”\footnote{Globe, May 14, and 9, 5., pp. 3422, 3253; Avins, pp. 652, 644.} So social equality had to do with mingling together, not with rights.

Sumner had enough supporters to continue the debate for four months, until, on May 14, the Senate deleted the school and jury clauses from the rider. The House took no action on it at all, though its debate also stressed the distinction between legal and social equality.\footnote{Globe, May 21 and 29, H., app. pp. 597–99; Avins, pp. 656–57.} The amendment died, but the amnesty bill was passed.

Sumner reintroduced his original bill when the Forty-third Congress convened in December 1873, but he died in March 1874, while the bill was still in committee. In the elections that fall, the Republicans lost control of the House and lost significant strength in the Senate. Sumner was dead; Bingham, who had failed to be renominated for his seat, did not return; and when the bill came up again, it never had much of a chance. What became the Civil Rights Act of 1875 provided only that all be entitled to “full and equal enjoyment” of public facilities, with no enforcement powers.

The fact that Congress considered and rejected a bill requiring desegregation does not, of course, prove that it thought desegregation went beyond the scope of the Fourteenth Amendment. Clearly, however, some members did hold that opinion. Legislative interpretations of the amendment varied. Although Trumbull did not make the point clear in 1866, he apparently thought it did no more than enact his two bills. Berger’s interpretation may indeed fit him. Sumner, however, used language similar to that of Howard, Bingham, and Stevens back in 1866. He invoked the Declaration to argue that some forms of segregation denied equal protection. Within five years after ratification, therefore, two conflicting constitutional theories had developed.
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What rights were included? One was the right not to be branded, stigmatized, subjected to inferior treatment, relegated to a status inferior to that of other citizens; not, at least, on the basis of race. There is, however, some confusion as to what constitutes that kind of treatment. What else? Berger argued that the only rights protected were those listed in the Civil Rights Bill and some, but by no means all, of those in Corfield v. Coryell, which had been an obscure case before the Reconstruction Congress got onto it. In that case, Justice Bushrod Washington, riding circuit, had discussed the privileges-and-immunities clause of Article IV, section 2:

What these fundamental rights are, it would perhaps be more tedious than difficult to enumerate. They may, however, be comprehended under the following general heads: Protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of any one state to pass through, or to reside in any other state . . .; to claim the benefits of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property . . . may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges intended to be fundamental. . . .

As we have seen, Berger's scholarship is defective, and the rights listed seem far broader than he admits, but his conclusion that the listed rights are included in the Fourteenth Amendment is disputed by no one. Others have wanted to go much further. Prominent among them is Justice Hugo Black, who argued throughout most of his thirty-four years on the Court that the amendment had "incorporated" the Bill of Rights; that is, that it made all of the first eight amendments binding on the states. Black's first exposition of this theory, in a dissent in Adamson v. California in 1947, stimulated some scholarly reaction, much of it negative. Charles Fairman wrote, "In his contention that Section I was intended to impose amendments I to VIII upon the states, the record of history is overwhelmingly against him." But William Winslow Crosskey, writing in the 1950s, and Alfred H. Kelly, writing in the 1960s, found more to criticize in Fairman's article than in Black's opinion.

74 6 Fed. Cas. 546, 551-52 (1823).
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Who is right? The frustrating answer has to be: Neither Black nor Fairman. Certainly Justice Black, though he cited accurately, cited selectively. Two major speeches, however, explicitly support his thesis. Howard’s introductory speech of May 23, 1866, quoted the same language from Corfield, which I have quoted, and continued:

Such is the character of the privileges and immunities spoken of in [IV.2]. . . . To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight Amendments of the Constitution. . . .

Now, sir, there is no power given in the Constitution to enforce and to carry out any of these guarantees. They are not powers granted by the Constitution to Congress, and of course do not come within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying out the foregoing or granted powers, but they stand simply as a bill of rights . . . while at the same time the states are not restrained from violating the principles embraced in them except by their own local constitutions. . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States, and compel them at all times to respect these great fundamental guarantees.76

Black also quotes Bingham, Howard’s counterpart in the House and the author of the amendment, at length. Only once, however, did Bingham say explicitly what Howard said. Inconveniently though not fatally for Black’s argument, Bingham did not say it until 1871, during a debate on the Ku Klux Klan Act.77 When asked why he had changed the language of Section 1 from the “necessary and proper” draft of February 3 to its final form, he replied:

I had read—and that is what induced me to attempt to impose by constitutional limitations upon the powers of the States—the great decision of Marshall in Barron v. the Mayor and City of Baltimore. . . .

In reexamining that case of Barron, Mr. Speaker, . . . I noted and apprehended as I never did before, certain words in that opinion of Marshall. Referring to the first eight articles of amendment to the Constitution of the United States, the Chief Justice said, “Had the framers of those amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the Constitution, and have expressed that intention.”

Acting upon this suggestion, I did imitate the framers of the original Constitution. . . . I prepared the provision of the first section of the fourteenth amendment . . . [He recited it.] Permit me to say that the privileges and immunities of citizens of the United States . . . are chiefly de-

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fined in the first eight amendments to the Constitution of the United States. [He recited them.]

... These eight articles I have shown never were limitations upon the power of the states, until made so by the fourteenth amendment.  

Fairman dismisses this argument as hindsight, but his dismissal is too peremptory. Much of his own “overwhelming evidence” consists of speeches by Bingham and Stevens during the debates of 1866. What these speeches suggest is not what Fairman apparently meant to argue, that Black went too far, but that he did not go far enough. This is not surprising, for the direction in which the passages led is one in which he would have been loath to go. Black’s incorporation doctrine, like his absolutist interpretation of the Bill of Rights, was intended to restrain judges, to keep them from writing their own views of justice into the Constitution. The problem is that that is exactly what such people as Bingham and Stevens were trying to do with their views. Again and again they argued that the Fourteenth Amendment protected not primarily the first eight amendments, but natural rights; and as the 1859 speech indicates, natural rights had a lavish scope.

Bingham restated this argument in the last major House speech before the vote:

There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power of the people, the whole people of the United States, to do that by congressional enactment which hitherto they have not had the power to do . . . ; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction.

The Radicals were indefinite about just what rights were protected, and it appears that they were not eager to run the risk of excluding much. For Kelly, the evidence against Black was chiefly

the general aura of vagueness that surrounded the passage of the Fourteenth Amendment in the two Houses. The debate was conducted almost entirely in terms of grand symbolism—that of the Declaration of Independence in particular—and remarkably little in terms of the specific legal implications of the new amendment. There was an obvious political reason for this: the Radical Republicans were trying to reassure the mod-

Fairman, like Berger, regarded the amendment's principal framers as muddled thinkers. A tone of disdain pervades his article. And indeed, we have caught Bingham and Stevens in one error, the effort to distinguish between disabilities of Negroes and those of married women. But it was their amendment. With help from Sumner and Trumbull, they wrote it; with help from Howard, they got it passed. Their views have to be given great weight. We cannot dismiss them simply because their arguments were not always discriminating or their thoughts precise. Discrimination and precision may not be the most necessary attributes for authors of a bill of rights, especially a bill that includes and allocates the power to enforce those rights.

The debates can befuddle contemporary readers. We have been warned repeatedly not to write our own theories of natural law into the Constitution. But the authors of the Reconstruction amendments intended either to enact their natural law theories into the Constitution or to make clear beyond doubt that the Constitution already contained those theories. Howard Jay Graham has written sensibly about this confusion:

Sharp appreciation of the pitfalls inherent in the meaning of "constitutionality," "unconstitutionality," "law," and "amendment" comes most naturally to those who have had the benefits of well-established tradition in these fields. This appreciation was what the Civil War generation lacked, and it lacked it because judicial control still was largely hypothetical, because the Constitution had not been amended since 1804, because law as a whole was much simpler, and because the natural rights-social compact theory still dominated nearly everyone's thinking.

Comparison of almost any of Bingham's speeches with the Barron or Prigg opinions will illustrate this point. It was not that the Radicals were muddled thinkers. They were just not legalistic thinkers, though some of them were lawyers, yet they refused to leave law and the Constitution to lawyers and judges. This was appropriate thinking, for there was another obvious political reason to be vague. The amendment not only gave interpretive powers to the courts, but, more important, gave legislative powers to Congress. The Radicals may not have been much concerned with preventing Congress from removing

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80 "Clio and the Court," p. 134.
81 See Crosskey, "Charles Fairman," p. 11.
82 Everyman's Constitution, p. 323.
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the disabilities of married women and legalizing intermarriage. Legislative powers are broad powers, and thus they were conceived.

But the debates on Sumner’s doomed civil rights bill reveal that not everyone conceived the powers or the rights granted so broadly as the Radicals did. Trumbull’s interpretation was narrower, and it was his amendment, too. Without the votes of the moderates, the bill could not have been passed. Their version of it demands attention. But there is no reason to prefer Trumbull’s interpretation, as Berger does, either because Trumbull thought more like a twentieth-century lawyer than the Radicals did or because he had fewer enemies than they.

Clearly, all the ambiguities and complexities inherent in studying legislative intent are present in force in the particular case of the Fourteenth Amendment. As Earl Warren said, the evidence is inconclusive.83 No statements about its meaning can be absolute and categorical.

Conclusion

Finally, after this long investigation, what can be said about that meaning? Confusion and contradiction abound, but some general conclusions are possible. The members of Congress who were most prominent in enacting the Fourteenth Amendment evinced a belief in something very similar to what Ronald Dworkin has called a right to “treatment as an equal”: a right to equal respect and concern, derived more or less directly from the Declaration of Independence, which depended on the individual’s very status as a human being. It was this right that prevented inferior treatment, not some notion that the freed slaves were equal to whites in ability and thus deserved equal status. This equality seemed to belong to all human beings, but what it entailed in terms of treatment, for blacks or for anyone else, was not made clear.

Not only did the Fourteenth Amendment establish this right, but it also guaranteed some specific individual rights. There was little agreement on what rights, out of an infinite possible list of interests, were included and what were not, but it is clear that the list was incomplete, though not infinite. Some interests were included and some excluded. And since the amendment contained a guarantee of equality, those rights that were included were for all persons equally. This is about as

exact a set of conclusions as it is possible to draw. Therefore, it is easy
to understand, even to share, Fairman’s and Berger’s irritation.

The “natural law” component of the debates is especially troubling. If the Radicals could argue that their ideas of natural law belong
in the Constitution, so can others. In the nineteenth century, opposing
views of natural law abounded, as they do today. The debates them-
selves contain some conflicting views. The reader will recall that Sen-
ator Blair implied in 1874 that natural law required racial segrega-
tion. Arguing from natural law principles opens up the possibility that
others may do so, too, with untoward results. Although there is prob-
ably no such thing as one’s personal, in the sense of idiosyncratic, view
of natural law—any such views are picked up from the larger soci-
ety—it is always difficult to show that the principles one accepts are
more natural than someone else’s principles.

Another problem is that, since giving these guarantees any force
soon became, for all practical purposes, the task of the courts, this
open-ended legislative history gives vast discretion to judges. This lat-
titude may be disquieting to those who are wary of countermajoritar-
ian bodies. The conclusion that the Radicals put their version of nat-
ural law into the Constitution does not give any judge the power to
do the same with his or her own theory. Nor is it likely that the Four-
teenth Amendment was meant to give the courts power to do every-
thing Congress could do under Section 5. But while no one wants
courts to amend the Constitution, neither do we want them to nullify
amendments that have been passed.

I have maintained that, as valuable as legislative history is in guid-
ing constitutional interpretation, past intent cannot dictate present de-
cisions. It would surely be difficult to derive many commands from
the Fourteenth Amendment’s history, since the guarantees found there
are so broad and general that they could be used to support almost
anything. But one great value of this history is that the debates suggest
other sources of meaning. Since members of Congress often spoke of
natural law, natural rights, and fundamental rights, interpreters are
encouraged to think about what these concepts meant to this Con-
gress, and to try to discover what concepts of natural law and rights
were familiar to them. Chapters 2 and 3 indicated that such discovery
is not difficult. Since much of the debate links the Fourteenth Amend-
ment to the Bill of Rights, we are encouraged to look to these guar-
antees. Both extratextual and structural modes of interpretation seem
appropriate. But as Chapter 5 will show, the Supreme Court has pre-

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*See Ely, Democracy and Distrust, chap. 3.
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ferred clause and precedent, choices that have produced consistent results.

So what emerges from congressional debates is, first, a notion of equality based on natural entitlement to rights, derived from the Declaration; second, a concern with protecting certain rights, including but not limited to life, liberty, and property; and third, an intention to grant people equality under law in order to give them protection from those who would oppress and even kill them. As Chapter 5 will show, what emerges from just over a century of adjudication is far less. If current doctrine is to stand, it must rest on foundations other than legislative history. It is time, now, to turn to court decisions to see how that doctrine developed, and what those foundations might be.