PREFATORY NOTE

TO

LEGISLATIVE HISTORY OF THE FOURTEENTH AMENDMENT

It is central to an understanding of the legislative history of the Fourteenth Amendment that the First Session of the 39th Congress met in an election year, that it soon became engaged in a struggle with the President unique in our history, whereby it sought to make a record on which to go to the country against the President. The issue of the day, as both Congress and President conceived it, was the reconstruction of the political institutions of the country after the South's defeat at Appomatox. More specifically, the principal questions which agitated men's minds and which, as the election approached, came nearly to dominate them, were suffrage or restricted representation for former Confederate States, amnesty or political disabilities for large numbers of Southerners, and the Confederate debt. These questions define the aims of the Fourteenth Amendment which, in 1866, were in the forefront of men's minds, and on them, substantially, the election of that year turned. See Beale, The Critical Year. This is not to say that other questions—which were, of course, related, and which were before very long to come quite clearly into focus—were not debated in the First Session of the 39th Congress. But they were subsidiary, and there is a striking paucity of allusion to them in the rather hurried debate on the Fourteenth Amendment itself. It is not insignificant that Charles Sumner did not once in the First Session of the 39th Congress speak either to Section 1 of the Fourteenth Amendment or to the Civil Rights Act, which were generally deemed similar in purpose.

In the debate on the Fourteenth Amendment itself, Mr. Bingham of Ohio, the author of Section 1, spoke at some

length about it in the House. So, in glowing terms, did Mr. Howard of Michigan in the Senate, though he had voted against it in committee. Representatives Rogers, a Democrat, attributed some importance to it, and there is an interesting passage in a speech by Senator Howe. Almost without exception, however, the other speakers ignored Section 1, passed it off by remarking on its self-evident justice and on the fact that Congress had previously expressed itself in favor of its purpose by passing the Civil Rights Act, or condemned it on the summary ground that it embodied that Act.

The Civil Rights Act, as passed, secured a series of enumerated rights, not including, in the view of its sponsors and clearly not of the representative body of congressional opinion, so-called political or social rights, or, specifically, the right to sit on juries. As passed in the Senate, on the basis of assurances from the leadership concerning its narrow scope, and as introduced in the House with the same assurances, the Civil Rights Act did contain some general language which was attacked as being susceptible of a "latitudinarian construction." The bill, in this form, was recommitted in the House, and when next it was reported, the general language in question had been eliminated.

In searching for light on congressional purpose regarding segregation, the two related debates mentioned above as well as a third, dealing with an abortive proposal which preceded the Fourteenth Amendment, should be considered. These debates, together with the Journal of the Joint Committee on Reconstruction, which records only motions and votes, are the only primary legislative source. No Committee Report was considered by the Congress when it voted to submit the Fourteenth Amendment to the States. It is impossible, on the basis of the debates, to conclude that the 39th Congress intended that segregation be abolished. The specific fear that segregation in schools would be abolished was voiced at some

length by three leading figures who opposed the Radical leadership and all its works. Two—Andrew Jackson Rogers in the House and Garrett Davis in the Senate, especially the latter—held extreme unreconstructed views on all matters; views which were not generally shared, and certainly not generally voiced, by other Democrats in the 39th Congress. The third—Senator Edgar Cowan—was the first and the most vigorous of the conservative Republicans who sided with the President. It is inescapable that warnings coming from these men were somewhat discounted by their colleagues. Moreover, these three almost invariably coupled their warnings concerning school segregation with forebodings in regard to miscegenation and the extension of suffrage to Negroes. Yet if anything is clear, it is clear that neither the Civil Rights Bill nor the Fourteenth Amendment extended suffrage. The internal evidence of the Amendment itself is conclusive on this point. As for miscegenation, with all the political pressures and the post-war fervor of the times, it is inconceivable that a two-thirds majority of the 39th Congress would have voted for any measure which it believed would strike down antimiscegenation statutes. Thus Messrs. Rogers, Davis and Cowan tended to prove too much for them to be taken altogether seriously. And the same is true of other scattered, and, for the most part, quite general, alarms sounded by the opposition.

There was, of course, behind leading Radicals, notably Thaddeus Stevens and Mr. Bingham, the uncompromising abolitionist tradition. Abolitionist thought went far, but it does not conform to the facts to say that it actuated the majority in the 39th Congress or that it was embodied in the Fourteenth Amendment. Cf. tenBroek, The Anti-Slavery Origins of the Fourteenth Amendment. Men of firm abolitionist antecedents were disappointed with the Fourteenth Amendment. Mr. Stevens privately called it a "shilly-shally, bungling thing," and in the House he and some others—though others less eloquently

than he—said as much publicly. The majority of the 39th Congress knew that the fullness of the abolitionist program was unfulfilled and the direst of the opposition's fears unfounded. It is even doubtful that some of those with abolitionist pasts were prepared to go as far in 1866, when they were in power, as they had been in the 'fifties. Mr. Bingham himself, the author of Section 1 of the Fourteenth Amendment, may be a case in point. He led the attack which eliminated from the Civil Rights Bill general language concerning "discrimination in civil rights or immunities." He raised a constitutional issue, but it is fair to conclude that his objection at the time went also to the "latitudinarian" nature of the provision. When a similar provision, about to be introduced in the Joint Committee on Reconstruction as a proposed constitutional amendment, was brought to him by Robert Dale Owen for comment, he expressed "qualified approval," and said that he thought the civil rights to be safeguarded ought to be specified. He must have conceived of the various proposals he introduced in the Committee, including Section 1 of the Amendment, as being narrower than the provision he had opposed in the Civil Rights Bill, since they specified particular "civil rights." His persistent effort in the Committee was to avoid the use of a general "civil rights" provision, at least one standing alone.

It is thus reasonably clear what the majority in the 39th Congress did not have specifically in mind. It is also clear that there were a number of existing practices in the South (and in some Northern States as well) which it was generally thought the Civil Rights Act, and hence the Fourteenth Amendment, would strike down. Among them were restrictions on movement, on ownership of property and on professional activities, and deprivation of procedural rights in court. Such practices were generally codified in Southern Black Codes. It may also be suggested, on the basis of a few remarks—one by a

moderate Republican in the House, another by a Radical in the Senate toward the end of the Fourteenth Amendment debate—that there was some opinion holding that if Negroes were taxed toward school funds, some sort of adequate, though segregated, school system would have to be provided for them from those funds. Finally, it was fairly common ground in Congress, and very likely throughout the North, that the mass of people whom the Thirteenth Amendment had freed would have somehow to be educated, "elevated," if any sort of a viable society were to be erected with them in its midst. Northern philanthropic organizations were already trying to promote education in the South. The Freedmen's Bureau was active in this field to some extent also. It may well have been thought that the Fourteenth Amendment might impose some obligation in this respect, at least on States which provided educational facilities for white children. But this is little more than conjecture.

To arrive at the only two relative certainties thus disclosed—one concerning the matters which, in the 39th Congress, were generally thought to be without, the other concerning those which were thought to be within, the scope of the Fourteenth Amendment—is not to have concluded the necessary inquiry into the legislative history of the Amendment. For it gives that history a much more conclusive appearance than its comprehensiveness warrants. The 39th Congress was on notice that it was enacting vague language of essentially indeterminate reach. No one—least of all Mr. Bingham—knew precisely what Section 1 meant. Mr. Howard, the manager of the Fourteenth Amendment in the Senate, alluded frankly to the vagueness of some of the language in Section 1. Reverdy Johnson, probably the best lawyer in Congress and no extreme partisan, confessed he did not know what the privileges and immunities of a citizen might be. No precise statement of the full reach of Section 1 of the Fourteenth Amendment was ever made

to the 39th Congress by anyone. Many men in Congress doubtless thought—Thaddeus Stevens certainly did—that the Amendment, Section 1 included, would operate in part through implementing legislation. Hopes both for a broad and a narrow application of the language of Section 1 must have been met by this expectation. And so, in the rush and under the political pressures of the final days, the 39th Congress, believing it was meeting some immediate needs now and others not yet or not at all, acted as other Congresses acted before and since; it left for the future the solution of a number of painful problems. It cannot be said that it knew what role the language it was enacting should or would play in that solution.