Legislative History of the Fourteenth Amendment In the 39th Congress.

The history of the Fourteenth Amendment in Congress is nearly the history of the entire first session of the 39th Congress. The better part of that session was devoted to discussing the subject matter of the Amendment, in connection with the proposed Amendment itself, with other measures or in general debate.

The Freedmen's Bureau Bill.

Having convened on December 4, 1865, the 39th Congress, two months later, on February 9, 1866, sent to the President its first major reconstruction measure, a bill enlarging the powers of the Freedmen's Bureau.[1] Section 7 of the Freedmen's Bureau Bill provided:

> "That whenever in any State or district in which the ordinary course of judicial proceedings has been interrupted by the rebellion, and wherein, in consequence of any State or local law, ordinance, police or other regulation, custom, or prejudice, any of the civil rights or immunities belonging to white persons, including the right to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right of bearing arms, are refused or denied to negroes . . . or any other persons, on account of race, color . . . or wherein they or any of them are subjected to any

[1] Cong. Globe, 39th Cong., 1st Sess. 416, 421, 688, 748. In these footnotes, citations to page numbers, without more, which appear hereafter refer to Cong. Globe, 39th Cong., 1st Sess.

> other or different punishment, pains, or penalties, for the commission of any act or offense than are prescribed for white persons . . . it shall be the duty of the President . . . to extend military protection and jurisdiction over all cases affecting such persons so discriminated against."

On the passage of this bill (on January 25 in the Senate [2] and February 6 in the House [3]), the Republican Party, with one exception in the House, stood together.[4] Senators Norton of Minnesota and Van Winkle of West Virginia, who, with Senator Cowan of Pennsylvania, now absent, voted against the Civil Rights Bill and against the Fourteenth Amendment, were recorded for this bill. So was Senator Doolittle of Wisconsin, who was absent for the vote on the Civil Rights Bill but who voted against the Fourteenth Amendment. This notwithstanding the fact that the coverage of this bill depended on the meaning of the terms "civil rights or immunities." And, indeed, their breadth gave rise to some apprehensions in the course of what was, however, not a very searching or exhaustive debate.[5] Representative Dawson of Pennsylvania, a Democrat, accused the sponsors of the bill of hugging to their bosoms "the phantom of negro equality . . . ." The Republicans, he said,

> "hold that the white and black races are equal. This they maintain involves and demands social equality; that negroes should . . . be admitted to the same tables at hotels, should be permitted to occupy the same seats in railroad cars and the same pews in churches; that they should be allowed . . . to sit on juries, to vote . . . . Their children are to attend

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[2] P. 421.

[3] P. 688.

[4] The exception in the House was Lovell H. Rousseau of Kentucky. There were some absentees, among whom Edgar Cowan in the Senate was notable.

[5] Pp. 318–319.

> the same schools with white children, and to sit side by side with them. Following close upon this will, of course, be marriages between races . . . ."[6]

There are a number of possible explanations for the votes of conservative Republicans in favor of the Freedmen's Bureau Bill. One rests on the fact that this bill drew constitutional validity from a source—the war power—not open to the Civil Rights Bill, which applied throughout the country. (But this would not explain votes in favor of the Freedmen's Bureau Bill and against the Fourteenth Amendment.) Constitutional scruples to the side, the fact that the bill did not apply in the North meant that there was no occasion to worry about federal interference with practices and legislation in that part of the country, which was where voters lived. Finally—though this is a consideration which is fully applicable only to the Senate vote on January 25—some of the gentlemen voting for the Freedmen's Bureau Bill may have been motivated by the feeling that a struggle between the President and the Radical Congress could still be avoided. Some conservative Republicans may well have thought that if they gave in to Radical opinion on the Freedmen's Bureau Bill their position would be strengthened in opposing further Radical measures. They had reason to believe that the President would pursue the same strategy. It was for a time commonly expected that Mr. Johnson would sign the Freedmen's Bureau Bill.[7] The President, however, vetoed it on February 19, and the Senate, on the following day, failed to override.[8]

The Civil Rights Bill.

On January 29, 1866, before passage in the House of the Freedmen's Bureau Bill, Mr. Trumbull of Illinois

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[6] P. 541.

[7] See White, The Life of Lyman Trumbull (1913), 260–261.

[8] Pp. 915–917, 943.

brought up in the Senate the Civil Rights Bill. As reported, Section 1 of this bill referred generally to "civil rights or immunities," as had Section 7 of the Freedmen's Bureau Bill. It 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; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make or enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding." [9]

In opening debate, Mr. Trumbull, a moderate Republican though currently allied with the Radicals, said that the bill was the most important measure to be taken up by the Senate since the Thirteenth Amendment, for it "is intended to give effect to that [Amendment] and secure to all persons within the United States practical freedom." It was, he said, a question of securing "privileges which are essential to freemen." He reviewed the Slave Codes which had fallen with the enactment of the Thirteenth Amendment. They had restricted the movement of Negroes; had forbidden them to own firearms; had punished the exercise by them of the functions of a minister of the Gospel; had excluded them from other occupations; and had made it "a highly penal offense for any

[9] P. 474.

person, white or colored, to teach slaves. . . ." These Slave Codes, Mr. Trumbull said, had fallen. But the Black Codes of the South had taken their place, and they "still impose upon [Negroes] the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations . . . ." Section 1, he continued, was the heart of the bill; it was there that "civil liberty" was secured to the Negro.

Mr. Trumbull tried to explain the phrase, "civil liberty." He said it was the liberty retained by the individual after his "natural liberty" had been necessarily circumscribed to make possible life in society with his fellows. It was of the essence of civil liberty, Mr. Trumbull said, that laws be brought to bear on all persons equally, "or as much so as the nature of things will admit." He then spoke of the privileges of a citizen as defining the nature of civil liberty, using passages out of *Campbell* v. *Morris,* 3 H. & McH. 535 (Md. 1797); *Abbot* v. *Bayley,* 6 Pick. 89 (Mass. 1827); and *Corfield* v. *Coryell,* 6 Fed. Cas. 546, No. 3230 (C. C. E. D. Pa. 1823), which, however, themselves gave no comprehensive definition. Under this Section, he said, Negroes would be entitled to "the rights of citizens. . . . The great fundamental rights set forth in this bill: the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property. These are the very rights that are set forth in this bill as appertaining to every freeman." [10]

Mr. McDougall of California, a Democrat, was not satisfied. What, again, was meant by "civil rights?" Mr. Trumbull answered by reading the enumeration of rights in Section 1. That was the definition. Was there

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[10] Pp. 474–475.

any reference to political rights, Mr. McDougall pursued. No, said Mr. Trumbull.[11]

Mr. Saulsbury, a Democrat from Delaware who once described himself wistfully as perhaps the last slaveholder in the United States, rose to denounce the bill "as one of the most dangerous that was ever introduced into the Senate of the United States." He attacked its constitutionality, then asked whether the bill conferred the right to vote. Certainly, he said, Mr. Trumbull may have no intention of conferring that right. But:

> "The question is not what the Senator means, but what is the legitimate meaning and import of the terms employed in the bill. . . . What are civil rights? What are the rights which you, I, or any citizen of this country enjoy? . . . [H]ere you use a generic term which in its most comprehensive signification includes every species of right that man can enjoy other that those the foundation of which rests exclusively in nature and in the law of nature." [12]

Debate reopened in the Senate the next day. It centered on the intricacies of the question of citizenship,[13] to deal with which an amendment was offered from the floor and eventually adopted.[14] It is not here material. Mr. Cowan of Pennsylvania, for whom a complete break with the Republican leadership was imminent, then addressed himself to broader matters. He said:

> "Now, as I understand the meaning and intent of this bill, it is that there shall be no discrimination made between the inhabitants of the several States of this Union, none in any way. In Pennsylvania, for the greater convenience of the people, and for the

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[11] P. 476.
[12] Pp. 476–477.
[13] Pp. 497–499.
[14] 14 Stat. 27.

> greater convenience, I may say, of both classes of the people, in certain districts the Legislature has provided schools for colored children, has discriminated as between the two classes of children. We put the African children in this school-house and the white children over in that school-house, and educate them there as best we can. In this amendment [the Thirteenth] to the Constitution of the United States abolishing slavery to break up that system which Pennsylvania has adopted for the education of her white and colored children? Are the school directors who carry out that law and who make this distinction between these classes of children to be punished for a violation of this statute of the United States? To me it is monstrous." [15]

It was quite a different thing, Mr. Cowan continued, to grant to everyone "the right to life, the right to liberty, the right to property." This he would be willing to do. But it would have to be done by amendment to the Constitution.[16] Mr. Cowan then proceeded to object to the punitive provisions of the bill. The portion of his remarks quoted above went unanswered.

After Mr. Howard, the Radical from Michigan, had spoken briefly, Reverdy Johnson, Democrat of Maryland, one of the great lawyers of his time, offered an analysis of the language of the bill. The States, in the exercise of their police power, had always, and had, in Mr. Johnson's opinion, properly, taken account of the prejudices of the people. When legislators failed to do that, they created the sort of situation which had resulted from the passage of the Fugitive Slave Act. They had on their hands unenforceable legislation. "I mention that," said Mr. Johnson, "for the purpose of applying it to one of the provisions of this bill." Most States had legislated against miscegenation. Yet this bill would wipe all such legisla-

[15] P. 500.
[16] *Ibid.*

tion off the books. Mr. Trumbull and William Pitt Fessenden of Maine, like Mr. Trumbull not a Radical though allied with the Radicals, interrupted Mr. Johnson to dispute this interpretation. Negroes could not marry whites, and whites could not marry Negroes, they argued; hence there could be no discrimination in an antimiscegenation statute. But neither Mr. Fessenden nor Mr. Trumbull answered Mr. Johnson's broader point, which was that even if his interpretation was in error, it was not "so gross a one that the courts may not fall into it." [17]

Debate in the Senate, when resumed, on January 31, turned wholly on the citizenship question. Insofar as it did not concern Indians not taxed, it is not unfairly characterized by Mr. Clark's (Rep., N. H.) summary of the reason Garrett Davis, Kentucky's unreconstructed Democrat, thought that Negroes were not and could not be citizens. Said Mr. Clark: "[I]t only comes back to this, that a nigger is a nigger." Said Mr. Davis: "That is the whole of it." [18]

Debate on February 1 again dealt with citizenship. Mr. Morrill of Maine delivered a Radical speech, notable for its espousal of an uncompromising theory of the equality of the races.

> "All the nations of the earth and all the varieties of the races of the nations of the earth have gathered here. . . . Here, sir, upon the grand plane of republican democratic liberty, they have undertaken to work out the great problem of man's capacity for self-government without stint or limit." [19]

There followed, that day and into the next, a long harangue by Mr. Davis, during the course of which Mr. Trumbull was provoked to say in the same breath both that "the very object of this bill is to break down all discrimination between black men and white men" and that

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[17] Pp. 504–506.
[18] P. 529.
[19] P. 570.

"[t]he bill is applicable exclusively to civil rights." [20] But the provocation was great, for Mr. Davis had been arguing that the bill discriminated against white men in that it created special rights for Negroes, and Mr. Trumbull wished to point out that the idea of such discrimination was foreign to the objectives of the bill.

As the vote was scheduled for that day—February 2—the pace of debate quickened. Mr. Wilson of Massachusetts, a Radical, noted, as had Mr. Trumbull, that a number of legislatures in "reorganized" States had enacted so-called Black Codes, some of which Union generals in command in those States had found it necessary to abrogate. It was because of the existence of these Codes that passage of the bill was called for. Mr. Trumbull, in closing for the proponents, stressed that the purpose of the bill was relatively narrow. He thought Mr. Cowan agreed with him that Negroes were entitled to equal civil rights. Mr. Cowan, who was about to vote against the bill and who had already said much and was to say yet more as the session progressed about the inferior place of the Negro in a society governed for and by the Caucasian race, replied, "Certainly." [21]

Having listened to this final note of confusion, the Senate proceeded to vote. The definite, public breach between President and Congress and between Radicals and conservatives in the Republican Party was to be marked by the veto of the Freedmen's Bureau Bill, which was still 17 days away.[22] However, the circumstances were somewhat different from those which had faced the Senate on January 25, when it passed the Freedmen's Bureau Bill, and on this vote (which was 33 to 12) the group of conservative Republican Senators who were to resist Radical pressure and stand firmly against the Four-

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[20] P. 599.

[21] Pp. 603–605.

[22] Thaddeus Stevens in the House, however, already spoke of the President in ominous tones. *E. g.*, pp. 536–537.

teenth Amendment was substantially formed. Senators Cowan, Norton of Minnesota and Van Winkle of West Virginia voted nay.[23] They were to be joined in opposition to the Fourteenth Amendment by Mr. Doolittle of Wisconsin, very close to the President, who was absent for this vote.

After the vote, on February 8, Senator John Sherman of Ohio, allied with the Radicals, but a moderate man, rose in the Senate to speak in justification of his votes in favor both of the Freedmen's Bureau Bill and of the Civil Rights Bill. Section 1 of the latter, he said,

> "defines what are the incidents of freedom, and says that these men must be protected in certain rights, and so careful is it in its language that it goes on and defines those rights, the right to sue and be sued, to plead and be impleaded, to acquire and hold property, and other universal incidents of freedom. . . . I ask the honorable Senator from Kentucky [Mr. Guthrie], with all his knowledge of the feeling and excitement created by this contest, whether he is willing to trust the natural rights of these freedmen to the rebels of Mississippi, Alabama, and other southern States?" [24]

Mr. Sherman went on to cite the Black Codes as indications of evils that had to be cured.[25] Here was a representative narrow view of the Civil Rights Act, its purpose and its accomplishment.

Representative James A. Wilson of Iowa, from the Judiciary Committee, managing the Civil Rights Bill in the House, brought it up there on March 1.[26] This was after the President's veto of the Freedmen's Bureau Bill had been upheld. It was also shortly after the House had considered and recommitted the first project for a

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[23] Pp. 606–607.
[24] P. 744.
[25] Pp. 744–745.
[26] P. 1115.

constitutional amendment dealing with civil rights to be reported out by the Joint Committee on Reconstruction.

Having discussed the provision of Section 1 of the bill which bestowed federal citizenship, Mr. Wilson addressed himself to the rest of that Section, which still included the general language stating that "there shall be no discrimination in civil rights or immunities." Mr. Wilson said:

> "This part of the bill will probably excite more opposition and elicit more discussion than any other; and yet to my mind it seems perfectly defensible. It provides for the equality of citizens of the United States in the enjoyment of 'civil rights and immunities.' What do these terms mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed. Do they mean that all citizens shall vote in the several States? No. . . . Nor do they mean that all citizens shall sit on the juries, or that their children shall attend the same schools. These are not civil rights or immunities. Well, what is the meaning? What are civil rights? I understand civil rights to be simply the absolute rights of individuals, such as—
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> > " 'The right of personal security, the right of personal liberty, and the right to acquire and enjoy property.' 'Right itself, in civil society, is that which any man is entitled to have, or to do, or to require from others, within the limits of prescribed law.' *Kent's Commentaries,* vol. 1, p. 199.
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> "But what of the term 'immunities?'. . . . It merely secures to citizens of the United States equality in the exemptions of the law. A colored citizen

> shall not, because he is colored, be subjected to obligations, duties, pains . . . . This is the spirit and scope of the bill, and it goes not one step beyond." [27]

Mr. Wilson then quoted the "definition" of "privileges and immunities" contained in *Corfield* v. *Coryell, supra,* to demonstrate what this bill was meant to secure. Then:

> "Mr. Speaker, if all our citizens were of one race and one color . . . [t]his bill would be almost, if not entirely, unnecessary, and if the States . . . would but shut their eyes to these differences [of color] and legislate, so far at least as regards civil rights and immunities, as though all citizens were of one race and color . . . . But such is not the case . . . .
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> ". . . Laws barbaric and treatment inhuman are the rewards meted out by our white enemies to our colored friends. We should put a stop to this at once and forever. . . ." [28]

Mr. Wilson was followed by Henry J. Raymond of New York, publisher of the New York Times and a leading moderate Republican in the House, who, though he was absent for the vote on passage of the Civil Rights Bill, later voted to uphold the President's veto of it; but who, later still, voted for the Fourteenth Amendment. Mr. Raymond pointed out that he had some time before introduced a bill "aiming at precisely the same general object contemplated in the bill now before the House, and asserting the same great principle." He wanted it read so that it could be taken account of in the discussion. Mr. Raymond's bill aimed at "precisely the same general object" by making Negroes citizens and then declaring that they were "entitled to all rights and privileges as such." [29]

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[27] P. 1117.
[28] P. 1118.
[29] P. 1120.

Mr. Shanklin of Kentucky, a Democrat, asked Mr. Wilson to allow an amendment stating explicitly that nothing in the bill conferred the right to vote. Mr. Wilson refused to agree to such a provision, "as it is in the bill now." [30]

The next speaker was Andrew Jackson Rogers, Democrat of New Jersey, a member of the Joint Committee on Reconstruction, and, though under 40, an important figure in the 39th Congress. Because of his occasional vehemence in debate, in this time of suspected loyalties, some of the House Democrats resisted Mr. Rogers' leadership, and the Radicals, on the other hand, were often pleased to act on the bland assumption that Mr. Rogers was the official Democratic leader in the House. He was not that, yet he was perhaps the most prominent Democrat in the House. A few days previously, Mr. Rogers had had occasion to take note of the Civil Rights Bill passed by the Senate. He had quoted that bill's Section 1, then said:

> "Negroes should have the channels of education opened to them by the States, and by the States they should be protected in life, liberty, and property, and by the States should be allowed all the rights of being witnesses, of suing and being sued . . . .
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> "Who gave the Senate the constitutional power to pass that bill guarantying equal rights to all?" [31]

Apparently Mr. Rogers believed that the Civil Rights Bill dealt with Negro education. He left no doubt of that speaking in this debate:

> "In the State of Pennsylvania there is a discrimination made between the schools for white children and the schools for black. The laws there provide

[30] *Ibid.*

[31] Cong. Globe, 39th Cong., 1st Sess., App. 134.

> that certain schools shall be set apart for black persons, and certain schools shall be set apart for white persons. . . . [T]here is nothing in the letter of the Constitution which gives . . . authority to Congress [to interfere] . . . .
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> ". . . As a white man is by law authorized to marry a white woman, so does this bill compel the State to grant to the negro the same right of marrying a white woman . . . .
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> "All the rights that we enjoy, except our natural rights, are derived from Government. Therefore, there are really but two kinds of rights, natural rights and civil rights. This bill, then, would prevent a State from refusing negro suffrage under the broad acceptation of the term 'civil rights and immunities.' " [32]

Debate continued for two more days. Messrs. Cook of Illinois and Thayer of Pennsylvania, Radicals, pointed to the Black Codes as the evil the bill was directed against.[33] Mr. Thayer went on to answer the "denunciation" by Mr. Rogers:

> ". . . [The bill] is an enactment simply declaring that all men born upon the soil of the United States shall enjoy the fundamental rights of citizenship. What rights are these? Why, sir, in order to avoid any misapprehension they are stated in the bill." [34]

This could not possibly be read to confer suffrage,[35] Mr. Thayer continued, and then went on to argue the constitutionality of the measure.

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[32] Pp. 1120–1122.
[33] Pp. 1123–1125, 1151.
[34] P. 1151.
[35] *Ibid.*

But Mr. Thornton of Illinois, for the Democrats, pressed the attack:

> "It is said that the words 'civil rights' do not include the right of suffrage, because that is a political right. . . . I do not assume . . . that [they] do . . . but with the loose and liberal mode of construction adopted in this age, who can tell what rights may not be conferred by virtue of the terms as used in this bill? Where is it to end? Who can tell how it may be defined, how it may be construed? Why not, then, if it is not intended to confer the right of suffrage upon this class, accept a proviso that no such design is entertained?" [36]

Mr. Windom of Minnesota, a Radical, after bandying some political pleasantries with the other side on the subject of Mr. Rogers' leadership, restated the line of the majority: The bill did not confer political or social rights; it conferred only such rights as the Black Codes demonstrated had to be protected by the general government.[37] Mr. Wilson, the manager of the bill, nevertheless now moved to amend by adding as a new section the following language:

> "That nothing in this act shall be so construed as to affect the laws of any State concerning the right of suffrage."

Mr. Wilson said:

> "Mr. Speaker, I wish to say [that t]hat section will not change my construction of the bill. I do not believe the term civil rights includes the right of suffrage. Some gentlemen seem to have some fear on that point."

The House adopted the amendment by voice vote.[38]

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[36] P. 1157.
[37] Pp. 1159, 1160.
[38] P. 1162.

Consideration of the bill was not resumed till five days later. At that time Mr. Bingham of Ohio moved to recommit with instructions to strike the general language at the beginning of Section 1 which prohibited "discrimination in civil rights or immunities." [39] He did not speak that day. The first to speak was Mr. Broomall of Pennsylvania, a Radical. The bill, he said, secured those rights which the South had denied to the Negro: speech, transit, domicil, to sue, to petition and habeas corpus.[40] Mr. Raymond took the floor to say again that he favored conferring citizenship upon the Negro and thought that could be done constitutionally. He favored also conferring on the Negro those rights which flowed from citizenship: the right of free passage, to bear arms, to testify, "all those rights that tend to elevate him and educate him for still higher reaches in the process of elevation." Giving the Negro the rights of citizenship "will teach all others of his fellow-citizens of all races to respect him more, and to aid him in his steps for constant progress and advancement in the rights and duties that belong to citizenship." [41] But Mr. Raymond deemed the enforcement provisions of the bill to be unconstitutional.

Mr. Delano of Ohio, a regular Republican who eventually voted for passage and to override the President's veto, voiced some doubts. He declared his constitutional scruples might be satisfied if the general civil rights language at the beginning of Section 1 and the enforcement provisions were taken out of the bill. But he addressed himself to other provisions as well. He asked Mr. Wilson whether the language in Section 1 entitling Negroes "to full and equal benefit of all laws and proceedings for the security of person and property *as is enjoyed by white citizens*" (the italicized phrase was not in the bill as passed by the Senate but was added in committee in the

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[39] Pp. 1266, 1271.
[40] P. 1263.
[41] Pp. 1266–1267.

House and appears in the statute as enacted) would not confer "upon the emancipated race the right of being jurors." Mr. Wilson thought not.[42] But Mr. Delano was not convinced:

> "I have no doubt of the sincerity of the gentleman, and . . . I have great confidence in his legal opinions . . . .
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> "But, with all this, I must confess that it does seem to me that this bill necessarily confers the right of being jurors . . . ." [43]

And Mr. Delano had another point:

> ". . . [W]e once had in the State of Ohio a law excluding the black population from any participation in the public schools or in the funds raised for the support of those schools. The law did not, of course, place the black population upon an equal footing with the white, and would, therefore, under the terms of this bill be void . . . ." [44]

Here Mr. Wilson broke in with, "I desire to ask the gentleman . . ." but Mr. Delano had no further time for interruptions and so a possible argument on this matter failed to materialize.

The next speaker, who went on at some length and was the last one of the day, was Mr. Kerr of Indiana, a Democrat. Power to enact this law was sought, he said, in the Amendment abolishing slavery, which, it was said, this bill implemented. But:

> "Is it slavery or involuntary servitude to forbid a free negro, on account of race and color, to testify against a white man? Is it either to deny to free negroes, on the same account, the privilege of engaging in certain kinds of business . . . such as retailing

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[42] Cong. Globe, 39th Cong., 1st Sess., App. 156–157.
[43] *Id.*, at 157.
[44] *Id.*, at 158.

> spirituous liquors? Is it either to deny to children of free negroes or mulattoes, on the like account, the privilege of attending the common schools of a State with the children of white men? . . ." [45]

These were matters, apparently, in Mr. Kerr's mind, with which the bill dealt. He himself favored letting Negroes testify and "providing facilities for the education of their children." But he thought Congress was powerless to attain these ends.[46] Mr. Kerr went on to comment on the vagueness of the terms employed in the bill:

> "What are [civil] rights? One writer says civil rights are those which have no relation to the establishment, support, or management of the Government. Another says they are rights of a citizen; rights due from one citizen to another, the privation of which is a *civil injury* for which redress may be sought by a *civil action*. Other authors define all these terms in different ways . . . . Who shall define these terms? Their definition here by gentlemen on this floor is one thing; their definition after this bill shall have become a law will be quite another thing." [47]

Discussion on the following day opened with an effort by Mr. Bingham, one of the leaders of the House, a Radical, though relatively independent for a Radical; he was to play a very prominent role in framing the Fourteenth Amendment. Mr. Bingham spoke in support of his motion to recommit with instructions to amend. He addressed himself to the general civil rights language which his proposal would strike. "What are civil rights?" Mr. Bingham asked. And he answered that

> "the term civil rights includes every right that pertains to the citizen under the Constitution, laws, and

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[45] P. 1268.

[46] P. 1268.

[47] Pp. 1270–1271.

> government of this country. . . . [A]re not political rights all embraced in the term 'civil rights,' and must it not of necessity be so interpreted?
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> ". . . [T]here is scarcely a State in this Union which does not, by its constitution or by its statute laws, make some discrimination on account of race or color between citizens of the United States in respect of civil rights." [48]

Mr. Bingham then referred to the rest of Section 1, stating that it tried to secure rights which should indeed be secured—something he had notably left unsaid about the provision he proposed to strike. But it was impossible to do what this bill would do except by constitutional amendment, and that held for all the provisions of Section 1, the general and the specific, with the exception of the sentence at the head which conferred citizenship. The Freedmen's Bureau Bill had been different because it would have applied only in territories under military occupation.[49] Mr. Bingham's objection to this bill was constitutional, and on the basis of that objection he voted against it even after the general language he disliked had been struck. But it is a fair conclusion that at this time Mr. Bingham considered the overly broad coverage of the bill with its general language unwise on policy grounds, and that he might have opposed it even if it had taken the form of a constitutional amendment.

Mr. Wilson spoke in answer to Mr. Bingham. The latter, he said,

> "tells the House that civil rights involve all the rights that citizens have under the Government . . . and that this bill is not intended merely to enforce equality of rights, so far as they relate to citizens of the United States, but invades the States to enforce equality of rights in respect to those things which

[48] P. 1291.

[49] Pp. 1291–1293.

> properly and rightfully depend on State regulations and laws. My friend . . . refers to those rights which belong to men as citizens of the United States and none other; and when he talks of setting aside the school laws and jury laws and franchise laws of the States by the bill . . . he steps beyond what he must know to be the . . . construction which must apply here . . . ." [50]

This misrepresented Mr. Bingham's statement at least to the extent of speaking explicitly of "school laws and jury laws," which Mr. Bingham had not done. Mr. Wilson went on:

> ". . . I find in the bill of rights . . . that 'no person shall be deprived of life, liberty, or property without due process of law.' I understand that these constitute the civil rights belonging to the citizens in connection with those which are necessary for the protection and maintenance and perfect enjoyment of the rights thus specifically named, and these are the rights to which this bill relates, having nothing to do with subjects submitted to the control of the several States." [51]

Mr. Bingham rose to complain generally, in one sentence, that "the gentleman from Iowa has taken advantage of me by misstating my position." [52] The voting then began. Mr. Wilson asked whether it was in order for him to accept Mr. Bingham's motion to recommit with instructions, which was in the form of an amendment to a motion of his own, made for tactical purposes in order to enable Mr. Wilson to control debate under the rules. He was told that he could accept Mr. Bingham's motion only by unanimous consent. "Mr. Stevens and others

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[50] P. 1294.
[51] *Ibid.*
[52] P. 1295.

objected." [53] Mr. Bingham's motion was then defeated by a large majority. But the House voted to recommit the bill without instructions. This vote was close: 82–70. Mr. Bingham, of course, voted to recommit. So did the Democrats, and moderates such as Mr. Raymond and Mr. Rousseau of Kentucky. So did a good many Radicals such as Mr. Morrill of Vermont and Mr. Shellabarger of Ohio, and even one of the leaders of the House, Mr. Schenck of Ohio. Thaddeus Stevens voted against and Mr. Wilson followed him, as did most Radicals.[54]

Mr. Wilson brought the bill back four days later, on March 13. He reported a committee amendment which struck from Section 1 the general language that had been attacked by Mr. Bingham and others. Mr. Wilson said:

> "Mr. Speaker, the amendment which has just been read proposes to strike out the general terms relating to civil rights. I do not think it materially changes the bill; but some gentlemen were apprehensive that the words we propose to strike out might give warrant for a latitudinarian construction not intended." [55]

This amendment was adopted by voice vote, as were a number of other unimportant ones. Mr. Wilson noted, in response to a question, that the bill as it now stood did not state that nothing in it would apply to the right of suffrage; but he thought that the striking of the general civil rights language made any such provision unnecessary. He then pressed for a vote. Mr. Bingham, Mr. Conkling and others asked that the bill be printed and allowed to lay over so gentlemen could read it again. Mr. Wilson would not give in, however, and the vote was taken. The majority in favor was large. Mr. Bingham

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[53] P. 1296.
[54] *Ibid.*
[55] P. 1366.

and five other Republicans were recorded against passage. Mr. Raymond and a few others did not vote.[56]

Two days later the bill was back in the Senate, and, on Mr. Trumbull's recommendation, the Senate concurred in all the House amendments. Garrett Davis made a speech attacking the bill once more, but there was no specific discussion of the amendment striking out the general civil rights language.[57]

The President vetoed the bill on March 27. In discussing Section 1, he recognized that the only rights safeguarded by it were those enumerated. He did not attack the Section on the basis of any alarmist "latitudinarian" construction. His objections were constitutional.[58]

There were no business sessions of the Senate for the next few days, Senator Solomon Foote of Vermont having died. Not till April 4 did the Senate reconsider the Civil Rights Bill. Mr. Trumbull made a long speech in answer to the veto message; it contained nothing new.[59] Reverdy Johnson replied the next day. This speech was addressed primarily to the constitutional issue. Mr. Cowan spoke at length in support of the veto message. So did Mr. Davis, who still maintained that the bill would abolish antimiscegenation statutes and mark the end of segregation in hotels and railroad cars and churches.[60] Finally the Senate passed the bill over the veto, five Republicans voting to uphold.[61] On April 9, the House took up the veto under a rule allowing no debate, and also overrode it. Seven Republicans, including Mr. Raymond, voted to uphold the President. Mr. Bingham was paired in support of the veto.[62]

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[56] P. 1367.

[57] Pp. 1413–1416.

[58] Pp. 1679–1681.

[59] Pp. 1755–1761.

[60] Pp. 1775–1780, 1782–1785; Cong. Globe, 39th Cong., 1st Sess., App. 182–183.

[61] P. 1809.

[62] P. 1861.

Fourteenth Amendment.

On February 13, 1866, Mr. Fessenden in the Senate and Mr. Bingham in the House introduced, from the Joint Committee on Reconstruction, a resolution proposing to amend the Constitution by adding to it an article as follows:

> "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States; and to all persons in the several States equal protection in the rights of life, liberty, and property." [63]

At this time the Freedmen's Bureau Bill had been sent to the President but not yet returned by him. The Senate had passed the Civil Rights Bill, but that bill had not yet been brought up in the House.

The Joint Committee on Reconstruction,[64] from which this proposal was reported, convened on January 6, 1866.[65] At the next meeting, on January 9, the Chairman, Senator Fessenden, suggested that before the former Confederate

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[63] Pp. 806, 813.

[64] The Committee, known popularly as the Committee of Fifteen, came into being under the Joint Resolution of December 13, 1865. Pp. 6, 30, 46–47. The terms of the Resolution were a poor forecast of the business with which the Committee was to deal. The Resolution instructed the Committee "to inquire into the condition of the States which formed the so-called Confederate States of America, and report whether they, or any of them, are entitled to be represented in either House of Congress, with leave to report at any time, by bill or otherwise." There were nine members from the House and six from the Senate, three of the total being Democrats: Representatives Stevens, Washburne of Illinois, Morrill of Vermont, Bingham of Ohio, Conkling of New York, Boutwell of Massachusetts, and Blow of Missouri, Republicans, and Grider of Kentucky and Rogers of New Jersey, Democrats; Senators Fessenden of Maine, Grimes of Iowa, Harris of New York, Howard of Michigan and Williams of Oregon, Republicans and Johnson of Maryland, Democrat.

[65] Kendrick, Journal of the Joint Committee on Reconstruction, 39.

States could be allowed to reenter the Union, not only would the question of the basis of representation have to be settled but "the rights of all persons [would have to be] amply secured, either by new provisions, or the necessary changes of existing provisions, in the Constitution of the United States, or otherwise." [66]

On January 12, the Committee met again and appointed a working subcommittee consisting of Mr. Fessenden and Thaddeus Stevens, Senator Howard of Michigan, a Radical, Mr. Conkling of New York, then in the House, who generally acted with the leadership, and Mr. Bingham.[67] Into the hopper of this subcommittee went the following draft, proposed by Mr. Bingham as an amendment to the Constitution:

> "The Congress shall have power to make all laws necessary and proper to secure to all persons in every state within this Union equal protection in their rights of life, liberty and property." [68]

From Mr. Stevens, in addition to a proposal on the basis of representation, came the following:

> "All laws, state and national, shall operate impartially and equally on all persons without regard to race or color." [69]

On January 20, Senator Fessenden, reporting to the full Committee from the Subcommittee, brought forth three proposed articles of amendment to the Constitution,

> "the first two as alternative propositions, one of which, with the third proposition, to be recommended to Congress for adoption:
>
> . . . . . .
>
> "Article A.
>
> "Representatives and direct taxes shall be apportioned among the several States within this Union,

[66] *Id.*, at 42.
[67] *Id.*, at 45–47.
[68] *Id.*, at 46.
[69] *Ibid.*

according to the respective numbers of citizens of the United States in each State; and all provisions in the Constitution or laws of any State, whereby any distinction is made in political or civil rights or privileges, on account of race, creed or color, shall be inoperative and void.

"Or the following:

"Article B.

"Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of citizens of the United States in each State; provided that, whenever the elective franchise shall be denied or abridged in any State on account of race, creed or color, all persons of such race, creed or color, shall be excluded from the basis of representation.

"Article C.

"Congress shall have 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." [70]

Mr. Stevens moved that Article C be severed from the other two, and this was done. He then moved that Article B be considered in preference to Article A. This too was done, and the Committee voted to report out Article B, with minor changes.[71] A proposal on the basis of representation, which did not confer suffrage, thus became the Committee's first product. It was doomed to defeat at the hands of Charles Sumner and others in the Senate, who wanted suffrage conferred on the Negro outright.

At the Committee's next meeting, on January 24, Article C was tackled. Various unsuccessful attempts

[70] *Id.*, at 50–51.

[71] *Id.*, at 51–53.

were made to tinker with the language dealing with political rights. Finally, by a vote of 7 to 5, it was decided to refer the proposal to a select committee consisting of Representatives Bingham, Boutwell of Massachusetts, a Radical, and Rogers for redrafting.[72] Three days later, Mr. Bingham reported it out in this form:

> "Congress shall have power to make all laws which shall be necessary and proper to secure all persons in every state full protection in the enjoyment of life, liberty and property; and to all citizens of the United States in any State the same immunities and also equal political rights and privileges." [73]

Equal protection had become full, and the same political rights had become equal. It is not clear what intended shifts of meaning underlay these shifts in words. The formula that remained untouched was "enjoyment of life, liberty and property." And with it remained the word "protection." Mr. Stevens tried to get this proposal reported out with minor stylistic changes, but could not do it. Four Republicans were absent and Senator Harris of New York and Representatives Conkling and Boutwell, all regular Republicans, voted nay.[74]

Consideration was resumed on February 3, when Mr. Bingham proposed as a substitute the language actually introduced in the Senate and House on February 13. Political rights were no longer mentioned; the phrase "privileges and immunities" appeared, and "protection" reverted from "full" to "equal." As the proposal is entered in the Journal of the Committee, the following appears immediately preceding the semicolon: "(Art. 4, Sec. 2)." And the following at the end: "(5th Amendment)." [75]

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[72] *Id.*, at 55–56.
[73] *Id.*, at 56.
[74] *Id.*, at 57–58.
[75] *Id.*, at 61.

Mr. Bingham's substitute was approved by a vote of 7 to 6, Mr. Stevens and Senator Fessenden voting against. On February 10, a vote of 9 to 5 reported it out of Committee. Senator Harris and Mr. Conkling were the only Republicans who voted nay.[76]

On February 26, the House began to debate this proposal. Mr. Bingham, introducing it briefly, aired the notion suggested by the parenthetical references to the Constitution. He said:

> "Every word of the proposed amendment is to-day in the Constitution of our country, save the words conferring the express grant of power upon the Congress of the United States.
>
> . . . . . .
>
> "Sir, it has been the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements of the Constitution. . . .
>
> "I ask the attention of the House to the further consideration that the proposed amendment does not impose upon any State of the Union, or any citizen of any State of the Union, any obligation which is not now enjoined upon them by the very letter of the Constitution." [77]

The States, Mr. Bingham said, whose duty it had hitherto been to enforce the Constitution, and especially the Bill of Rights, had failed in that duty.[78]

Mr. Rogers then spoke for the opposition. He noted first that the need which Mr. Bingham professed for his amendment proved that the Civil Rights Bill—then about to come up in the House—was unconstitutional.[79] Next

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[76] *Id.*, at 61–63.

[77] P. 1034.

[78] *Ibid.*

[79] Cong. Globe, 39th Cong., 1st Sess., App. 133.

Mr. Rogers addressed himself to the equal protection language. Under it, he said,

> "Congress can pass . . . a law compelling South Carolina to grant to negroes every right accorded to white people there; and as white men there have the right to marry white women, negroes, under this amendment, would be entitled to the same right . . . ." [80]

Further:

> "In the State of Pennsylvania there are laws which make a distinction with regard to the schooling of white children and the schooling of black children. . . . Under this amendment, Congress would have power to compel the State to provide for white children and black children to attend the same school, upon the principle that all the people in the several States shall have equal protection in all the rights of life, liberty, and property, and all the privileges and immunities of citizens in the several States.
>
> . . . . . .
>
> "Sir, I defy any man upon the other side of the House to name to me any right of the citizen which is not included in the words 'life, liberty, property, privileges, and immunities,' unless it should be the right of suffrage. . . ." [81]

The next day, when debate was resumed, the House heard—at length—Mr. Higby of California, a Radical, who was of the opinion that the proposal merely gave effect to parts of the Constitution which "probably were intended from the beginning to have life and vitality." He said:

> "The fifth article of the amendments of our present Constitution provides that—

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[80] *Id.*, at 134.

[81] *Id.*, at 134, 135.

"'No person shall be deprived of life, liberty, or property without due process of law.'

"The language of this proposed amendment is very little different. It provides that Congress shall secure—

"To all persons in the several States equal protection in the rights of life, liberty, and property.

"Thus, sir, we find by an examination of the Constitution that it was intended to provide . . . precisely what will be provided by this article . . . ." [82]

Mr. Niblack, a Democrat, enquired gently of Mr. Higby what effect the latter thought the proposed amendment might have on the condition of the Chinese in California. "The Chinese," said Mr. Higby, "are nothing but a pagan race. . . . You cannot make good citizens of them . . . ." [83] The part of the Bingham proposal which Mr. Higby had just quoted referred, of course, to "persons."

Mr. Kelley of Pennsylvania, also a Radical, thought the proposed amendment did not confer upon Congress any powers it did not already have. The important thing in his mind was suffrage for the Negro. Congress had the power to grant this as well; it surely would have the power if the proposed amendment were enacted, and since some doubted that it had it now, perhaps it was just as well, and certainly it could do no harm, to enact this proposed amendment.[84]

Mr. Hale of New York, who next spoke, was a lawyer and former judge. He was a Republican who was to vote to override the veto of the Civil Rights Bill [85] and even-

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[82] P. 1054.

[83] P. 1056.

[84] Pp. 1057–1063.

[85] Mr. Hale was absent for the vote on passage of the Civil Rights Bill. P. 1367.

tually for the Fourteenth Amendment. But he was disturbed, and he was against this proposal. It seemed to him to entrust Congress with most extraordinary powers. To begin with, Mr. Hale paid his respects to Mr. Bingham:

> "Listening to the remarks of the distinguished member of the committee who reported this joint resolution to the House, one would be led to think that this amendment was a subject of the most trivial consequence. He tells us, and tells us with an air of gravity that I could not but admire, that the words of the resolution are all in the Constitution as it stands, with the single exception of the power given to Congress to legislate. A very important exception, it strikes me . . . .
>
> "My friend from California, [Mr. Higby] . . . went a little further, and succeeded in showing that . . . the words of this joint resolution are all in the Constitution as it now stands. He turns to the eighth section of the first article, and . . . he finds the words 'the Congress shall have power' . . . .
>
> . . . . . .
>
> "The ingenuity of the argument was admirable. I never heard it parallelled except in the case of the gentleman who undertook to justify suicide from the Scripture by quoting two texts: 'Judas went and hanged himself;' 'Go thou and do likewise.'
>
> . . . . . .
>
> "What is the effect of the amendment . . . . I submit that it is in effect a provision under which all State legislation, in its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen, may be overriden, may be repealed or abolished, and the law of Congress established instead." [86]

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[86] P. 1063.

This roused Thaddeus Stevens. He asked:

> "Does the gentleman mean to say that, under this provision, Congress could interfere in any case where the legislation of a State was equal, impartial to all? Or is it not simply to provide that, where any State makes a distinction in the same law between different classes of individuals, Congress shall have power to correct such discrimination and inequality?" [87]

The first proposition stated by Mr. Stevens was what Mr. Hale had meant, and he said so. This was much more, he said than just a "provision for the equality of individual citizens before the laws of the several States." [88]

Mr. Hale had another point, and in making it, he drew from Thaddeus Stevens a statement of a theory of reasonable classification under the Equal Protection Clause. Mr. Hale thought the proposed amendment went too far even if Mr. Stevens' rather than his own reading of the power it would vest in Congress were correct. For example, Mr. Hale said, all States distinguish between the property rights of married women on the one hand, and of *"femmes sole"* and men on the other. Such distinctions would fall under the proposal. No, said Mr. Stevens:

> "When a distinction is made between two married people or two *femmes sole*, then it is unequal legislation; but where all of the same class are dealt with in the same way then there is no pretense of inequality."

But Mr. Hale disagreed. The proposal, he said, "gives to *all persons* equal protection." If what Mr. Stevens had said were the correct construction, then it would be

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[87] *Ibid.*
[88] *Ibid.*

sufficient also to extend the same rights to one Negro as to another in order to satisfy the proposed language. There was no further answer from Mr. Stevens.[89]

Mr. Hale next drew Mr. Bingham's fire. The latter put up to him the fact that property rights and procedural rights in judicial proceedings had been denied by some States. Was not some protection needed? Mr. Hale suggested that the States should provide it. And if Mr. Bingham found that the State of Ohio did not afford sufficient protection, he ought to come to New York, where things were different. Mr. Bingham pursued the matter:

> "I do not cast any imputation upon the State of New York. The gentleman knows full well, from conversations I have had with him, that so far as I understand this power, under no possible interpretation can it ever be made to operate in the State of New York while she occupies her present proud position.
>
> . . . . . .
>
> "It is to apply to other States . . . that have in their constitutions and laws to-day provisions in direct violation of every principle of our Constitution.
>
> "Mr. Rogers. I suppose the gentleman refers to the State of Indiana?
>
> "Mr. Bingham. I do not know; it may be so. It applies unquestionably to the State of Oregon." [90]

This is an interesting passage. By "every principle of our Constitution," Mr. Bingham did not necessarily mean any provision of the Constitution then actually in force. As will be seen, and as has been seen, it was never quite clear whether Mr. Bingham thought he was introducing new substance into the Constitution or, so to speak, merely putting teeth into what was already there. Be

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[89] P. 1064.

[90] Pp. 1064–1065.

that as it may, surely he was here referring to State enactments which he thought should not be tolerated. He refused to commit himself on Indiana. The reference there may have been to the Indiana Constitution which denied suffrage to Negroes and mulattoes.[91] The Oregon Constitution did not permit free Negroes or mulattoes not residing in the State at the time of its adoption to come into the State, reside there, hold real estate, contract or sue.[92] This sort of thing Mr. Bingham evidently wanted to strike down. As for the State of New York in her then "proud position," which in this respect she occupied till 1938, her laws provided for the establishment of separate schools for colored children in the discretion of "[t]he school authorities of any city or incorporated village," or of the inhabitants of "any union school district, or of any school district organized under a special act." [93]

Mr. Price of Iowa, a Radical, made the last speech of the day on the subject. He said he was "one of the few men, one of the very few men, who live in this day who do not claim to be a constitutional lawyer," and proceeded to demonstrate why. This is what the proposed amendment meant to him:

> "I understand it to mean simply this: if a citizen of Iowa or a citizen of Pennsylvania has any business, or if curiosity has induced him to visit the State of South Carolina or Georgia, he shall have the same protection of the laws there that he would have had had he lived there for ten years." [94]

Debate reopened on the following day with a speech by Mr. Davis of New York, a Republican who ended by voting with the Radicals but who did not always hold their views. He adopted Mr. Hale's principal point, that

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[91] Ind. Const., 1851, Art. II, §§ 2, 5.
[92] Ore. Const., 1857, Art. I, § 35.
[93] N. Y. L. 1864, c. 555, Tit. 10, § 2.
[94] P. 1066.

this was an extraordinary grant of power to Congress, and expressed the fear that that power would be used "in the establishment of perfect political equality between the colored and the white races of the South." [95] The Negroes, he said,

> "must be made equal before the law, and be permitted to enjoy life, liberty, and the pursuit of happiness. I am pledged to my own conscience to favor every measure of legislation which shall be found essential to the protection of their just rights,[96] and shall most cheerfully aid in any plan for their education and elevation which may reasonably be adopted." [97]

But this proposal went too far.

Mr. Woodbridge of Vermont, a regular Republican who spoke next, approved of the proposal because it

> "is intended to enable Congress . . . to give to a citizen of the United States the natural rights which necessarily pertain to citizenship. It is intended to enable Congress . . . to give to a citizen of the United States, in whatever State he may be, those privileges and immunities which are guaranteed to him under the Constitution . . . . It is intended to enable Congress to give to all citizens the inalienable rights of life and liberty, and to every citizen in whatever State he may be that protection to his property which is extended to the other citizens of the State." [98]

There followed a major speech by Mr. Bingham. He said:

> "The proposition pending before the House is simply a proposition to arm the Congress . . . with the

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[95] P. 1085.

[96] Mr. Davis was to vote for the Civil Rights Act. P. 1367.

[97] P. 1085.

[98] P. 1088.

> power to enforce the bill of rights as it stands in the Constitution today. It 'hath that extent—no more' " [99]

Mr. Bingham then quoted from Article IV, Section 2 of the Constitution (the Privileges and Immunities Clause) and read the Due Process Clause of the Fifth Amendment. He felt the opposition argument amounted to saying that while these constitutional provisions were fine, Congress should not be empowered to enforce them.

> "Why are gentlemen opposed to the enforcement of the bill of rights, as proposed? Because they aver it would interfere with the reserved rights of the States! Who ever before heard that any State had reserved to itself the right, under the Constitution . . . to withhold from any citizen of the United States within its limits, under any pretext whatever, any of the privileges of a citizen of the United States, or to impose upon him, no matter from what State he may have come, any burden contrary to that provision of the Constitution. . . .
>
> "What does the word immunity in your Constitution mean? "Exemption from unequal burdens." [100]

What, to Mr. Bingham, did the Bill of Rights mean? Not necessarily all of the first eight amendments or only those amendments. He had referred to Article IV and to the Fifth Amendment. Mr. Rogers asked what Mr. Bingham meant by "due process of law." Mr. Bingham wouldn't stop to answer. There were many decided cases on that, he said. Let the gentleman look them up. He proceeded to refer to "the rights of 'life, liberty, and property.' " The federal courts were not protecting them, he said, citing *Barron* v. *Baltimore*, 7 Pet. 247. Somehow this was happening despite the fact that the Constitution as it stood guaranteed these rights. It was just that the

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[99] *Ibid.*

[100] P. 1089.

"'injunctions and prohibitions' addressed by the people in the Constitution to the States" had been disregarded.

> "[T]hose requirements of our Constitution have been broken; they are disregarded today in Oregon . . . ."[101]
>
> "The question is, simply, whether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish officials of States for violation of the oath enjoined upon them by their Constitution? That is the question, and the whole question. The adoption of the proposed amendment will take from the States no rights that belong to the States. . . . [B]ut . . . if they conspire together to enact laws refusing equal protection to life, liberty, or property, the Congress is [by the proposal] vested with power to hold them to answer before the bar of the national courts for the violation of their oaths and of the rights of their fellow men. Why should it not be so? . . . Is the bill of rights to stand in our Constitution hereafter, as in the past five years within eleven States, a mere dead letter?" [102]

Again, the Bill of Rights. Mr. Bingham went on: "the sacred rights of person," the "rights of human nature." [103] Then:

> "Gentlemen who oppose this amendment simply declare to these rebel States, go on with your confiscation statutes, your statutes of banishment, your statutes of unjust imprisonment, your statutes of murder and death against men because of their loyalty to . . . the United States." [104]

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[101] See n. 92, *supra*.
[102] Pp. 1089–1090.
[103] P. 1090.
[104] Pp. 1090–1091.

The peroration was about due process of law, "law in its highest sense," and equal protection.[105]

Mr. Hotchkiss of New York, who followed, was a Radical anxious to preserve his standing. But he had taken to heart what his colleague, Mr. Hale, had said, and he had drawn his own conclusions:

> "As I understand it [Mr. Bingham's] object in offering this resolution . . . is to provide that no State shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another. If this amendment secured that I should vote very cheerfully for it today; but . . . I do not regard it as permanently securing those rights . . . .
>
> ". . . I am unwilling that Congress should have [the] power [this amendment confers]. . . . The object of a Constitution is not only to confer power upon the majority, but to restrict the power of the majority . . . . It is not indulging in imagination to any great stretch to suppose that we may have a Congress here who would establish such rules in my State as I should be unwilling to be governed by. Should the power of this Government . . . pass into the hands of the rebels . . . ."
>
> . . . . . .
>
> "Mr. Speaker, I make these remarks because I do not wish to be placed in the wrong upon this question. I think the gentleman from Ohio [Mr. Bingham] is not sufficiently radical in his views upon this subject. I think he is a conservative. [Laughter.] I do not make the remark in any offensive sense. But I want him to go to the root of this matter.
>
> ". . . Why not provide by an amendment to the Constitution that no State shall discriminate against

[105] P. 1094.

> any class of citizens; and let that amendment stand as part of the organic law of the land, subject only to be defeated by another . . . ." [106]

Mr. Conkling, who had voted against reporting this proposal out of the Joint Committee on Reconstruction, was quick to rise and point out that he was against it for reasons "very different from, if not entirely opposite to," those given by Mr. Hotchkiss. Mr. Conkling certainly thought no objection was to be made to the proposal "because it does not go far enough or because it is not sufficiently radical." [107] He then moved to postpone consideration of it to a day certain, the second Tuesday in April. A vote was first taken on a Democratic proposal to postpone indefinitely. This was defeated by a party vote, with, however, some notable defections. Thus, Messrs. Davis and Hale voted with the Democrats. The Conkling motion, taken up next, carried 110–37. The Republican leadership was solidly behind it. Mr. Bingham himself voted for it. Six Republicans voted consistently against any kind of postponement—Democratic or Republican. Mr. Davis decided that if he could not have indefinite postponement, he wanted none. The date of this vote was February 28.[108] The second Tuesday in April came and went, with no mention of Mr. Bingham's proposal. It was never brought up in the Senate, nor ever again in the House.

From the day on which it reported out the Bingham proposal through the 5th of March, the Joint Committee on Reconstruction met regularly and considered a measure for the readmission of the State of Tennessee into the Union. Having worked one out, it failed to meet again till April 16.[109] On that day, it heard Senator

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[106] P. 1095.

[107] *Ibid.*

[108] *Ibid.*

[109] Kendrick, *supra*, at 63–81. Subcommittees were, in the meantime, taking evidence on conditions in the former Confederate States.

Stewart of Nevada expound one of the notable—but unsuccessful—reconstruction plans of the day. The essence of the Stewart plan was that Negroes would be given the vote immediately, but there would also be an amnesty, and the possibility of special restrictions on Negro voters would be left open. Thus the South would be able to balance the new political power created in its midst.[110] Under the plan, a former Confederate State would be readmitted as soon as it ratified an article of amendment to the Constitution, of which Section 1 read:

> "All discriminations among the people because of race, color, or previous condition of servitude, either in civil rights or the right of suffrage, are prohibited; but the States may exempt persons now voters from restrictions on suffrage hereafter imposed." [111]

At the Committee's next meeting on April 21,

> "*Mr. Stevens* said he had a plan of reconstruction, one not of his own framing, but which he should support, and which he submitted to the Committee for consideration.
>
> "It was read as follows:
>
> . . . . . .
>
> "*Whereas,* It is expedient that the States lately in insurrection should . . . be restored to full participation in all political rights; therefore,
>
> "*Be it resolved,* . . . that the following Article be proposed . . . as an amendment to the Constitution . . . :
>
> "Article —
>
> "Section 1. No discrimination shall be made by any State, nor by the United States, as to civil rights of persons because of race, color, or previous condition of servitude.

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[110] *Id.*, at 82, 252–255.

[111] P. 1906.

"Sec. 2. From and after the fourth day of July, in the year one thousand eight hundred and seventy-six, no discrimination shall be made by any State, nor by the United States, as to the enjoyment . . . of the right of suffrage . . . .

"Sec. 3. [Excludes all persons who are denied suffrage from the basis of representation, till 1876.]

"Sec. 4. [Confederate debt and compensation for slaves.]

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

"*And be it further resolved,* [Former Confederate States which ratify this amendment and amend their laws to comply with it will be readmitted, when ratification of the amendment is complete.]

"*Provided,* [that certain 'rebels' are excluded from office till 1876.]" [112]

As Mr. Stevens noted, this proposal was not his own. It had been placed before him in March by Robert Dale Owen, reformer son of a reformer father. Owen has described his meeting with Thaddeus Stevens. Their conversation turned on the provision for delayed Negro suffrage (Section 2). This was a frank recognition, said Owen, of the fact that the Negro was not yet ready for suffrage. "I hate to delay full justice so long," said Mr. Stevens. But suffrage was not now the Negro's immediate need, the younger man answered. "He thirsts for education, and will have it if we but give him a chance, and if we don't call him away from the schoolroom to take a seat which he is unfitted to fill in a legislative chamber." Mr. Stevens then made a quick decision in favor of the proposal. He said there wasn't a majority for immediate suffrage, and this might pass.[113] Owen also

[112] Kendrick, *supra*, at 83–84.

[113] Owen, Political Results from the Varioloid, 35 Atlantic Monthly 660, 662–663.

took his amendment around to other members of the Joint Committee. Senator Fessenden, Representative Elihu Washburne of Illinois, Grant's friend, who was briefly to be his Secretary of State, Mr. Conkling, Senator Howard and Mr. Boutwell all approved with various degrees of enthusiasm, though none with the decisiveness of Mr. Stevens. "So, qualifiedly [these are Owen's words], did Bingham, observing, however, that he thought the first section ought to specify, in detail, the civil rights which we proposed to assure; he had a favorite section of his own on that subject." [114]

The Owen proposal having been placed before it, the Committee proceeded to go over it section by section. Mr. Bingham moved that Section 1 be amended by adding the following:

> "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."

Mr. Bingham lost the vote on this change, 7 to 5. He carried Mr. Stevens with him, and also Mr. Rogers and Reverdy Johnson, though not Representative Grider of Kentucky, the third Democrat on the Committee.[115] Mr. Rogers' thought may have been that any language reminiscent of the Bingham proposal which the House had pretty evidently disapproved of not so long before [116] would embarrass the Radicals, and he was therefore for it. Senator Johnson may have been similarly motivated. The Committee then voted 10 to 2 (Messrs. Grider and Rogers) to adopt Section 1 as it stood.[117] Sections 2, 3 and 4 were also adopted.[118] When the Com-

[114] *Id.*, at 664.
[115] Kendrick, *supra*, at 85.
[116] See *supra*, pp. —.
[117] Kendrick, *supra*, at 85.
[118] *Id.*, at 86–87.

mittee reached Section 5, Mr. Bingham moved the following as a substitute:

> "Sec. 5. 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 is, of course, word for word, language of the Fourteenth Amendment. The Committee adopted it, 10 to 2 (Messrs. Grider and Rogers, the latter now presumably voting his convictions). Section 5 of the original proposal was renumbered and also adopted.[119] Throughout this meeting Senators Fessenden and Harris and Mr. Conkling were absent.

The Committee met again two days later, Senator Fessenden still absent, and discussed and modified the final provisions of the proposal, following the numbered articles, which it severed, intending to report them separately. The Committee failed, however, to report out what it had approved, and instead, on Mr. Conkling's motion, adjourned.[120] It met again on April 25. Senator Williams of Oregon, a Radical, moved to strike Section 5. *i. e.*, the substitute which Mr. Bingham had got accepted at the meeting of April 21. This motion carried, 7 to 5. Mr. Stevens was with Mr. Bingham in opposition. So was Mr. Rogers. Mr. Rogers had voted for equal protection language in Section 1, a vote which was lost, but he had voted against the substitution of the section he was now supporting. Senators Harris, Howard, Johnson and Williams and Messrs. Grider, Conkling and Boutwell voted to strike the section. Senator Fessenden was still

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[119] *Id.*, at 87–88.

[120] *Id.*, at 89–97.

absent. The Committee then voted to report the remaining package, 7 to 6. Messrs. Stevens and Bingham favored this action. Representatives Conkling, Boutwell and Blow of Missouri were the Republicans voting nay. Mr. Bingham, nothing daunted, promptly moved the adoption of his deleted Section 5 as a separate proposed amendment to the Constitution. He was again defeated, 8–4, even Mr. Stevens leaving him on this vote. All three Democrats were with Mr. Bingham. Senator Williams then moved that the vote to report out the package be reconsidered. This carried 10 to 2, the only nays being Senator Howard and Mr. Stevens. With that the Committee adjourned.[121]

Robert Dale Owen tells part of the story behind these vacillations. He had it orally from Mr. Stevens. The Fourteenth Amendment, without a Due Process or Equal Protection or Privileges and Immunities Clause, but with a "no discrimination in civil rights" provision, might have been the final version reported out of Committee but for Senator Fessenden's absence, caused by his being sick of the varioloid, a mild form of smallpox. It was suggested that it might seem a lack of courtesy to vote out the most important measure produced by the Committee, of which Mr. Fessenden was Chairman, in his absence. Hence the decision to do so was left in abeyance. That gave a chance to the New York, Illinois and Indiana congressional delegations to caucus and to decide that it was politically inadvisable to go to the country in 1866 on a platform having anything to do with Negro suffrage, immediate or prospective. On that issue, these delegations felt, the Republicans might lose the election, and they communicated to the Committee their opposition to any provision concerning Negro suffrage. It was for this reason that the Committee, having previously, for formal reasons only, reopened its

[121] *Id.*, at 98–100.

decision to report out the Owen proposal, reversed it at its next meeting.[122]

The next meeting took place on April 28, Chairman Fessenden having recovered. Instead of granting suffrage prospectively, it was now decided simply to eliminate from the basis of representation persons to whom the vote was denied. Other changes were also made.[123] Then Mr. Bingham, still trying, moved to strike Section 1 (the no discrimination section), and to substitute his privileges and immunities, due process and equal protection language, which had once been substituted for Section 5 and then been struck. This motion carried, 10 to 3. All three Democrats voted for it, as did Mr. Conkling. The opposition consisted of Senator Howard, who was to be a vigorous defender and a prominent interpreter in debate of the new Section 1, and Representative Morrill of Vermont, both Radicals, and Senator Grimes of Iowa, a moderate allied with the Radicals. Senators Fessenden and Harris abstained.[124] The resulting constitutional amendment was reported out on a party vote, only the three Democrats being opposed.[125] Section 1 was Mr. Bingham's language. Section 2 reduced the basis of representation for States in which male citizens were denied the vote. Section 3 dealt with voting disqualifications for former Confederates, Section 4 with the debt, and Section 5 stood as it had in the Owen proposal. The Committee also reported out a bill readmitting, upon the ratification of the amendment, States which had voted to ratify it, and a bill excluding from office certain former Confederate officials.[126] The Joint Committee on Reconstruction for the First Session of the 39th Congress was to originate no further measures.

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[122] Owen, *supra*, at 665–666.
[123] Kendrick, *supra*, at 100–106.
[124] *Id.*, at 106–107.
[125] *Id.*, at 113–114.
[126] *Id.*, at 116–120.

On April 30, 1866, Mr. Fessenden in the Senate and Mr. Stevens in the House introduced the result of the Committee's labors.[127] They both announced that a Committee Report as well as testimony taken before the Committee would soon be readied and distributed.

Debate started in the House first, on May 8, under a thirty-minute rule.[128] Mr. Stevens opened. The Founders, he said, had not been able to build on the uncompromising foundation of the Declaration of Independence. They had decided to wait for "a more propitious time. That time ought to be present now." Now should have been the time to build "upon the firm foundation of eternal justice." But: "[T]he public mind has been educated in error for a century. How difficult in a day to unlearn it." The proposition he was presenting, Mr. Stevens said, "falls far short of my wishes, but it fulfills my hopes. I believe it is all that can be obtained in the present state of public opinion." [129]

In all probability, the disappointment of Thaddeus Stevens centered on the failure to make any provision for Negro suffrage, immediate or prospective. It was for this reason that he had called the Fourteenth Amendment a "shilly-shally, bungling thing" in conversation with Robert Dale Owen.[130] But he spoke his disappointment to the House in general terms. He went on then to "refer to the provisions of the proposed amendment."

> "The first section prohibits the States from abridging the privileges and immunities of citizens of the United States, or unlawfully depriving them of life, liberty, or property etc. . . .
>
> "I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted, in some form or other,

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[127] Pp. 2265, 2286.
[128] Pp. 2433–2434.
[129] P. 2459.
[130] Owen, *supra*, at 665.

> in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way . . . . Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same. These are great advantages over their present codes. . . . I need not enumerate these partial and oppressive laws. Unless the Constitution should restrain them those States will . . . keep up this discrimination and crush to death the hated freedmen. Some answer, 'Your civil rights bill secures the same things.' That is partly true, but a law is repealable by a majority." [131]

Mr. Stevens then went through the rest of the amendment.

James G. Blaine of Maine, debated briefly with Mr. Stevens about Section 3.[132] Mr. Finck, a Democrat from Ohio, made a full-dress speech. All he had to say about the first section was:

> "Well, all I have to say about this section is, that if it is necessary to adopt it, in order to confer upon Congress power over the matters contained in it, then the civil rights bill, which the President vetoed, was passed without authority, and is clearly unconstitutional." [133]

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[131] P. 2459.
[132] P. 2460.
[133] P. 2461.

Mr. Garfield, the future President, spoke next. He too had little to say about Section 1. He was glad to see "this first section here which proposes to hold over every American citizen, without regard to color, the protecting shield of law." Mr. Finck's argument that the section demonstrated the unconstitutionality of the Civil Rights Act had been well met, he thought, by Mr. Stevens in anticipation.[134]

Mr. Thayer of Pennsylvania, a Radical, followed. He devoted a paragraph to the first section, saying:

> "As I understand it, it is but incorporating in the Constitution . . . the principle of the civil rights bill . . . [so that it] shall be forever incorporated . . . ." [135]

Mr. Boyer of Pennsylvania, a Democrat, was critical of the entire package, but only very briefly of Section 1:

> "The first section embodies the principles of the civil rights bill, and is intended to secure ultimately, and to some extent indirectly, the political equality of the negro race. It is objectionable also in its phraseology, being open to ambiguity and admitting of conflicting constructions." [136]

Mr. Kelley, the Radical from Pennsylvania, delivered himself of a political attack on his colleague, Mr. Boyer, prophesying defeat for the latter in the forthcoming election.[137] "There is not a man in Montgomery or Lehigh county" (Mr. Boyer's constituency), said Mr. Kelley, "that will not say those provisions [of Section 1] ought to be in the Constitution if they are not already there." [138] Mr. Schenck of Ohio, a leader of the House, spoke the

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[134] P. 2462.

[135] P. 2465.

[136] P. 2467.

[137] Mr. Boyer was reelected and served in the 40th Congress. See Biographical Directory of the American Congress 1774–1949, 877.

[138] P. 2468.

thirty minutes allowed without saying a word about Section 1.[139] Green Clay Smith of Kentucky, a conservative Republican who voted against the Civil Rights Act and to uphold the veto of it, though he was to end up voting for the Fourteenth Amendment, also spoke for thirty minutes without mentioning Section 1.[140]

Debate was resumed the next day. Mr. Broomall of Pennsylvania, a Radical, who, like Mr. Stevens, said the proposal fell short of the ideal, spoke a few words about Section 1:

> "The fact that all who will vote for the pending measure, or whose votes are asked for it, voted for this proposition in another shape, in the civil rights bill, shows that it will meet the favor of the House." [141]

It was necessary to "put a provision in the Constitution which is already contained in an act of Congress," because, while Mr. Broomall did not agree with Mr. Bingham that the Civil Rights Act was unconstitutional, he wanted to make doubly sure, so long as there were any doubts on the subject.[142] Mr. Shanklin of Kentucky, a Democrat, followed. He, too, disposed of Section 1 very briefly. It struck down "those rights which were declared by the Framers of the Constitution to belong to the States exclusively and necessary for the protection of the property and liberty of the people." It centralized all powers in the general government.[143]

Henry J. Raymond allowed more time for a discussion of Section 1. He said it "secures an equality of rights among all the citizens of the United States." The "principle" of Section 1 had had a "somewhat curious history."

> "It was first embodied in a proposition introduced by . . . [Mr. Bingham] in the form of an amend-

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[139] Pp. 2469–2471.
[140] Pp. 2471–2473.
[141] P. 2498.
[142] *Ibid.*
[143] P. 2500.

> ment to the Constitution, giving Congress power to secure an absolute equality of civil rights . . . . Next it came before us in the form of a bill, by which Congress proposed to exercise precisely the powers which that amendment was intended to confer . . . . I regarded as very doubtful . . . whether Congress, under the existing Constitution, had [the] power . . . I did not vote for the bill . . . .
>
> "Now, sir, I have at all times declared myself heartily in favor of the main object which that bill was intended to secure. I was in favor of securing an equality of rights to all citizens . . . all I asked was that it should be done [constitutionally]. And so believing, I shall vote very cheerfully for this amendment." [144]

Mr. Raymond was, however, opposed to Section 3.

The next speech was by Mr. McKee of Kentucky, a Radical. He spoke only about Section 3.[145] Mr. Wilson of Iowa, who had managed the Civil Rights Bill in the House, spoke briefly, attacking Mr. Raymond's position. He could not see that Mr. Raymond's constitutional objection to the Civil Rights Bill had been sincere.[146] He was followed by Mr. Eldridge of Wisconsin, a leader among congressional Democrats. Mr. Eldridge complained that there had been no written report from the Joint Committee on Reconstruction, and that evidence heard by it had not been printed. He alluded in passing to the standard argument that if the Civil Rights Act was constitutional, Section 1 was unnecessary.[147] Mr. Boutwell, who followed, did not mention Section 1. Nor did Mr. Spalding of Ohio, also a Radical.[148] Mr. Miller of Pennsylvania, again a Radical, did make what

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[144] P. 2502.
[145] Pp. 2504–2505.
[146] P. 2505.
[147] P. 2506.
[148] Pp. 2507–2510.

was becoming, and was to remain through the campaign of 1866, the customary Radical reference to Section 1:

> "As to the first, it is so just that no State shall deprive any person of life, liberty, or property without due process of law, nor deny equal protection of the laws, and so clearly within the spirit of the Declaration of Independence of the 4th of July, 1776, that no member of this House can seriously object to it." [149]

That was all.

Mr. Eliot of Massachusetts, a Radical perhaps more of the idealist sort, did devote some time to Section 1. It was not all that it should have been, he thought, because it did not confer suffrage, that is, equality of political as well as civil rights. The time for that would yet come. Meanwhile:

> "I support the first section because the doctrine it declares is right, and if, under the Constitution as it now stands, Congress has not the power to prohibit State legislation discriminating against classes of citizens . . . or denying to any person . . . the equal protection of the laws, then, in my judgment, such power should be distinctly conferred. . . ." [150]

On the third and final day of this debate, Mr. Randall of Pennsylvania, the future Speaker, a Democrat, devoted a paragraph to Section 1:

> "The first section proposes to make an equality in every respect between the two races, notwithstanding the policy of discrimination which has heretofore been exclusively exercised by the States, which in my judgment should remain and continue. They relate to matters appertaining to State citizenship, and there is no occasion whatever for the Federal

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[149] P. 2510.
[150] P. 2511.

> power to be exercised between the two races at variance with the wishes of the people of the States . . . . If you have the right to interfere in behalf of one character of rights—I may say of every character of rights, save suffrage—how soon will you be ready to tear down every barrier? It is only because you fear the people that you do not now do it." [151]

Mr. Strouse, also a Democrat from Pennsylvania, accused the Radicals of wanting so to amend the Constitution "that the emancipated slave shall in all respects be the equal of the white man." But he did not substantiate the charge with any analysis of the proposed amendment.[152] Mr. Banks of Massachusetts, a Radical, spoke exclusively about suffrage and the danger of resurgent Southern political power.[153] Mr. Eckley, of Ohio, another Radical, said that "[s]ecurity of life, liberty, and property" had to be afforded "to all citizens of all the States." This was his reference to Section 1.[154] Messrs. Longyear and Beaman of Michigan, two Radicals, rose to declare that Section 3 dealt too softly with former Confederates.[155]

Andrew Jackson Rogers was the next speaker:

> "Now, sir, I have examined these propositions . . . and I have come to the conclusion different to what some others have come, that the first section of this programme of disunion is the most dangerous to liberty. It saps the foundation of the Government; it consolidates everything . . . .
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> "This section . . . is no more nor less than an attempt to embody in the Constitution . . . that outrageous and miserable civil rights bill . . . ." [156]

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[151] P. 2530.
[152] P. 2531.
[153] Pp. 2532–2534.
[154] P. 2535.
[155] Pp. 2536–2537.
[156] P. 2538.

Mr. Rogers recited the provisions of Section 1, then asked:

> "What are privileges and immunities? Why, sir, all the rights we have under the laws of the country are embraced under the definition of privileges and immunities. The right to vote is a privilege. The right to marry is a privilege. The right to contract is a privilege. The right to be a juror is a privilege. The right to be a judge or President of the United States is a privilege. I hold if that ever becomes a part of the fundamental law of the land it will prevent any State from refusing to allow anything to anybody embraced under this term of privileges and immunities. . . . It will result in a revolution worse than that through which we have just passed." [157]

Mr. Rogers did not deal with the Equal Protection Clause specifically. Following his attack on the Privileges and Immunities Clause, he passed to Section 2, which, he said, was intended to exert indirect pressure on the South to grant Negro suffrage. Then:

> "Sir, I want it distinctly understood that the American people believe that this Government was made for white men and white women. They do not believe, nor can you make them believe—the edict of God Almighty is stamped against it—that there is social equality between the black race and the white.
>
> "I have no fault to find with the colored race. I wish them well, and if I were in a State where they exist in large numbers I would vote to give them every right enjoyed by the white people except the right of a negro to marry a white woman and the

[157] *Ibid.*

right to vote. But, sir, . . . this [is an] indirect way to inflict upon the people of the South Negro suffrage." [158]

Mr. Farnsworth of Illinois, a Radical, followed Mr. Rogers. He regretted that the amendment did not extend suffrage. But he liked what was there. He analyzed Section 1 in two paragraphs:

". . . [T]here is but one clause in it which is not already in the Constitution, and it might as well in my opinion read, 'No State shall deny to any person within its jurisdiction the equal protection of the laws.' " [159]

The rest of Section 1 as it then stood was, to Mr. Fransworth, redundant, since already in the Constitution elsewhere. But:

". . . [A] reaffirmation of a good principle will do no harm, and I shall not therefore oppose [Section 1] on account of what I may regard as surplusage.

" 'Equal protection of the laws;' can there be any well-founded objection to this? Is not this the very foundation of a republican government? Is it not the undeniable right of every subject of the Government to receive 'equal protection of the laws' with every other subject? How can we have and enjoy equal rights of 'life, liberty, and the pursuit of happiness' without 'equal protection of the laws?' This is so self-evident and just that no man whose soul is not too cramped and dwarfed to hold the smallest germ of justice can fail to see and appreciate it." [160]

The House, before proceeding to vote, now heard a speech by Mr. Bingham and some closing remarks by

[158] *Ibid.*
[159] P. 2539.
[160] *Ibid.*

Mr. Stevens. Mr. Bingham devoted more attention than had anybody else to Section 1:

> "The necessity for the first section . . . is one of the lessons that have been taught . . . by the history of the past four years . . . . There was a want hitherto, and there remains a want now, in the Constitution . . . which the proposed amendment will supply. It is the power of the people . . . by express authority of the Constitution 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 whenever the same shall be abridged or denied by the unconstitutional acts of any State.
>
> ". . . [T]his amendment takes from no State any right that ever pertained to it. No State ever had the right . . . to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy. The amendment does not give, as the second section shows, the power to Congress of regulating suffrage . . . .
>
> ". . . But, sir, it has been suggested, not here, but elsewhere, if this section does not confer suffrage the need of it is not perceived. To all such I beg leave again to say, that many instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violation of the guaranteed privileges of citizens of the United States, for which the national government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, 'cruel and unusual punishments' have been inflicted

> under State laws . . . not only for crimes committed, but for sacred duty done . . . .
>
> "Sir, the words of the Constitution that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States' include, among other privileges, the right to bear true allegiance to the Constitution . . . ." [161]

There had been a time, said Mr. Bingham, when the State of South Carolina, by its Nullification Proclamation, had abridged that right. There had then been passed an enforcement act, 4 Stat. 632, which protected the agents of the general government. But there had been no act protecting the citizen against punishment for fidelity to the federal government, because Congress had lacked power under the Constitution.

> "That great want of the citizen and stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment. That is the extent that it hath, no more; and let gentlemen answer to God and their country who oppose its incorporation into the organic law of the land." [162]

Mr. Bingham went on to discuss Section 3, about which he was less enthusiastic.

It was to Section 3 that Thaddeus Stevens addressed his closing remarks. He noted dissension about it, and pleaded for its adoption, to save the Republican party and through it the country. Unless Section 3 was passed, he could see "[t]hat side of the House . . . filled with yelling secessionists and hissing copperheads." Section 3 was actually "too lenient for my hard heart. Not only to 1870, but to 18070, every rebel who shed the blood of loyal men should be prevented from exercising any power

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[161] P. 2562.

[162] Pp. 2542–2543.

in this Government." Mr. Stevens conjured up for his colleagues the scene in the House before the war, when "the men that you propose to admit" through a milder Section 3 occupied "the other side," when "the mighty Toombs, with his shaggy locks," headed a noisy gang, "when weapons were drawn, and Barksdale's bowie-knife gleamed before our eyes. Would you have these men back again so soon to reenact those scenes? Wait till I am gone, I pray you. I want not to go through it again. It will be but a short time for my colleague to wait." [163]

With this eloquence ringing in its ears, the House, though by a close vote (84–79), followed Mr. Stevens' lead and cut off amendments. (Mr. Garfield had one changing Section 3.) By a vote of 128 to 37, the House then passed the proposal as reported out of committee. Not a single Republican said nay.[164] This was the afternoon of May 10. The final vote in committee had been had twelve days before.

The proposal was brought up in the Senate on May 23. Before debate started, a point which had been raised in the House also was made by Charles Sumner. The testimony taken before the Joint Committee, he said, had not been published as a whole, and no report drawing the Committee's conclusions had been submitted. He thought it was a "mistake that we are asked to proceed . . . under such circumstances." Mr. Fessenden answered, saying there was nothing to be gained by waiting longer.[165]

Debate was opened by Mr. Howard, since Senator Fessenden was not feeling well enough to speak at length. Mr. Howard discussed Section 1. "It would be a curious question," he said, "to solve what are the privileges and immunities of citizens . . . ." He thought some intimation of the definition the courts would even-

[163] P. 2544.
[164] P. 2545.
[165] P. 2763.

tually give to the phrase, "privileges and immunities" could be gathered from *Corfield* v. *Coryell, supra.* Then:

> "Such is the character of the privileges and immunities . . . . 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 guarantied and secured by the first eight amendments of the Constitution . . . ." [166]

As the Constitution stood, Mr. Howard said, the first eight amendments were not limitations imposed upon the States.

As for the Equal Protection Clause:

> "This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man.
>
> "But, sir, the first section of the proposed amendment does not give . . . the right to vote . . . ." [167]

Debate after Mr. Howard's speech turned on other sections of the proposal, except that Mr. Wade of Ohio and others wondered whether Section 1 should not, like the Civil Rights Act, define United States citizenship.[168] The next day Mr. Stewart of Nevada made a long speech in favor of Negro suffrage, as provided for in the plan he had proposed.[169] Further debate was then postponed. It had so far gone on for parts of two days. It was not resumed till four days later, on May 29, when Mr. Howard,

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[166] P. 2765.

[167] P. 2766.

[168] Pp. 2768–2769.

[169] Pp. 2798–2803. See *supra*, p. —.

"[a]fter consultation with some of the friends of this measure," presented some amendments which, "it has been thought . . . will be acceptable to both Houses of Congress and to the country . . . ." [170] In other words, a Republican caucus had been in session for a number of days to straighten out differences among the Republicans, which, as debate had revealed, centered largely on sections other than Section 1.[171] This caucus, as Mr. Hendricks, Democrat of Indiana, charged, was so secret that "no outside Senators, not even the sharp-eyed men of the press, have been able to learn one word that was spoken, or one vote given." [172]

The proceedings of the Republican caucus have remained secret to this day, but from the changes reported by Mr. Howard, which, with one minor exception, put the amendment in the shape in which it was adopted, it may be inferred that not much of the discussion could have concerned the Privileges and Immunities, Due Process and Equal Protection Clauses of Section 1. That Section was changed only by adding at the head of it the language defining national citizenship.

Following Mr. Howard's announcement, there was some debate about whether Indians not taxed would become citizens. Mr. Cowan expressed misgivings that Gypsies would receive citizenship, and Mr. Conness of California, a Radical, said he did not mind Chinamen becoming citizens.[173] The next day was largely taken up with a speech by Mr. Doolittle, who did not discuss Section 1.[174] On June 4, when debate was resumed, Mr. Hendricks spoke at length. His attack on Section 1 was limited to objecting that it bestowed citizenship on Indians.[175]

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[170] P. 2869.

[171] See Kendrick, *supra*, at 316.

[172] P. 2939.

[173] Pp. 2891–2893.

[174] Pp. 2914–2918.

[175] P. 2939.

On June 5, Mr. Poland of Vermont, a regular Republican, discussed Section 1. The privileges and immunities language, he thought, went no farther than Article IV. To the residue of the section he thought there could not possibly be any objection, "[n]ow that slavery is abolished, and the whole people of the nation stand upon the basis of freedom . . . ." Mr. Poland said:

> "It is the very spirit and inspiration of our system of government . . . . It is essentially declared in the Declaration of Independence and in all the provisions of the Constitution. Nothwithstanding this . . . State laws exist, and some of them of very recent enactment, in direct violation of these principles. Congress has already shown its desire and intention to uproot and destroy all such partial State legislation in the passage of what is called the civil rights bill. The power of Congress to do this has been doubted and denied by persons entitled to high consideration. It certainly seems desirable that no doubt should be left existing as to the power of Congress . . . ." [176]

Mr. Howe, a Radical from Wisconsin, had some interesting things to say about Section 1. He said that the South would, and in part still did, deny to the Negro elementary rights:

> ". . . The right to hold land . . . the right to collect their wages by the processes of the law . . . the right to appear in the courts as suitors . . . the right to give testimony . . . .
>
> ". . . [B]ut, sir, these are not the only rights that can be denied . . . . I have taken considerable pains to look over the actual legislation [in the South] . . . . I read not long ago a statute enacted by the Legislature of Florida for the education of her

[176] P. 2961.

> colored people . . . . They make provision for the education of their white children also, and everybody who has any property there is taxed for the education of the white children. Black and white are taxed alike for that purpose; but for the education of colored children a fund is raised only from colored men." [177]

Mr. Howe then described the colored school system in Florida, which was, of course, segregated, without pointing out that fact; what he stressed was the inadequacy of the poorly supported colored schools. He clearly implied that Section 1 would render this legislation illegal. But, again, he gave no indication that he believed its vice to lie in segregation.[178]

The next day the Senate talked about suffrage and the basis of representation.[179] The day of June 7 opened with a four-hour speech by Garrett Davis who did not devote much of his time to Section 1. He said that the privileges and immunities provision was unnecessary in view of Article IV, Section 2 of the Constitution. The due process language, he said, was

> "objectionable, because in relation to her own citizens it belongs to each State exclusively . . . to regulate that matter. It is also unnecessary, because every State constitution contains such a provision . . . . To the remaining branch [of Section 1] . . . each of these objections apply with equal and conclusive force." [180]

On June 8, Reverdy Johnson spoke about the basis of representation. Then, after some remarks by Mr. McDougall of California,[181] the respected Republican

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[177] Cong. Globe, 39th Cong., 1st Sess., App. 219.
[178] *Ibid.*
[179] Pp. 2985–2993.
[180] Cong. Globe, 39th Cong., 1st Sess., App. 240.
[181] Pp. 3026–3031.

voice of Mr. Henderson of Missouri was heard on Section 1. In conferring citizenship, he said, it simply confirmed what the law already was. That being so, "it will be a loss of time to discuss the remaining provisions of the section, for they merely secure the rights that attach to citizenship in all free Governments." [182] Later in his speech, Mr. Henderson said that the Black Codes of the South had denied to the Negro the "commonest rights of human nature" and had made him a "degraded outcast," more nearly slave than free. The Freedmen's Bureau Bill and Civil Rights Act had been passed to cure this situation, to break down this "system of oppression." They had been meant to secure for the Negro "what the lawyers call civil rights." Mr. Henderson then noted doubts about the constitutionality of those measures, clearly implying that Section 1 was necessary to settle such doubts.[183]

Just before the final vote was taken, late on the same day—June 8—Mr. Johnson, who had so far not commented on Section 1, said he was in favor of the citizenship and due process provisions in it but objected to the Privileges and Immunities Clause, "simply because I do not understand what will be the effect of that." He therefore proposed to strike it. His motion was defeated.[184] It would have let the equal protection language stand. The Fourteenth Amendment was carried in the Senate by a vote of 33 to 11. Messrs. Cowan, Doolittle, Norton and Van Winkle were the Republicans voting nay.[185]

On June 13 the House, under a fifteen-minute rule, discussed the changes made in the Senate.[186] Mr. Rogers

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[182] P. 3031.
[183] Pp. 3034–3035.
[184] P. 3041.
[185] P. 3042.
[186] P. 3144.

spoke first. The burden of his remarks was a complaint that the amendment had been ill-considered by a Congress cringing under the party whip. He referred in passing to Section 1, saying that it "simply embodied the gist of the civil rights bill." [187] His heavy artillery was concentrated on the manner in which the amendment had been pushed through the Senate by command of a secret Radical caucus. Four more gentlemen spoke, none addressing themselves to Section 1.[188] Then Thaddeus Stevens moved the previous question, speaking rather briefly just before the vote. The implacable old man was not happy:

> "In my youth, in my manhood, in my old age, I had fondly dreamed that when any fortunate chance should have broken up for awhile the foundation of our institutions, and released us from obligations the most tyrannical . . . that the intelligent, pure and just men of this Republic . . . would have so remodelled all our institutions as to have freed them from every vestige of human oppression, of inequality of rights, of the recognized degradation of the poor, and the superior caste of the rich. In short, that no distinction would be tolerated in this purified Republic but what arose from merit and conduct. This bright dream has vanished 'like the baseless fabric of a vision.' I find that we shall be obliged to be content with patching up the worst portions of the ancient edifice, and leaving it, in many of its parts, to be swept through by the tempests, the frosts, and the storms of despotism.
>
> "Do you inquire why, holding these views and possessing some will of my own, I accept so imperfect a proposition? I answer, because I live among men and not among angels . . . ." [189]

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[187] Cong. Globe, 39th Cong., 1st Sess., App. 229.

[188] Pp. 3144–3148.

[189] P. 3148.

Mr. Stevens lightly and hastily reviewed some of the changes made in the Senate. The principal one was Section 3, and he disapproved. He ended by urging passage of the imperfect product: "I dread delay." He said:

> "The danger is that before any constitutional guards shall have been adopted Congress will be flooded by rebels. . . . Hence, I say, let us no longer delay; take what we can get now, and hope for better things in further legislation; in enabling acts or other provisions.
>
> "I now, sir, ask for the question." [190]

The vote which followed immediately and which sent the Fourteenth Amendment to the country was 120 yeas, 32 nays. Mr. Eldridge, the Democrat, said: "I desire to state that if Messrs. Brooks and Voorhees had not been expelled, they would have voted against this proposition. [Great laughter.]" And Mr. Schenck, of the Radical leadership, retorted: "And I desire to say that if Jeff. Davis were here, he would probably also have voted the same way. [Renewed laughter.]"

There were no Republican votes against the Amendment in the House. Mr. Raymond of New York voted for. Lovell Rousseau of Kentucky, a notable Republican conservative, was absent.[191]

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[190] *Ibid.*

[191] P. 3149.