THE ADOPTION OF THE FOURTEENTH AMENDMENT

BY

HORACE EDGAR FLACK

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PREFACE.

The Supreme Court of the United States, in the Slaughter House Cases, declared that the privileges and immunities of citizens guaranteed by the Fourteenth Amendment are those which they possess as citizens of the United States and not those which they enjoy by virtue of state citizenship. This decision means that those privileges and immunities which flow from state citizenship must rest for their security and protection where they have heretofore rested, namely, upon the States. In Maxwell *vs.* Dow the Court declared that the privileges and immunities of citizens of the United States do not include those enumerated in, and secured against violation on the part of the Central Government by the first eight Amendments to the Federal Constitution. The same Court, in the Civil Rights Cases, declared that Congress cannot enact direct, affirmative legislation for the enforcement of the Fourteenth Amendment and can enact only remedial legislation.

The decisions in the above cases have given to the Fourteenth Amendment a meaning quite different from that which many of those who participated in its drafting and ratification intended it to have. The decisions in the Slaughter House and Civil Rights Cases especially have been criticized on this ground. Treatises have been written on the judicial construction of the Amendment, but thus far no effort has been made to give anything like a complete or exhaustive study of the historical incidents connected with its proposal and adoption. An examination, therefore, of the circumstances under which this addition to our fundamental instrument of government was made, and the discovery from them, if possible, of the desires and expectations of its framers and supporters, becomes an interesting and important constitutional inquiry. This has

also necessitated an examination of the legislation preceding the proposal of the Amendment and that enacted for its enforcement. The purpose of this study is to pass historical judgment as to the purpose and object of the Amendment, the powers intended to be granted to the Federal Government as well as those to be prohibited the States, and not to pass political judgment. Furthermore, it is not the purpose of the study to consider the effect of the limited construction given the Amendment, but unquestionably it has had the effect of preserving our dual form of government as established by the Constitution of 1789, and, although the Federal Government has to-day, under the Fourteenth Amendment, greater powers than it possessed under the old Constitution, there has been no revolutionary change in the respective powers of the States and the General Government. Those who believe this dual form of Government best, all things being considered, must thank the Judicial, and not the Legislative, Department for preserving it. No opinion has been expressed as to whether the limited construction given the Amendment has been or will be to the best interests of the country, but the assertion may be ventured that the South has welcomed the position taken by the Supreme Court.

The chief sources used have been the Congressional Globe and Record, the Reports of Committees, especially those of the Reconstruction Committee, the Journal of the Reconstruction Committee, the Journals and Reports of the Legislatures of the several States, and contemporary newspapers. References to other sources will be found in the foot-notes. It may be said that the Journal of the Reconstruction Committee has, for the first time, been used to any considerable extent in connection with a study of the Fourteenth Amendment.

The first eleven Amendments to the Constitution of the United States were intended as checks or limitations on the Federal Government and had their origin in a spirit of jealousy on the part of the States. This jealousy was

largely due to the fear that the Federal Government might become too strong and centralized unless restrictions were imposed upon it. The War Amendments marked a new departure and a new epoch in the constitutional history of the country, since they trench directly upon the powers of the States, being in this respect just the opposite of the early Amendments. Since reference is made so frequently to the War Amendments, it has been thought advisable to publish them in the Appendix.

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CHAPTER I.

The Freedmen's Bureau and Civil Rights Bills.

To get at the basis of the Fourteenth Amendment, to grasp its true meaning and purpose, as well as to understand the object of its framers and of the people, it is necessary to analyze the legislation which preceded and followed the adoption of the Amendment, the causes or alleged causes which led to such legislation and to the proposal and adoption of the Amendment. The legislation preceding the adoption of the Amendment will probably give an index to the objects Congress was striving to obtain, or to the evils for which a remedy was being sought, while the legislation which followed its adoption will give at least a partial interpretation of what Congress thought the Amendment meant and what things or subjects it included. This legislation, together with the debates in Congress, while being considered by that body, as well as the debates on the Amendment itself, should afford us sufficient material and facts on which to base a fairly accurate estimate of what Congress intended to accomplish by the Amendment. In fact, a careful analysis of these measures and debates should enable us to state with as much certainty as most conclusions are stated just what object or objects Congress and the framers of the Amendment had in view in submitting it to the States for ratification. As to what the people or the States thought of it, will be considered in a later chapter.

A caucus of the Republican members of the House was

held on Saturday, December 2, 1865. Thaddeus Stevens, by tacit consent, assumed the leadership and submitted the following plan to the caucus: (1) To claim the whole question of reconstruction as the exclusive business of Congress. (2) To regard the steps that had already been taken by the President for the restoration of the Confederate States as only provisional, and, therefore, subject to revision or reversal by Congress. (3) Each House to forego the exercise of its function of judging of the election and qualifications of its own members in case of those elected by the Southern States. This plan was accepted without objection. The caucus also directed the clerk of the House to omit from the roll all members from the Southern States and ordered that a joint resolution for the appointment of a joint committee of fifteen be introduced. This committee was "to inquire into the conditions 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," and providing that "until such report be made and acted upon by Congress no member from such States be received into either House." This programme was carried out in the House on the following Monday.[1]

This caucus and its programme were but foreshadowing the struggle that was to take place between the President and Congress over the question of reconstruction.

The Freedmen's Bureau Bill is the first, in point of time, of the efforts of Congress to reconstruct the Southern States. The original bill was enacted March 3, 1865, and was to expire one year after the termination of hostilities. Its object was to protect and support the freedmen who were within the territory controlled by the Union forces.

The Thirty-ninth Congress assembled in December, 1865, and on January 5, 1866, Mr. Trumbull introduced a bill to enlarge the powers of the Freedmen's Bureau. This bill was referred to the Judiciary Committee of the Senate, of

[1] Dewitt, The Trial and Impeachment of Andrew Johnson, pp. 27–28, and the Congressional Globe, 1st Sess., 39th Cong., pp. 5–6.

which Mr. Trumbull was chairman, from which it was reported back six days later with amendments. Aside from the subject-matter of this bill, its consideration is very important as showing the feelings and tendencies of Congressmen near the opening of the session, the gradual weakening of the conservatives, and their final union with the Radicals.

The bill, as reported from the committee by Mr. Trumbull, consisted of eight sections, the seventh and eighth of which are of importance to us. The other sections authorized the President to divide the country into districts, to appoint commissioners, to reserve from sale or settlement certain public lands in Florida, Mississippi and Arkansas, which were to be allotted to the loyal refugees and freedmen in parcels not exceeding forty acres, and to direct the commissioners to purchase sites or buildings for schools and asylums.

The seventh section, which is of greatest importance, declares it to be the duty of the President to extend military protection and jurisdiction over all cases where 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, sell, hold and convey real and personal property, and to have the full and equal benefit of all laws and proceedings for the security of person and estate) are refused or denied, in consequence of local law, customs or prejudice, on account of race, color, or previous condition of servitude, or where different punishments or penalties are inflicted than are prescribed for white persons committing like offenses.

The eighth section was punitive in its nature, making it a misdemeanor, punishable by a fine of $1000, or imprisonment for one year, or both, for any one to deprive another of any of the rights enumerated in the preceding section on account of race, color, or previous condition of servitude. These two sections of the bill were only to apply to those States or districts in which the ordinary course of judicial proceedings had been interrupted by the war. The

officers and agents of the Bureau were to hear and determine all offenses committed against the provisions of this section, as well as all cases where there was discrimination on account of race or color, under such rules and regulations as the President, through the War Department, might prescribe.[2]

The whole bill may be said to be a war measure, though applicable in time of peace, for military officers were to be put in charge of the districts. There seems to be little doubt but that it was unconstitutional and that it could scarcely be justified even as a war measure. The measure was unwise and inexpedient to say the least of it, for it retarded rather than aided reconstruction.

Besides providing for military courts, the bill took from the States matters which the States and local communities had up to that time entirely controlled, for never before had the Federal Government interfered or attempted to interfere with the rights of the States to determine who should be qualified to make and enforce contracts, sue and be sued, give testimony, inherit, etc.

It was claimed that the second section of the Thirteenth Amendment gave Congress the power to do anything to secure to the freedmen all the civil rights that were secured to white men. Mr. Hendricks, of Indiana, denied that construction, holding that no new rights were conferred upon freedmen, and that the only effect of the Amendment was to break the bonds which bound the slave to his master. He also contended that the laws of Indiana, which did not permit negroes to acquire real estate, make contracts, or to intermarry with whites, would practically be annulled by the bill, since they were civil rights. He also regarded the right to sit on a jury as a civil right.[3]

Mr. Trumbull, replying to Mr. Hendricks, said that the provisions of this bill which would interfere with the laws of Indiana could have no operation there, since the ordi-

[2] Globe, 39th Cong., 1st Sess., pp. 209–10.
[3] Ibid., p. 318.

nary course of judicial proceedings had not been interrupted. He held, however, that the second section of the Thirteenth Amendment was adopted for the purpose of giving Congress power to pass laws destroying all discriminations in civil rights against the black man. He denied that the bill interfered with the laws against the amalgamation of the races, since they equally forbade the white man to marry a negro. While this bill was to be temporary, he stated that the Civil Rights Bill, which was then before Congress, was intended to be permanent and to extend to all parts of the country. It was incumbent on Congress, he declared, to secure this protection if the States would not.[4]

Senator Wilson, of Massachusetts, who later became Vice President under General Grant, pointed to the fact that the laws of many of the Southern States were inconsistent with freedom, and that the Civil Rights Bill was to annul the black codes and put all under the protection of equal laws.[5] Mr. Davis tried to amend the bill to secure an appeal from the decision of the agents of the bureau to the courts, but all his amendments were rejected.[6] He also held that the bill was unconstitutional in that it invested the bureau with judicial powers, these powers to be exercised by army officers, and that it deprived the citizen of his right to trial by jury in civil cases contrary to the Seventh Amendment to the Constitution. He agreed with Mr. Hendricks as to its effect on the laws against the intermarriage of the races, and predicted that the Southern States would be kept out until Congress had passed some obnoxious amendments, had conferred suffrage on the negroes in the District of Columbia, had imposed the same odious principle on the South which most of the Northern States rejected with scorn, and had enacted the Freedmen's Bureau and Civil Rights Bills.[7]

[4] Ibid., pp. 321–323.
[5] Ibid., p. 340.
[6] Ibid., pp. 399–400.
[7] Ibid., pp. 415–19.

The bill was passed in the Senate, January 25, 1866, by a vote of 37 to 10, the vote being strictly partisan.[8]

The bill was then debated in the House at considerable length. Mr. Dawson, of Pennsylvania, in opposing it, stated that he regarded the privileges or rights secured by the Fourth, Fifth and Sixth Amendments as the birthright of every American. He asserted that the Radicals held that both races were equal, socially and politically, and that this involved the same rights and privileges at hotels, in railway cars, in churches, in schools, the same right to hold office, to sit on juries, to vote, to preside over courts, etc.[9] While this interpretation probably could not be given to the bill itself, it shows what some of the minority thought and felt to be the inevitable result of the doctrines enunciated by the radical leaders, and as will be seen later, these very principles were finally incorporated into the laws of the Federal Government by the party and men who denied having any such intentions.

Mr. Kerr,[10] of Indiana, and Mr. Marshall, of Illinois, were of the opinion that the Thirteenth Amendment did not authorize the bill. The latter asserted that if the bill were carried out, it would be in the power of the Federal Government to establish military tribunals in every State where there was discrimination against negroes. He regarded the right to sit on juries, to marry, and to vote as civil rights, and which could not, therefore, be denied on account of race or color.[11]

Mr. Rousseau, of Kentucky, said that under the operation of the bill a minister refusing to marry a negro and white person would be committing a criminal act and consequently would be subject to the penalty imposed by the eighth section. He also declared that it gave negroes the same privileges in railway cars and theaters, and that there would be mixed schools where it was in operation. He cited a letter from Charleston to show that he was right in

[8] Ibid., p. 421.
[9] Ibid., p. 541.
[10] Ibid., p. 623.
[11] Ibid., pp. 628–29.

regard to schools, and declared that no one could successfully combat his position, and, though he was interrupted several times, no one questioned his statements in regard to these things.[12]

Mr. Moulton held that the right to sit on juries and the right to marry were not civil rights, but Mr. Thornton of the same State thought otherwise.[13] Mr. Grinnell, of Iowa, seemed to regard the right to bear arms as a civil right, for in giving evidence to show that the bill was needed in Kentucky, he pointed to the fact that negroes were not allowed to keep a gun, to sit on the jury, or to vote.[14] Mr. Eliot, of Massachusetts, who had charge of the bill in the House, moved an amendment to the seventh section by inserting as one of the rights to which negroes were entitled "the constitutional right to bear arms."[15] Since the House adopted this amendment, which was also concurred in by the Senate, it is evident that the right to bear arms was regarded as one of the rights pertaining to citizens, and as this right is secured by the Second Amendment, it may reasonably be inferred that the other rights and privileges secured or enumerated by the first eight Amendments were also regarded as belonging to all persons. The bill passed the House February 6, 1866, by a vote of 136 to 33[16]—only one Republican (from Missouri) voting in the negative.

When the bill was again before the Senate, with the House amendments, Mr. Trumbull remarked that the amendment as to the right to bear arms did not alter the meaning of the section. That is, that the right to bear arms being a civil right secured by the Constitution would have been secured to the negroes by the bill in its original form.[17]

On February 19, the President returned the bill to the Senate with a veto message. He thought it not only

[12] Ibid., Appendix, pp. 69–71.
[13] Ibid., p. 632.
[14] Ibid., p. 651.
[15] Ibid., p. 654.
[16] Ibid., p. 688.
[17] Ibid., p. 743.

inconsistent with the public welfare and unconstitutional in certain provisions, but also obnoxious in that it did not define the civil rights and immunities to be secured to the freedmen by it.[18] Messrs. Davis and Trumbull were the only Senators who spoke on the veto. The former, in supporting it, declared that the intermarriage of the races, commingling in hotels, theaters, steamboats, and other civil rights and privileges, had always been denied

[18] Ibid., p. 916. Among other things he declared: "I share with Congress the strongest desire to secure to the freedmen the full enjoyment of their freedom and property, and their entire independence and equality in making contracts for their labor; but the bill before me contains provisions which, in my opinion, are not warranted by the Constitution, and are not well suited to accomplish the end in view. . . . In those eleven States, the bill subjects any white person who may be charged with depriving a freedman of 'any civil rights or immunities belonging to white persons' to imprisonment, or fine, or both, without, however, defining the 'civil rights and immunities' which are thus to be secured to the freedman by military law. . . .

"The trials, having their origin under this bill are to take place without the intervention of a jury, and without any fixed rules of law or evidence. The rules on which offenses are to be heard and determined by the numerous agents are such rules and regulations as the President, through the War Department shall prescribe. No previous presentment is required, nor any indictment charging the commission of a crime against the laws; but the trial must proceed on charges and specifications. The punishment will be—not what the law declares, but such as a court-martial may think proper; and from these arbitrary tribunals there lies no appeal, no writ of error to any of the courts in which the Constitution of the United States vests exclusively the judicial power of the country." This system of military jurisdiction, he said, could not be reconciled with the Fifth and Sixth Amendments to the Constitution of the United States.

In his second veto of the bill, July 16, 1866, the President reaffirmed the objections given in his veto, February 19, and referred to the Civil Rights Bill which had been passed over his veto, April 9, as a further reason against the necessity of the bill. In reference to the Civil Rights Bill, he declared: "By the provisions of the act full protection is afforded through the district courts of the United States, to all persons injured and whose privileges, as thus declared, are in any way impaired; and heavy penalties are denounced against the person who wilfully violates the law. I need not state that that law did not receive my approval; yet its remedies are far more preferable than those proposed in the present bill, the one being civil and the other military."

In reference to that part of the bill which made it possible for a man to be deprived of his property contrary to the Fifth Amendment, he said: "As a general principle, such legislation is unsafe, unwise, partial and unconstitutional." McPherson's Reconstruction, p. 147.

the free negroes, until Massachusetts had recently granted them.[19] Mr. Trumbull spoke quite at length in opposition to the veto, but never denied or questioned the contention of Mr. Davis.

The veto was sustained February 20, the vote being 30 to 18 in favor of the bill, and so not the necessary two thirds to override the veto.[20]

Messrs. Doolittle, Cowan, Dixon, Morgan, and Stewart were among the Republicans voting with the Democrats, but some of those who were able, at that time, to be controlled by reason were soon won over by the Radicals. While the bill failed to become law, it was practically reenacted July 16, 1866, over the veto of the President. His second veto was so strong, however, that party discipline and prejudice were necessary to keep it from being sustained, as it could not have been sustained on its merits.[21]

So bitter was the fight against the President at the time both Houses passed the bill over the veto on the same day that it was received, without debate in the House and with two speeches in the Senate, even before the message was printed.[22]

The Civil Rights Bill was undoubtedly the most important bill passed during the first session of the 39th Congress. It was a companion measure to the Freedmen's Bureau Bill, both being introduced at the same time by Senator Trumbull. Both bills were also referred to the same committee and reported back at the same time. Precedence was given, however, to the Freedmen's Bureau Bill, but after its failure to become law, the Civil Rights Bill was taken up and debated at great length—the minority using every means possible to prevent its passage.

The Radicals were very much chagrined by the successful veto of the Freedmen's Bureau Bill, and every effort was

[19] Globe, 39th Cong., 1st Sess., p. 936.
[20] Ibid., p. 943.
[21] Burgess, Reconstruction and the Constitution, p. 89.
[22] Blaine, in his "Twenty Years of Congress," volume II, p. 171, says: "It required potent persuasion, reinforced by the severest party discipline, to prevent a serious break in both Houses against the bill."

made to bring the recalcitrant into line. The party whip was brought to bear with telling effect, as it was determined that the Civil Rights Bill should become law. The first section of the Civil Rights Bill was almost identical with section 14 of the Freedmen's Bureau Bill as finally adopted, and it is to the first section of the Civil Rights Bill that we especially wish to direct attention, since it was to secure the provisions of this section that the first section of the Fourteenth Amendment was incorporated into our Constitution. The first section was in fact the basis of the whole bill, the other sections merely providing the machinery for its enforcement.

Section one as originally introduced declared 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 and 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 benefits of all laws and proceedings for the security of persons and property, and shall be subject to like punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." It was subsequently added that all persons born in the United States, and not subject to any foreign power, Indians not taxed being excluded, were citizens of the United States.[23] The purpose of this clause was to make a declaration that negroes were citizens of the United States, and so avoid the consequences of the Dred Scott decision. This is the only notable difference between the provisions of this section of the Civil Rights Bill and those of the Freedmen's Bureau Bill.

Mr. Trumbull, chairman of the Senate Judiciary Com-

[23] Globe, 39th Cong., 1st Sess., pp. 211 and 474.

mittee, and the putative father of the Civil Rights Bill, said that the purpose of the bill was to destroy the discrimination made against the negro in the laws of the Southern States and to carry into effect the Thirteenth Amendment. The second section of the Amendment gave Congress the power to pass any bill that it deemed appropriate to secure the freedom conferred by the first section. He cited the laws of South Carolina and Mississippi to show that the negroes were discriminated against, and said that nearly all the state legislatures of the Southern States which had met since the adoption of the Amendment abolishing slavery, had practically reënacted the slave codes. The right to have fire-arms, to go from place to place, to teach, to preach, and to own property, he regarded as the rights of a freedman, and that the laws denying these rights to the negroes might properly be declared void. He was candid enough, however, to state, without being questioned, that the bill might be assailed on the ground that it gave to the Federal Government powers which properly belonged to the States, though he did not think it open to that objection, since it would have no operation in any State where the laws were equal.

In answer to the query of what was meant by the term "civil rights," he replied that the first section of the bill defined it, and that it did not undertake to confer any political rights.[24] It seems evident, however, that the term "civil rights" was meant to include more than the specific rights enumerated in the first section of the bill, for Mr. Trumbull had, a few minutes before, declared that the right to travel, to teach, to preach, etc., were rights which belonged to all, and that the bill was to secure them to all.

It must also be remembered that Mr. Trumbull had framed the Freedmen's Bureau Bill which had been passed by the Senate four days before, the seventh section of which was almost identical with the first section of this bill. That bill made the same enumeration of rights, but they were

[24] Ibid., pp. 474–76.

declared to be only a part of the civil rights and immunities of citizens.

Mr. Saulsbury, of Delaware, took a decided stand against the whole measure, declaring that it was not only unconstitutional, but that it was subversive of the true theory of our Federal system. His position was that the theory of those who advocated the bill would make the people subject to the absolute control of Congress, and that this was contrary to the intentions of the Fathers. He did not deny that those who voted for the Thirteenth Amendment might have intended to confer the power on Congress to pass such a bill as the one under consideration, but that such intention was not avowed at the time. In his opinion suffrage was a civil right and would, therefore, be conferred on negroes by the bill. The terms of the bill would be construed, he said, according to their legitimate meaning and import, and not according to what Mr. Trumbull intended. This bill, if enacted into law, would, he asserted, deprive the States of their police power, and would nullify the laws of his State which forbade negroes to keep fire-arms or ammunition.[25] This last statement was not questioned by any one, and since Mr. Trumbull also seemed to recognize that the right to keep arms was a right to which all were entitled, we may conclude that this right was intended to be conferred upon negroes if the States permitted white men to enjoy it. The right to keep and bear arms is recognized in the national Constitution, but only to the extent of saying that the Federal Government could not deny the right, and not at all limiting the power of the States to determine who might exercise that right. As a further evidence that Mr. Saulsbury was correct in his opinion, we have already seen that the right to bear arms was specifically recognized as one of the civil rights in the Freedmen's Bureau Bill.

Mr. Van Winkle, of West Virginia, and Mr. Cowan, of Pennsylvania, both Republicans, thought the bill unconstitutional. Mr. Cowan went so far as to say that if the Con-

[25] Ibid., pp. 476–78.

stitution authorized the bill, then Congress had the power to overturn the States themselves. If the bill became law the statutes of Pennsylvania in regard to inheritances would, he declared, be repealed and the law providing for separate schools would be nullified, thus making the school directors, should they execute the state law, criminals. In his opinion, the Amendment abolishing slavery was not intended to revolutionize the laws of the States, nor was it pretended that it did more than sever the bonds that bound the slave to his former master, and that no wider operation could be given it than to sever the relation between the master and his slave.[26] He also thought that the bill would nullify state laws in regard to miscegenation.[27]

Mr. Howard, of Michigan, a member of the Reconstruction Committee, spoke in defense of the bill, and in reply to Mr. Cowan said that he was a member of the Judiciary Committee at the time the Thirteenth Amendment was drafted and reported to the Senate; that he remembered very distinctly the views entertained by the members of that committee in regard to the Amendment; and that it was the intention of its friends and advocates to give Congress the precise power over slavery and freedmen which was proposed to be exercised by the bill then under consideration. He said that they easily foresaw what efforts would be made by the South to deprive the freedmen of their rights and privileges, and that it was the purpose of the Amendment to give Congress the power to forestall or annul those efforts.[28]

Mr. Reverdy Johnson, of Maryland, who was probably the best constitutional lawyer in the 39th Congress, believed that the bill was unconstitutional. He even thought that it would nullify state laws against miscegenation, though he did not think the framers of it intended to do this.[29] If he, a good lawyer and a conservative man, thought the terms of the bill could be so construed as to do this, it is

[26] Ibid., pp. 499–500.
[27] Ibid., p. 604.
[28] Ibid., p. 503.
[29] Ibid., p. 505.

perfectly evident that the courts might fall into the same error, if indeed it would be an error. He suggested that the bill should be made so plain as to obviate this difficulty, but his suggestion was not followed.

Some of the Senators from California, Oregon, Minnesota and other Western States, wanted the first clause so amended as not to make Indians citizens, saying that the state laws which made it an indictable offense for a white man to sell arms or ammunition or intoxicating liquors to Indians, would be nullified, since it could properly be held that the Indians, if declared to be citizens, would have the same right to buy, sell, and use that kind of property as any other citizen. Mr. Henderson, of Missouri, replying to these objections, said that it would not necessarily follow that such laws would be abrogated, since the States would still have the power to declare who were competent to make contracts, etc., just as they did in regard to minors.[30] He seems to have been in error here, for in the same section of the bill it was stated that the right to make contracts, to buy, to sell, etc., could not be denied on account of race or color. It would thus be impossible for the States to say that Indians could not keep fire-arms or make contracts, since the law must apply equally to all races. There might be educational or age requirements, but such requirements would have to apply to all.

Mr. Davis, of Kentucky, seemed to think that, if the bill became law, suffrage would be conferred on the negroes, that miscegenation could not be prohibited by state law, and that a despotic central government would be created. He characterized the bill as "outrageous," "unconstitutional," "iniquitous," "most monstrous," and "abominable."[31] Mr. Trumbull again reiterated the statement that the bill was applicable exclusively to civil rights and that it did not propose to regulate political rights or to confer suffrage.[32]

[30] Ibid., pp. 572–74.
[31] Ibid., pp. 595–99.
[32] Ibid., p. 599.

Mr. Guthrie, of Kentucky, a very fair-minded man, said that Congress was legislating before the States had acted, before they had had time to legislate, and that the bill under consideration attempted to repeal state laws and to enact new laws for them, the enforcement of which was put in new hands. He denied that the people had intended by the Thirteenth Amendment to turn over the state governments and subject them to the dominion of Congress.[33] Mr. McDougall, of California, opposed the bill on the ground both of constitutional law and of sound policy. He approved what was said by Senators Guthrie, Hendricks, and Cowan.[34]

Mr. Saulsbury, just before the final vote was taken, offered an amendment inserting the words "except the right to vote in the States" after the words "civil rights." He contended that suffrage was a civil right, and since Mr. Trumbull had said that it was not the purpose or intention of the bill to confer suffrage, he wanted it so stated specifically. The amendment was rejected, however, by a vote of 39 to 7[35]—three Democrats voting against it, evidently thinking that suffrage was not conferred by it.

The bill was then passed by the Senate, February 2, 1866, by a vote of 33 to 12, five being absent.[36] Among the negative votes were those of three Republicans, Cowan, Van Winkle and Norton.

Mr. Wilson, of Iowa, chairman of the Judiciary Committee, had charge of the bill in the House and opened the debate on it March 1. It was not the object of the bill, he said, to establish new rights, but to protect and enforce those which already belonged to every citizen. It did not mean that all citizens should have the right to sit on juries, or that their children should attend the same schools, for these were not civil rights or immunities! He regarded civil rights as synonymous with natural rights. As to the clause declaring who should be citizens of the United States,

[33] Ibid., pp. 600–01.
[34] Ibid., p. 604.
[35] Ibid., p. 606.
[36] Ibid., p. 607.

he said that this was but declaratory of what was already the law, holding that all free persons born in the United States were citizens thereof. The opinion of Marshall in the celebrated case of McCulloh *vs.* Maryland was cited to show that Congress was the sole judge as to the necessity of the measure, and it was declared that there could be no appeal from the decision of Congress except to another Congress.[37]

Mr. Cook, of Illinois, also took the position that Congress was the judge as to the necessity and appropriateness of legislation to secure the rights of freedmen to those who had been freed.[38]

Mr. Rogers, of New Jersey, one of the leaders of the minority, vigorously opposed the whole measure. He declared that the Amendment proposed by Mr. Bingham, and which had just been discussed in the House, was offered to authorize such a bill as this one. Mr. Bingham had offered that Amendment with the approval of the majority of the Reconstruction Committee, and it might properly be inferred that those who approved that Amendment at least thought it doubtful whether Congress possessed the power to pass such a bill as the one then under consideration.

If Congress had the power to interfere with the state laws, regulating schools and marriage, it equally had the power, contended Mr. Rogers, to confer the elective franchise. In fact, he regarded suffrage as a civil right and as such would be conferred by the bill. Reference was also made to Secretary Seward's reply to the objections raised against the second clause of the Thirteenth Amendment.[39] Governor Perry, of South Carolina, had wired the President that the only objection the Legislature had to the Amendment abolishing slavery was the second section, which it feared might be construed to give Congress power of local legislation over both negroes and white men. To this telegram Secretary Seward replied that the objection

[37] Ibid., pp. 1115–18.
[38] Ibid., p. 1124.
[39] Ibid., pp. 1120–23.

to the second section was regarded as "querulous and unreasonable," since it really restrained, rather than enlarged, the powers of Congress. These telegrams were sent to the Legislature by Governor Perry to be placed on "record as the construction which had been given to the Amendment by the executive department of the Federal Government." The Legislature, in ratifying the Amendment, stated that it was understood that Congress could not legislate as to the political status or civil relations of the negroes.

Alabama and Florida added almost identical declaratory resolutions, to the effect that the Amendment was not to confer power upon Congress to legislate upon the political status of the freedmen in those States.[40]

Mr. Thayer, of Pennsylvania, declared that the bill could not be construed to confer suffrage, suffrage being a political, and not a civil, right, and that the enumeration of the rights to be secured precluded the possibility of extending the meaning of the general words beyond the particulars enumerated. If his position on this point is correct, then the meaning of the general terms used in the first section of the Fourteenth Amendment could be extended, since there is no enumeration of particulars in it. The first clause of the Civil Rights Bill only reiterated what was already law, he contended, and that if this was not the case, that Congress had the power, under the naturalization clause of the Constitution, to declare who were citizens. He also stated explicitly that he intended, when he voted for the second section of the Thirteenth Amendment, to give Congress the power to legislate for the purpose of securing the rights which the first section gave to the freedmen; in other words, to authorize such measures as the Civil Rights Bill. He did not think the Amendment proposed by Mr. Bingham necessary, though he would support it in order to make things doubly secure.[41]

To show that there was a feeling among others than opponents of the bill that it might be construed to confer

[40] McPherson, Reconstruction, pp. 21–25.
[41] Globe, 39th Cong., 1st Sess., pp. 1151–53.

suffrage, Mr. Hill, of Indiana, a Republican and a supporter of the measure, proposed that the words "except the right of suffrage" be inserted. This amendment he considered a fair and explicit statement of what the advocates of the bill had repeatedly declared in debate. He also thought it necessary in order to relieve the bill from ambiguity upon that point.[42]

Mr. Eldridge, of Wisconsin, said that the bill not only proposed to regulate the police and municipal affairs of the States, but that it attempted to prostrate the judiciary of the States, and that it was designed to accumulate and centralize power in the Federal Government. He also cited the fact that Mr. Bingham had introduced a resolution proposing a constitutional amendment for the purpose of meeting the constitutional objections to the passage of the bill.[43] He very tersely presented the objections entertained by the minority to such legislation.

Mr. Thornton, of Illinois, a conservative Democrat, held that it was not necessary for a man to possess and enjoy all the civil rights and immunities in order to be free, and that the Amendment abolishing slavery only authorized such legislation as was necessary to make men free. He thought the former slaves should have the right to testify and to contract, but to undertake to legislate beyond that would trench upon the rights of the States. He maintained that the construction put upon the Amendment by the advocates of the bill would make the power conferred upon Congress by it indefinite and unlimited except by the caprices of those who might assume to exercise it. If Congress should determine, he continued, that the elective franchise was necessary to freedom, then it could enact a law conferring it. This contention seems perfectly proper, for if the premise of the proposition of those advocating the bill is accepted, it logically follows that Congress might declare that any or all of the political rights were either necessary or appropriate to secure freedom to the former

[42] Ibid., p. 1154.
[43] Ibid., pp. 1154–55.

slaves. Mr. Thornton did not think the term "civil rights" included the right of suffrage, but that with the loose and liberal construction then in use it might be so construed, and for that reason he thought the amendment stating specifically that suffrage should not be granted ought to be accepted.[44]

Mr. Broomall, of Pennsylvania, regarded the right of speech, of transit, of domicil, and of petition as being some of the rights and immunities of citizens.[45] Mr. Raymond, of New York, a conservative or administration Republican, said that the negroes, if made citizens of the United States, would have the right to go from one State to another, to bear arms and to testify in the Federal courts. He, however, thought the bill unconstitutional, especially the second section.[46]

Mr. Delano, of Ohio, a Republican, thought that the clause "the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens" conferred the right of being jurors, though Mr. Wilson did not think so. Mr. Delano stated that he was in favor of the main purposes of the bill, but he did not think it advisable to confer upon the negroes at that time the right of being jurors. Furthermore, he thought it doubtful whether Congress had the power to pass the bill, since neither the right to testify nor to inherit was necessary to freedom, as was illustrated by the various state laws declaring that certain persons could not testify or inherit. In some States aliens could not inherit and infidels could not testify. It was also pointed out that the former law of Ohio which did not permit negroes to participate in the public schools or in the funds would have been void under this bill.[47] If the phrase "full and equal benefit of all laws and proceedings" was not an extension of the privileges enumerated, then it was meaningless and should not have been put in. While opposing the bill

[44] Ibid., pp. 1156–57.
[45] Ibid., p. 1263.
[46] Ibid., pp. 1266–67.
[47] Ibid., Appendix, pp. 156–58.

as being of doubtful constitutionality, as tending towards centralization and consolidation, Mr. Delano nevertheless voted for it.[48] Mr. Davis, of New York, was another who said that the bill was not in consonance with the Constitution, but was in derogation of the rights of the States, and yet voted for it.[49]

Mr. Kerr, of Indiana, seemed to think that the bill would permit negroes to engage in certain kinds of business, such as retailing spirituous liquors, which was denied them, to attend the same schools with white children, and to rent and occupy the most prominent pews in churches. These rights as well as the right to testify were not necessary incidents of freedmen, nor did the denial of them render any one a slave. If Congress had the power to confer these privileges it could equally be claimed that it had the power to grant the suffrage.[50] The laws of Indiana at that time did not allow negroes to sell spirituous liquors or to attend the common schools.

One of the most significant speeches made on the bill was the one delivered by Mr. Bingham, one of the ablest members of Congress. He was also one of the Radical leaders and a member of the Reconstruction Committee, but his objections to the bill were of such a character that he could not support it. Like Delano, Raymond, and other Republicans, his objections were based on constitutional grounds, but unlike Delano and some others he was unwilling to give his vote to a measure that he thought was unconstitutional.

Again, his position was entirely different from that of Cowan, Norton, and Van Winkle in the Senate, and of

[48] "In my opinion, if we adopt the principle of this bill, we declare in effect that Congress has authority to go into the States and manage and legislate with regard to all the personal rights of the citizen—rights of life, liberty, and property. You render this Government no longer a Government of limited powers; you concentrate and consolidate here an extent of authority that will swallow up all or nearly all of the rights of the States with respect to the property, the liberties, and the lives of its citizens." Ibid., Appendix, p. 158.

[49] Ibid., p. 1265.

[50] Ibid., p. 1268.

Raymond, Latham, and others in the House, since he was not a Johnson Republican, but one of the extreme Radicals. He did not, however, like many Radicals, permit his partisanship to control his judgment and action when it came to a question of constitutional power. He was earnestly desirous of accomplishing the objects aimed at by the bill, but thought that it transcended the Federal jurisdiction, since the questions about which it undertook to legislate were left by the Constitution entirely with the States. The great need of the Republic was the enforcement of the Bill of Rights (the first eight Amendments), but this could not be done by the Federal Government, he declared, since those Amendments had been uniformly held to be limitations upon the United States. The power to punish offenses against life, liberty, or property was one of the reserved powers of the States.

Mr. Bingham also took the position that the term "civil rights" was very comprehensive and that it embraced every right that pertained to a citizen as such, including political rights. Mr. Trumbull had admitted to him that the franchise of office was a civil right according to all the authorities. He thought the evils which the bill sought to remedy should be remedied by a constitutional amendment expressly prohibiting the States from such an abuse of power, and not by an arbitrary assumption of power by Congress.

The Amendment which he had advocated would give Congress the power, he said, to punish all violations of the Bill of Rights by state officers.[51] He spoke only thirty minutes, but within that short time made one of the strongest speeches against the bill—a speech full of sound reasoning and good legal arguments, but his auditors were in no mood to be governed by reason, however strongly presented or no matter what its source.

His position on this very important bill, as well as the arguments used by him, should be kept in mind on account of the aid to be derived from them in interpreting the first section of the Fourteenth Amendment, since he was the

[51] Ibid., pp. 1291–92.

author of that section. At a first glance one would be inclined to think that he was inconsistent in voting for the Freedmen's Bureau Bill and then opposing the Civil Rights Bill, since they were so similar, but there was this marked difference which accounts for his votes on both measures. The former bill was to apply only to the insurrectionary States and was to cease upon the restoration of those States to their constitutional relations with the Union, while the latter was to apply to all the States and was intended to be permanent.

Mr. Shellabarger, of Ohio, was among the Republicans who had doubts as to the constitutionality of the bill, though he said he had resolved his doubts in favor of the security and protection of the American citizen and would vote for the bill.[52]

Even Mr. Wilson, who had charge of the bill in the House, admitted in his opening speech that precedents, both judicial and legislative, were found in sharp conflict with its provisions. In his closing speech, he replied to the objections raised by Mr. Bingham, maintaining that state laws in regard to schools, juries and suffrage would not be set aside by the bill if properly construed, since it only embraced those rights which belonged to citizens of the United States as such and did not attempt to regulate those rights which rightfully depended upon state laws and regulations. He denied the contention of Mr. Bingham that an amendment to the Constitution was necessary to enforce the Bill of Rights, since the possession of the rights by citizens necessarily conferred by implication the power upon Congress to provide by appropriate legislation for their protection.

If a State undertook to deprive any citizen of life, liberty, or property without due process of law, Congress had the power to provide a remedy for his protection.[53] His posi-

[52] Ibid., p. 1273.

[53] "I find in the Bill of Rights which the gentleman (Mr. Bingham) desires to have enforced by an amendment to the constitution that 'no person shall be deprived of life, liberty or property without due process of law.' I understand that these constitute

tion was directly opposed to the ruling of the Supreme Court of the United States, since it had been repeatedly held that the Bill of Rights or the first eight Amendments were limitations upon the Federal Government and by no means limited the powers of the States. Property had been taken by the States without due process of law, and there was no remedy said the Court in the case of Barron *vs.* Baltimore. His position was thus untenable, and since he stated that the purpose of the bill was to secure the rights enumerated in the Bill of Rights, it becomes clearly evident that, according to the previous rulings of the Supreme Court, the bill was unconstitutional. His speech furthermore strengthens the presumption that Mr. Bingham was striving to make the rights and privileges of the early Amendments applicable to the States as well as to the Federal Government. Mr. Wilson may have given the opinion of the Judiciary Committee and of many members of Congress, but his arguments fall far short of those produced by Mr. Bingham, especially when considered from the point of view of constitutional law. In fact, his arguments, as well as those of many of the adherents of the bill, were based more upon what ought to be than upon what could constitutionally and legally be, and so were more of the nature of political theory and philosophy than of constitutional law.

Mr. Latham, a Republican Representative from West Virginia, held that Congress could not put its interpretation upon the Constitution, this being a matter belonging to the judiciary, though it could give its interpretation to its own acts. This seems perfectly true, for otherwise the Eleventh Amendment would have been unnecessary, and accepting this statement it becomes apparent that Congress could not interpret the Thirteenth Amendment since it would be a question for the Courts to decide just what rights were con-

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." Ibid., p. 1294.

ferred by it. Congress had the power, in fact it had already exercised it, to declare that all, regardless of color or race, should have an equal right to testify in the Federal Courts, an equal participation in all the rights and privileges which Congress might constitutionally regulate, but he denied that Congress had the right to interfere with the internal policy of the States so as to define and regulate the civil rights and immunities of the inhabitants thereof.

His objections were not limited to the questions of its constitutionality alone, for he considered it one of a series of measures, which, if adopted, would change the whole policy as well as the very form of our Government "by a complete centralization of all power in the National Government."[54]

We have seen that there was apprehension among Republicans, as well as among the Democrats that the term "civil rights" might be construed to confer suffrage, and in order to remove all doubt on that score, Mr. Wilson, reiterating that it did not alter his construction of the bill, added a new section by way of amendment that the bill should not be so construed as to affect the laws of any State concerning the right of suffrage. The amendment was agreed to without division or comment.[55] Mr. Bingham had also moved that the Committee be instructed to strike out "and there shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory of the United States on account of race, color, or previous condition of servitude." This motion was defeated by a vote of 113 to 37. It is rather singular that not a Democrat voted to instruct the Committee to strike out the above clause. The bill was then recommitted without instructions by a vote of 82 to 70.[56]

It is worthy of notice that, although Mr. Bingham's motion was defeated, the Committee nevertheless reported back the bill with the identical changes that he had proposed or suggested. Mr. Wilson, in reporting the bill with

[54] Ibid., pp. 1295–96.
[55] Ibid., p. 1162, also Blaine's "Twenty Years of Congress," II, p. 175.
[56] Ibid., pp. 1291 and 1296.

this amendment, said it did not materially change the bill, but that some feared the deleted words might give warrant for a latitudinarian construction not intended. If this were true, why had the proposal of Mr. Bingham been objected to so seriously? It is impossible to say just why the words were struck out, though it might be inferred that it was done in order to secure the passage of the bill, for there might have been considerable opposition to the clause which had not been expressed. Thirty-seven Republicans had moreover voted to that effect, and this of itself must have had some weight. The amendment stating that suffrage was not to be regarded as a civil right or immunity became unnecessary after those words were struck out.[57]

The final vote on the passage of the bill was 111 to 38. The following Republicans voted with the Democrats against the passage of the bill: Messrs. Bingham, Latham, Phelps, W. H. Randall, Rousseau, and Smith. All of these, except Mr. Bingham, were from the border states of Kentucky, West Virginia and Maryland, where there was a considerable number of negroes. Mr. Bingham's objection to the bill was based entirely upon constitutional grounds. Mr. Raymond would probably have voted against the bill had he been present.

To show the view that the minority had of the bill to the last, Mr. LeBlond moved, after the bill had passed, to amend its title by making it read: "A bill to abrogate the rights and break down the judicial system of the States."

The amendments made in the House were concurred in by the Senate without division on March 15.

On March 27, the President returned the bill with his objections to the Senate, where it had originated. He gave his objections *ad seriatim* to each section, using many of the arguments which had been urged in Congress against it, and holding that it was both unnecessary and unconstitutional and that it discriminated between negroes and intelligent foreigners. He characterized it as a stride towards the concentration of all legislative power in the National Govern-

[57] Ibid., pp. 1366–67.

ment.[58] His arguments were calm, clear, and temperate. The galleries and floor of the Senate Chamber were crowded when the veto message of the President was received, but the reading of it was postponed for some time, for the case of Senator Stockton was being considered.[59] It is rather significant that his case was not finally disposed of until it was definitely known that the Civil Rights Bill had been vetoed.

[58] Ibid., p. 1679. Referring to the rights secured by the first section, he said, "a perfect equality of the white and colored races is attempted to be fixed by Federal law in every State of the Union, over the vast field of state jurisdiction covered by the enumerated rights. In no one of these can any State ever exercise any power of discrimination between the different races. In the exercise of state policy over matters exclusively affecting the people of each State, it has frequently been thought expedient to discriminate between the two races. By the statutes of some of the States, northern as well as southern, it is enacted, for instance, that no white person shall intermarry with a negro or mulatto." He stated that he did not believe that the bill would annul state laws in regard to marriage, but that if Congress had the power to provide that there should be no discrimination in the matters enumerated in the bill, then it could pass a law repealing the laws of the States in regard to marriage.

He then continued: "Hitherto every subject embraced in the enumeration of rights contained in this bill has been considered as exclusively belonging to the States. They all relate to the internal policy and economy of the respective States. If it be granted that Congress can repeal all state laws, discriminating between whites and blacks in the subjects covered by this bill, why, it may be asked, may not Congress repeal, in the same way, all state laws discriminating between the two races on the subjects of suffrage and office."

Speaking of the general effect of the bill, he declared it interfered "with the municipal legislation of the States, with the relations existing exclusively between a State and its citizens or between inhabitants of the same State—an absorption and assumption of power by the General Government which, if acquiesced in, must sap and destroy our federative system of limited powers, and break down the barriers which preserve the rights of the States. It is another step, or rather stride, towards centralization, and the concentration of all legislative powers in the National Government.

"The tendency of the bill must be to resuscitate the spirit of rebellion, and to arrest the progress of those influences which are more closely drawing around the States the bonds of union and peace." He stated that he was ready to coöperate with Congress in any legislation that was necessary to secure the civil rights to all persons "under equal and imperative laws, in conformity with the provisions of the Federal Constitution."

[59] Ibid., p. 1679, also McPherson's Scrap Book, "The Civil Rights Bill," p. 28.

Unlike the action on the veto of the Freedmen's Bureau Bill, the veto of this bill was not taken up for discussion until April 4. The cause of delay was partially the death of Senator Foote, of Vermont, who died on the morning of the 28th. The Senate, out of respect, adjourned until April 2. The veto message would, it seems, have been the regular order on that day, but there was no mention of it either on that day or the day following. While no reason was given for this delay, a careful study of the record reveals it. Time had to be given for Mr. Foote's successor to be appointed and to reach the city, for every vote was needed. It was also desirable that Mr. Stockton's successor should be on hand.

The veto was the occasion of a vigorous debate in the Senate. Mr. Trumbull made an elaborate speech, considering the veto in detail and maintaining the constitutionality and necessity of the bill. He was followed the next day by Reverdy Johnson who made an able speech in support of the veto, holding that if Congress could legislate for the black, it could for the white, thereby destroying the reserved rights of the States. The first section of the bill, in his opinion, struck at the legislative authority of the States; the second section struck at their judicial departments, and thus prostrated the States at the footstool of the Federal power.[60] Mr. Wade made a very defiant speech in opposition to the veto.

During the debate an unusual incident showed the temper which had been engendered in the Senate by the veto and the debate on it. Late in the evening of April 5, Mr. Trumbull intimated his purpose or willingness to have the vote taken if there was no further debate. Mr. Cowan suggested that an hour be agreed upon to take the vote the next day, since two Senators, Messrs. Wright and Dixon, were very sick and could not with safety come out at night. Messrs. Guthrie, Hendricks and others strongly insisted upon the point of courtesy. Mr. Wade spoke very bitterly in reply, saying that he was thankful that God had stricken

[60] Ibid., p. 1761.

a member so that he could not be present to sustain the veto.[61] Mr. McDougall rebuked him with deserving severity. The Senate adjourned, however, by a vote of 33 to 12, thus failing to sustain Mr. Wade's angry position.[62]

Mr. Davis reiterated his objections to the bill, claiming that the distinctions or discriminations made between negroes and whites on steamboats, in railway cars, in hotels and in churches, would be swept aside by the bill.[63] Messrs. Doolittle, Saulsbury and McDougall also spoke in support of the veto.

The bill passed the Senate, notwithstanding the objections of the President, by the necessary two thirds vote, on April 6, 1866. The final vote was 33 to 15.[64]

Mr. Wright, of New Jersey, who had been sick for some time, was brought into the Senate chamber for the purpose of sustaining the veto. Mr. Dixon, of Connecticut, the only Senator not voting, was also sick, but would have been brought in had it been seen that his vote would sustain the veto. Mr. Stockton's place had not yet been filled, though strenuous efforts had been made by Thaddeus Stevens and others to have this done, for there was fear among the Radicals that the veto might be sustained. Had Mr. Stockton retained his seat, with the vote of Mr. Dixon, the bill would not have been passed. Mr. Morgan, who had sustained the veto of the Freedman's Bureau Bill, was applauded when he voted for the bill, for he was the only one who was regarded as at all doubtful.

Mr. Edmunds, who had been appointed to fill the vacancy created by the death of Mr. Foote, took his seat April 5, the day before the vote was taken. The fear on the part of the Republicans that the veto might be sustained made them resort to every possible means to obtain their end. Mr. Stockton, who had been duly elected Senator from New

[61] "I will tell the President and everybody else that if God Almighty has stricken one member so that he cannot be here to uphold the dictation of a despot, I thank him for His interposition and I will take advantage of it if I can." Globe, p. 1786.
[62] Ibid., p. 1786.
[63] Ibid., Appendix, p. 183.
[64] Ibid., p. 1809.

Jersey, but against whose election certain members of the New Jersey Legislature had protested, was now slated for rejection. His credentials had been passed upon by the Judiciary Committee, of which Mr. Trumbull was Chairman, and his election declared to be legal.

The Committee had made their report January 30, Mr. Clark, of New Hampshire, being the only member of the committee who did not approve the report. No action whatever had been taken upon the report and there is little probability that Mr. Stockton's right to his seat would ever have been called in question had the Republican majority been sufficient without unseating him, for otherwise the delay in regard to his case cannot be accounted for. When it was seen that the Civil Rights Bill was in great jeopardy, and that the Radical plan of reconstruction would consequently be endangered, it was decided to get rid of Stockton. So on March 22, his case was brought before the Senate. This was four days after the Civil Rights Bill had been placed in the hands of the President. Many Radicals voted to permit Mr. Stockton to keep his seat, and had his colleague, Mr. Wright, been present he would have retained it. Mr. Wright had paired with Mr. Morrill, of Maine, on the question before he left the city, but the latter, after giving Mr. Stockton notice that he considered the pair at an end, voted. To show, however, that he had compunctions about it, he did not vote when his name was first called, but after the roll call had been completed, and seeing it within his power to decide the question, pressure having been brought to bear by Sumner and others, he voted. The final vote by which Mr. Stockton was unseated was taken on March 27, after the veto message of the bill had been received, but before it was read. Strenuous efforts were made to postpone final action until Mr. Wright could get to the city, but these efforts were futile.

No debate was permitted in the House, the bill passing that body on the ninth of April by a vote of 122 to 41. The following Republicans, Noel, Raymond and Whaley, in

addition to those who voted with the minority before, voted to sustain the veto.

Mr. Colfax, the Speaker, requested the Clerk to call his name, his vote being greeted with applause. His announcement that the bill, the objections of the President to the contrary notwithstanding, had become a law, was received with great applause, both by members of the House and the throng in the galleries, the hisses of a few sorrowful soldiers being unnoticed in the general joy.[65]

We may conclude, then, that many of the ablest men in Congress, including strong men in the Republican party like Doolittle, Cowan, Raymond, and Bingham, thought that Congress was going beyond its power in passing the Civil Rights Bill. All those who opposed the bill, not only took the position that it was unconstitutional, but most of them thought it unwise and inexpedient. Many even of those who supported it admitted that it undertook to regulate affairs that had uniformly been regarded as belonging exclusively to the States. While not regarding the bill as conferring the right of suffrage, or as interfering with the state laws as to the inter-marriage of the races, though many strong legal minds thought it would have that result, it cannot be questioned but that it conferred, or proposed to confer, upon the freedmen rights which would greatly interfere with state legislation. Many believed that the negro would be entitled to sit on juries, to attend the same schools, etc., since, if the States undertook to legislate on those matters, it might be claimed that he was denied the equal rights and privileges accorded to white men. It does not appear that all of these contentions were specifically contradicted. It would seem reasonable to suppose that if the bill should prove to be constitutional that these rights could not be legally denied them.

Having seen what Congress thought of the bill, it might be well to see what the people thought of it—what rights and privileges they regarded as being conferred by it. As is to be expected, we find the press of the country divided

[65] Ibid., p. 1861, and N. Y. Herald, April 10, 1866.

on it, largely along political lines, just as was the case in Congress. The Southern press was naturally hostile to the legislation. The Southern mind had long been taught to regard the Federal Government as one of very limited powers, and any legislation which tended to increase that power at the expense of the States, would obviously be condemned. Consequently we find the Southern press denouncing the bill as infringing the rights of the States and centralizing all or very nearly all power in the Central Government.[66] Furthermore, the South was the section which would be affected by it and that section would never consent to any legislation that tended towards equality with the negroes.

Many papers at the North took a similar view, among them being the *World,* the *Herald,* and the *Times.* The Cincinnati *Commercial* also threw the weight of its editorial columns upon this side. All of these except the *World* were Republican papers. The press, even more than members of Congress, gave a broad and liberal meaning to the bill, saying that under cover of "full and equal rights" state laws forbidding amalgamation would be set aside and that negroes could not be kept out of theaters, churches, etc.[67] The Cincinnati *Commercial,* a conservative Republican paper, thought that the bill was unconstitutional, in that it would open the schools, hotels, churches, theaters, concert halls, etc., to negroes on the same terms with white people, and that it would make it a crime to refuse them these rights.[68]

This was also the opinion of the National *Intelligencer* of Washington, the so-called Administration organ.

The *Tribune,* of which Greeley was the editor, was a strong supporter of the measures and policies of the Radicals, but had very little to say about the Civil Rights Bill further than that it was a just measure and should be adopted. It never denied the contention of many that it

[66] Charleston (S. C.) Courier, April 11, 1866.
[67] N. Y. Herald, March 29, 1866.
[68] March 30, 1866.

would curtail the rights of the States. The New York *Evening Post,* a Republican paper, advocated the bill, apparently thinking that it would guarantee free speech and free press, which, in its opinion, was badly needed in the South. The right to hold office and to serve on the jury was not considered as among the rights secured by the bill,[69] but the right peacefully to assemble, to petition, to have freedom of movement, to have impartial protection of life, person and property were.[70] It was also held that the right to keep fire-arms would be secured to the negroes on the same terms as to whites.[71]

It was declared by a strong opponent of the bill that every argument in its favor savored of centralization, and that the President had properly characterized it when he said it was a great stride towards consolidation. State laws against miscegenation would be made void by it, the ministers or magistrates refusing to marry those of different races being made subject to fine and imprisonment. If the bill became a law the state governments would practically be abolished; if Congress could confer *civil* rights, it could with equal propriety confer *political* rights, since to do either required an invasion of the province of the States.[72]

The statement that miscegenation would not only be possible under the bill, but that state laws against it would be nullified, may seem rather extreme, though we have already seen that this view was taken by some while the bill was before Congress. If these statements were limited to opponents of the bill and to partisan newspapers, we might discard them at once as preposterous. There are, however, facts of greater weight than these mere statements. A negro preacher married a white man and a negro woman in the State of Tennessee, for which he was fined $500, while the parties to the marriage contract were imprisoned, being unable to pay the fine of $50, which was imposed on each of them. The *Tribune,* after recounting this, expressed the

[69] N. Y. Post, March 28, 1866.
[70] Ibid., March 30 and April 3, 1866.
[71] Ibid., April 7, 1866.
[72] World, March 28, 1866.

desire that the case be brought before the Supreme Court of the United States for adjudication under the Civil Rights Bill.[73] A case somewhat similar to this, and said to be the first case of its kind in Mississippi, occurred at Jackson in June, 1866. The parties were tried, found guilty, and sentenced to the county jail for six months, with fine of $500 each. The military officers looked on, but offered no interference.[74] The Civil Rights Bill was probably the basis of both of these incidents.

One writer declared that Senator Trumbull's speech on the veto of the bill affirmed a principle "pregnant with danger to the rightful authority and jurisdiction of the States." "Instead of overthrowing the vital objection urged in the veto message," this writer declared, "Mr. Trumbull in reality conceded all that it involves," since he neither denies nor shows that the bill does not include and cover subjects in regard to which the States have up to this time exclusively legislated.[75]

In the Cincinnati *Commercial,* it was argued that the bill was more deserving of the veto than the Freedmen's Bureau Bill, since it was an attempt to take from the States the right reserved to them by the Constitution to enact and enforce their own police regulations, and that Congress did not have the power to declare state laws null and void, this being a question for the Courts to determine.[76] Such legislation as the Civil Rights and Freedmen's Bureau Bills was declared to be revolutionary in its character from the fact that it took from the local authorities and legislators matters that had uniformly been referred to them.[77]

The bill was regarded as the death blow to the States in that the state judiciary would practically be abolished by it, since the state courts could only act under powers granted by the Federal Government. It was also asserted that the

[73] N. Y. Times, July 16, 1866, under caption: "Amalgamation in Tennessee."
[74] Garner, Reconstruction in Mississippi, p. 114.
[75] Editorial in Times, April 7, 1866.
[76] March 27, 1866.
[77] Ibid., March 29, 1866.

measure carried Federal interference into privacies into which even the most local laws never entered, for the customs of a community were made amenable to Federal authority—an authority entirely foreign to the community. At a public sale of church pews, it was declared negroes could not be prevented from purchasing, while a white man could if he were objectionable to the church or the customs of the church, since such refusal would not be made on account of color. The same would be true, it was urged, in regard to hotels and other places of accommodation, for if a negro was refused admittance, the proprietor would be subject to both fine and imprisonment, while a white man could only recover civil damages however wrongfully he might have been refused accommodations.[78]

A mass meeting of the citizens of Carroll County, at Westminster, Maryland, May 19, 1866, adopted a series of resolutions, one of which was a declaration that the Civil Rights Bill was unconstitutional, and that if carried into effect would upheave the foundations of social order. These resolutions were sanctioned both by the Republicans and Democrats.[79]

The belief that the bill conferred upon the negroes the right of attending churches and theaters was not limited to the so-called loyal States, for this opinion was also held in the South, and the desire was expressed that, if it was to be enforced in this respect, it be *first* enforced in Boston. "What that city has so effectually sowed," it was declared, "let it reap!"[80] The view was also held in the South that the Civil Rights Bill not only infringed, but that it destroyed, the rights of the States by concentrating all power in the Central Government, by making the state judiciary amenable and subservient to Federal authority, and by conferring upon Congress powers unknown to the original law of the country.[81] A view of the bill not generally taken by the Southern press was that taken by the Mobile *Regis-*

[78] National Intelligencer, March 24, 1866.
[79] N. Y. Herald, May 26, 1866.
[80] Atlanta Intelligencer, May 3, 1866.
[81] Charleston Courier, April 2, 1866.

ter. This journal did not think that the bill would interfere with the regulations and customs of steamboats, railroads, street cars, theaters, or other places of public resort.[82]

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

The bill enumerated certain specific rights, such as the right to testify, to sue, be sued, etc., but it was generally felt that more than these enumerated rights were conferred, and that under its provisions negroes could not be kept out of the jury-box, and that they were to have equal rights with the whites in every respect, even to the right of intermarriage. The right of intermarriage, however, was not so generally held to be conferred by the bill, but the other opinions, it seems, were clearly warranted, both by the context of the bill and by the declarations of some of its supporters.

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

[82] Quoted in Cincinnati Commercial, April 21, 1866. The Memphis Argus practically held the same opinion as the Charleston Courier, stating that it consolidated all power in the hands of Congress. The Cincinnati Commercial of April 21 quoted the Argus on this point, but did not deny its interpretation of the bill, merely saying that a part of the bill was similar to the fugitive slave law.

About two weeks after the bill had passed Congress, two so-called freedmen, in order to see whether the bill had really benefited them in a practical way, went to a sleeper and demanded accommodations as a train was about to leave Washington for New York. The demand was refused them at the request of the other passengers (all said to be New Englanders), who threatened to leave the car if the negroes were admitted. The negroes thereupon threatened prosecution under the Civil Rights Bill and took their departure.[83] Two or three incidents occurred in Baltimore at an earlier date. A negro asserted the right to ride in a railway car on the York Road among the other passengers, and when compelled to go to the front platform where colored persons were allowed to ride, noted the number of the car, probably to bring suit, and departed. On the same night, another negro, James Williams, appeared at the ticket office of the Holliday Street Theater, and asked for a ticket, which was of course refused. The next night another negro went to a public house and asked for a drink, and on the refusal of the proprietor to sell him the liquor, went away to file complaint at the station, claiming that "as a citizen he was entitled to the same privileges as white men."[84] Before the middle of May the Baltimore & Ohio Railroad Company had a suit pending against it for refusing to sell a negro a first-class ticket. It was also stated that several suits had been brought in Baltimore and other parts of the country against persons refusing to admit negroes to entertainments from which they were at that time excluded by state or municipal laws.[85] The editor of the *National Intelligencer,* commenting upon these facts, observed that if the bill was constitutional it would be difficult to see how negroes could be debarred, except at the risk of a suit, from going into hotels, theaters, restaurants, billiard rooms, or any licensed house where men have a legal right to accommodations. Towards the last of April

[83] Cincinnati Commercial, April 30, 1866.
[84] National Intelligencer, April 24, 1866, also Baltimore American, April 16, 1866.
[85] Ibid., May 16, 1866.

the negroes of New York began to "feel their civil rights"—four or five going into a fashionable restaurant, sitting down among white ladies and gentlemen, and appealing to the Civil Rights Bill to protect them from ejectment.[86] The editor referring to this incident said the same game would probably be tried at the churches, theaters and other resorts, but that after some annoyance and inconvenience, the negroes would be quietly regulated by public opinion. It was also stated[87] that the negroes of Boston proposed to contest the power of theater managers, church wardens, etc., to exclude them from mingling with the whites in an "equality" of position. They evidently carried out their intentions, but were excluded from the theaters, since only a nominal fine was imposed by the law which had been passed on that subject.[88] There were several occurrences in the North and West where negroes claimed the right to attend places of amusement to the discomfiture of white ladies. The editor added that the South would have to endure the same thing, though not responsible for it.[89]

The first suit under the Civil Rights Bill was in Indiana, and in this case the bill was held constitutional. This was the case of Barnes *vs.* Browning. Barnes, a negro, sued Browning, a hotel proprietor, for wages, and the plea offered by Browning was that Barnes was not entitled to sue in the courts of Indiana, since he had come into the State contrary to the Constitution of the State. There was a provision in the Indiana Constitution which prohibited negro immigration and declared null and void any contracts made with such persons. There was also a law to enforce this provision, which was to the effect that no negro coming into the State could make or enforce contracts.

Barnes demurred to the answer of the defendant maintaining that the Indiana law and Constitution in that respect were void, because: (1) It was opposed to the spirit and letter of the Constitution of the United States. (2) It was

[86] N. Y. Herald, April 28, 1866.
[87] Atlanta Intelligencer, April 18, 1866.
[88] Cincinnati Commercial, May 2, 1866.
[89] Atlanta Intelligencer, April 26, 1866.

in conflict with the 13th Amendment. (3) It was void under the first section of the Civil Rights Bill. The lower court sustained the demurrer, and the case was brought before Judge Test of the Circuit Court by way of appeal. He sustained the decision of the lower court, though basing his decision on the 13th Amendment, since the Civil Rights Bill had not been officially promulgated.[90] The suit was no doubt inspired by the passage of the bill, for it was instituted April 11, only two days after its passage, and reference being made to it in reply to the plea set up by the defendant.

This decision was rendered at LaFayette, Indiana, April 14, 1866, just five days after the passage of the bill by Congress. Another case very similar to this one was decided by the Supreme Court of Indiana at its May term. Smith, a negro, sued Moody to collect a promissory note. The same plea was set up in this case as in the other, the lower court deciding in favor of Moody. The Supreme Court, however, reversed this decision, holding that the Civil Rights Bill had nullified the provision of the Indiana Constitution prohibiting negroes from coming into the State or making contracts.[91] This was probably the first decision of the highest court in any State in which the Civil Rights Bill was involved.

Probably the second case in which the measure was brought before the Courts was at Annapolis, Maryland. Here, on April 17, a negro was introduced as a witness. The State's Attorney was greatly surprised at this, saying that there was no authority for it, but it was claimed that the Civil Rights Bill had given it.[92] Soon after the Fourteenth Amendment had been submitted to the States, the Chief Justice of the Court of Appeals of Maryland held that the Civil Rights Bill was constitutional. On June 22 one Somers assaulted a negro and was brought before a justice of the peace. His counsel held that the negro could

[90] McPherson's Scrap-book, "The Civil Rights Bill," pp. 91–92, also the Chicago Republican, April 17, 1866.
[91] 26 Indiana Reports, p. 299.
[92] Baltimore American, April 20, 1866.

not testify, but the justice held that the state law had been abrogated by the Civil Rights Bill. In default of bond, Somers was put in jail. Effort was made to secure a writ of *habeas corpus,* but Judge Bowie upheld the decision of the justice, saying that the bill was constitutional in regard to the right to testify. Since the other provisions of the bill were not involved, he did not undertake to say whether they were constitutional or not.[93] More than a month before this Judge Thomas, of the Circuit Court of Virginia, in a case before him at Alexandria, declared that the Civil Rights Bill was unconstitutional and that negro evidence could not be admitted, since the state law forbade it in civil cases in which white men alone were parties. In his opinion Congress did not have the power to impair the right of the States to decide what classes of persons were competent to testify in their Courts.[94]

The first case which we have found where the constitutionality of the bill was decided in the Federal courts is that of the United States *vs.* Rhodes, decided by Justice Swayne, of the Supreme Court, sitting as a Circuit Justice. On May 1, 1866, the home of Nancy Talbot, a negress, was entered by white men named Rhodes for the purpose of robbery. She was not allowed to testify against them in the Kentucky Courts. The Federal Court had jurisdiction under the Civil Rights Bill. Justice Swayne said the bill was remedial and should be liberally construed; that the Thirteenth Amendment was the first Amendment which trenched upon the power of the States, the others limiting the power of the Federal Government; that the Congress succeeding the one which proposed that Amendment had passed the bill, many of the members being the same, and that this fact was not "without weight and significance." The bill was declared to be constitutional in all its provisions.[95]

A negro was indicted in Memphis, Tennessee, for keeping

[93] Baltimore American and N. Y. Times, July 7, 1866.
[94] Annual Cyclopedia, 1866, p. 765. Also Eckenrode, Political Reconstruction in Virginia, p. 50.
[95] Abbott (U. S.), 28, and 37 Federal Cases, 785.

a tippling house and billiard room contrary to state law. His attorneys claimed that the state law was annulled by the Civil Rights Bill, but the State's Attorney declared that he would not obey or observe that bill, since it was unconstitutional.[96] The Criminal Court of the city, however, sustained the contention of the defendant that the state law was null and void because in conflict with the Civil Rights Bill. An appeal was taken to the Supreme Court of the State.[97]

Judge Gilpin, Chief Justice of Delaware, held that the Civil Rights Bill was void and inoperative in so far as it assumed to regulate the rules of evidence, etc., of state courts. This decision was rendered in November, 1867, though prior to this he seems to have accepted that part of the bill which provided that a different punishment could not be inflicted on account of color, without, however, passing on the constitutionality of the bill. It may be proper to add that he was a Republican.[98]

Several arrests were made for refusing to receive negro testimony. Five magistrates of the Corporation Court of Norfolk were arrested for this, the United States Commissioner holding that they had violated the Civil Rights Bill and binding them over for trial at the May term (1867) of the District Court.[99] Judge Thomas, who refused to receive negro testimony at Alexandria, was arrested and taken to Richmond, where he was released on his own recognizance in the sum of $1,000 to appear at the November term of the Court.[100] Judge Magruder, of Maryland, was several times arrested for a similar offence. John Hopwood, a Justice of the Peace, of the same State, was also arrested.

The Maryland Legislature passed a law to reimburse any magistrate or judge for costs and fines to which they were liable for rendering decisions adverse to the Civil Rights Bill. It was stated in the bill that this was done for the purpose

[96] Baltimore American, April 21, 1866. (From Memphis Argus.)
[97] McPherson's Scrap-book, "The Civil Rights Bill," pp. 110 and 119.
[98] Ibid., p. 149.
[99] Ibid., p. 134.
[100] Ibid., p. 136.

of making the judiciary free—to enable the judicial officers to render decisions according to their views of the law.[101] Judge Abell, of Louisiana, was arrested July, 1866, being charged with having "wickedly, wilfully, and with malice aforethought" declared the Civil Rights Bill unconstitutional. The decision for which he was arrested was made May 9, 1866. In this decision he declared that it aimed to strike down the independence of the States, to sap the foundation of Republican Government, to override the laws of the States, and to obliterate every trace of the independence of the state judiciaries.[102]

Chief Justice Hardy, of Alabama, declared that the bill was unconstitutional, confirming the sentence of the lower court which had convicted a negro for carrying fire-arms contrary to state law.[103] Judge Harberson, of Kentucky, held the bill unconstitutional, as did also the city judge of Louisville, in the same State. The former declared that the right to testify was not essential to freedom as was shown by the action of the free States in denying that right to free negroes for eighty years in cases where whites were involved. He, therefore, decided that the bill was not "appropriate legislation" under the Thirteenth Amendment, and that if it was, it could not apply to those who were free before the Amendment was ratified.[104] This was practically the position taken by Judge Krecket, of the United States District Court, January 29, 1867, for he held that the Civil Rights Bill was intended to protect negroes who had been slaves, and did not include white persons at all.[105] It was stated that the bill had been held unconstitutional in Nevada, but no reference to the case was given.[106]

A negro in Gilmer County, West Virginia, sued the clerk of the county court for refusing to sell a license for his marriage with a white woman. It was stated that this would

[101] Ibid., pp. 110, 122, 134, 135.
[102] Ibid., pp. 112, 118.
[103] Ibid., p. 120.
[104] Ibid., pp. 113, 115.
[105] Ibid., p. 134.
[106] Ibid., p. 115.

bring the Civil Rights Bill before the Courts.[107] Judge Walton, of Augusta, Maine, imposed a fine of $40 and thirty days imprisonment on a negro and a white woman for having married in violation of the state law. The punishment was so light because the parties were ignorant of the law. Their counsel made the plea that the Civil Rights Bill allowed them to marry, but the judge was unable to agree, saying that the bill could not alter the laws of the State, and that the marriage was null and void. The writer reporting this incident stated that some of the Radicals were exasperated from the fact that a radical judge had renounced and set at naught a law of the United States which gave the negro the same rights that were enjoyed by white men.[108] Under the caption " Negroes Getting their Civil Rights," an account was given of a negro and white woman before the court in Nashville. The woman was slightly fined and sent to the work house, while the negro was sent to the Freedmen's Court.[109]

In addition to the instances we have already given in which the Civil Rights Bill was held to be constitutional, there are several others, but in most of these cases the question at issue was as to the right to testify. As early as June, 1866, the Orphan's Court for Baltimore decided that negroes could testify under the Civil Rights Bill.[110] The same provision of the bill was held to be valid by Judge French, of Washington County, Maryland. He followed the decision of Judge Bowie rather than that of Judge Magruder.[111] Judge Durrell, of the United States District Court for Louisiana, held the bill to be constitutional.[112]

The Civil Court of Detroit, Michigan, decided, September, 1866, that negroes could not be prevented from enjoying any privilege they chose and could pay for. The case before the court was brought by a negro for the refusal of the door-

[107] Ibid., p. 115.
[108] Ibid., p. 136.
[109] Ibid., p. 113.
[110] Ibid., p. 113.
[111] Ibid., p. 132.
[112] Ibid., p. 115.

keeper to admit him and his companions to the main body of the theater—they being directed to the gallery. The judge in this case was said to be a Democrat.[113] The United States Commissioner, at Mobile, Alabama, decided June 26, 1867, that the railway company of that city could not prevent negroes from riding in the same cars with white persons, since to do so was in violation of the law, evidently referring to the Civil Rights Bill, for the counsel for the negro asked that the president of the company be bound over to the Federal Court under that bill, which was done.[114]

Mayor Horton of the same city, an appointee of the military authorities, banished a negro boy from the city, this not being possible in regard to white people. He was indicted, tried, and found guilty for violation of the Civil Rights Bill. There was much rejoicing that the "trap made to catch the Southerners had first gobbled up a yankee official."[115]

Among the incidents to show the view generally taken of the bill is that of two negro women of Portsmouth, Virginia, who tried to enter the cabin on a ferryboat intended for ladies.[116] A similar incident occurred in Baltimore as to a waiting room set apart for ladies at one of the depots.[117] Suits were instituted in both cases under the Civil Rights Bill.

There were other incidents, more or less similar to those we have given, in which attempts were made by negroes to enjoy the same privileges accorded to white persons. There were doubtless a number of similar incidents which did not receive public notice, as well as many which we have not observed.

The instances we have cited, however, are apparently sufficient to justify the conclusion that the belief prevailed generally—north, east, west and south—especially among the negroes, that the Civil Rights Bill gave the colored people the same rights and privleges as white men as regards travel,

[113] Ibid., p. 120
[114] Ibid., p. 136.
[115] Ibid., p. 151.
[116] N. Y. Tribune, May 18 and 21, 1867.
[117] McPherson's Scrap-book, "The Civil Rights Bill," p. 109.

schools, theaters, churches, and the ordinary rights which may be legally demanded. There also seems to have been a less general belief that it also permitted the intermarriage of the races. Many of these cases occurred before the Fourteenth Amendment passed Congress. Reference was also made to some of them in the debates, and weight must be given them in interpreting the purposes of the Amendment, since it was acknowledged that the first section of the Amendment was the Civil Rights Bill incorporated into the Constitution. This somewhat extended account of the bill, therefore, and the cases arising under it, have been given for the purpose of aiding us in the interpretation of that Amendment, and this will become more apparent in the chapters that are to follow.

CHAPTER II.

The Fourteenth Amendment Before Congress.

SECTION ONE OF THE AMENDMENT.

The consideration of the Amendment itself will take us back in point of time, for it was not presented as a whole at first, but by sections, nor were these sections finally acted upon by both Houses until after the Civil Rights Bill had been disposed of, having been side tracked to give full sway to that important measure. There may also have been other considerations which caused the postponement of the various amendments; for example, to let the Reconstruction Committee formulate and present its entire plan of reconstruction, to give it time to secure all the evidence it could to aid in the enactment of that plan, or to postpone final action until after the spring elections in some of the New England States, so that the Republican interests might not be affected by the plan of reconstruction proposed.

The Amendment was not a spontaneous creation, was not the product of one mind, but of many. It was also a product of evolution, and its growth and development make an interesting study. In considering this evolution of the Fourteenth Amendment, it seems advisable to consider each section separately in order to render the connection and meaning more clear and apparent. This may necessitate a certain amount of repetition, but we trust that the object aimed at, clearness, will justify this course.

The first section is by far the most important section of the Amendment, for it is the only one which has played any very noticeable part in our country's history or has had any influence whatever upon our customs or legislation. This section also underwent more changes than any of the others before receiving the form in which it now stands in the Con-

stitution. In the various forms in which it was presented the same purpose and spirit were observable. It is about this section also that there has been so much contention as to its meaning and object.

Probably the interpretation most generally given and most readily accepted is that its principal and almost only purpose was to define citizenship; that it was to make federal citizenship primary, a citizen of the United States becoming by residence therein, *ipso facto,* a citizen of one of the States. The Courts have practically given this interpretation to it, declaring that it was to make citizens of the freedmen. A careful examination of the proceedings of Congress should show whether or not this was the principal object originally aimed at.

On the second day of the session, December 5, 1865, Mr. Stevens, the Republican leader in the House, introduced a joint resolution proposing an Amendment to the Constitution of the United States. It was in the following form: "All national and state laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color." The next day, Mr. Bingham, of Ohio, introduced a resolution to accomplish the same object, though the forms of the two resolutions were quite different. The resolution introduced by Mr. Bingham was reported back by him from the Reconstruction Committee, February 13, 1866, in the following form: "Article ————. 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."[1] This was practically the form in which it had been introduced December 6.

Mr. Bingham, its author, in bringing this resolution before the House, February 26, made known his reason for proposing it as an amendment. He stated that it had been the defect of the Republic that there was no express grant of power in the Constitution to enforce

[1] Globe, 39th Cong., 1st Sess., pp. 14 and 813.

the requirements of the Constitution, and cited the fact that the contemporaneous construction, the continued construction, legislative, executive and judicial, had been and was that the provisions of the immortal Bill of Rights embodied in the Constitution rested for their execution and enforcement upon the fidelity of the States.[2] In this brief statement he revealed the nature and purpose of the Amendment. It meant nothing less than the conferring upon Congress the power to enforce, in every State of the Union, the Bill of Rights, as found in the first eight Amendments. If his purpose should succeed, it meant that Congress, and not the Legislatures of the States, would be empowered to legislate concerning all the subjects embraced in the Bill of Rights, thus increasing the power of the Central Government at the expense of the States.

A decided opposition to the resolution was manifested when it came up for debate the next day. Mr. Kelley, of Pennsylvania, declared that the power which the Amendment proposed to confer was already in the Constitution, but that it had lain dormant. He was, therefore, in favor of submitting it to the States. The debate was of a general and uninteresting nature with the exception of the speech by Mr. Hale, of New York, who declared that the tenor and effect of the resolution was to bring about a more radical change in the system of government and to institute a wider departure from the theory upon which it was founded than had ever been proposed in any legislative or constitutional assembly. "I submit," he continued, "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 overridden, may be repealed or abolished, and the law of Congress established instead." He took the position that however desirable it might be that there should be reforms in state law, such reforms should be made by the States. He also opposed the Amendment on the ground that its language was too vague and general, that, at a single stride, it put almost unlimited power in the hands

[2] Ibid., p. 1034.

of Congress, and that the words "necessary and proper" had already been given a liberal construction by the Courts.[3]

Mr. Davis, also of New York, continued the debate the following day in opposition to the resolution. He thought that the Amendment, if adopted, would not only centralize power in the Federal Government and that that power was "intended to be exercised in the establishment of perfect political equality between the colored and the white race of the South." The Amendment, he asserted, was a grant of power to Congress to enact original legislation in regard to life, liberty, and property, and that Congress was to be the judge as to what was necessary legislation, and concluded: "Under such a power the constitutional functions of state Legislatures are impaired, and Congress may arrogate those powers of legislation which are the peculiar muniments of state organization, and which cannot be taken from the States without a radical and fatal change in their relations. I will, sir, consent to no centralization of power in Congress in derogation of constitutional limitations, nor will I lodge there today any grant of power which may in other times, and under the control of unprincipled political aspirants or demagogues, be exercised in contravention of the rights and liberties of my countrymen."[4]

Messrs. Hale and Davis were Republicans, both had voted for the Freedmen's Bureau Bill and both voted for the Civil Rights Bill at a later date, and their objections to the proposed Amendment were, therefore, not partisan.

Mr. Woodbridge made a short speech in support of the resolution, stating that its purpose was to enable Congress to secure, by legislation, the privileges and immunities guaranteed to every citizen under the Constitution. In his opinion this or a similar Amendment was both necessary and proper.[5]

Mr. Bingham, the author of the resolution, followed with a somewhat elaborate speech in defense of the resolution. He denied the suggestion that had been made that its pur-

[3] Ibid., pp. 1059–1066.
[4] Ibid., pp. 1085–1087.
[5] Ibid., p. 1088.

pose was to mar the Constitution. Its only purpose was, he declared, to empower Congress to enforce the Bill of Rights. He cited the decision of the Federal Supreme Court in the case of Barron *vs.* the Mayor and City Council of Baltimore to show that the Bill of Rights was not applicable to or binding upon the States. He referred to a speech by Mr. Webster to show that the Bill of Rights was, however, to be enforced and observed by the States, but since this had not been done in many States it was essential that an amendment should be adopted giving Congress the power to enforce it.[6]

Mr. Conkling stated that he had opposed the measure while it was before the Committee. Mr. Hotchkiss thought it too conservative, saying that it left the rights of the citizens entirely in the hands of Congress, and that a future Congress might, therefore, make laws which would not be agreeable. He wanted the Constitution so amended as to deprive the States of the power to discriminate against any class of citizens, and advocated the postponement of the resolution. Mr. Conkling, with the *quasi* consent of Mr. Bingham, moved the postponement of the resolution until the second Tuesday of April, though he voted for the postponement for an entirely different reason than did Mr. Hotchkiss, declaring that it could not be objected to as not being sufficiently radical. His motion was agreed to by a vote of 110 to 37—Mr. Bingham voting in the affirmative.[7]

It is rather difficult to determine the cause of the postponement. Mr. Bingham may have seen that it was impossible to secure its adoption at the time in view of the hostile criticism of it by members of his own party, though it was suggested that the postponement was due to the fact that elections were soon to take place in New Hampshire and Connecticut, and that it was feared that the measure might be so radical as to affect the interests of the party in power.[8] The resolution was not called up in April, nor

[6] Ibid., pp. 1088–1094.
[7] Ibid., pp. 1094–1095.
[8] N. Y. Herald, March 2, 1866.

indeed was it again brought before the House in the same form.

Although the resolution was not debated in the Senate, it is worthy of note that Senator Stewart, of Nevada, referred to it, February 28, saying that it would change our form of government if adopted, and that little legislation would be left for the States.[9]

It may be interesting at this point to show the attitude of the Reconstruction Committee[10] in regard to the proposed Amendment. At the third meeting of the Committee, January 12, 1866, the day after Mr. Trumbull had introduced the Freedmen's Bureau and Civil Rights Bills, Mr. Bingham submitted the following resolution proposing 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." At the same time he moved its reference to a sub-committee consisting of Messrs. Fessenden, Stevens, Howard, Conkling, and Bingham.[11] This sub-committee, composed entirely of Republicans, to which the various propositions in regard to the apportionment of Representatives were also to be referred, reported back the resolution at the fifth meeting of the Committee, January 20, in the following form: "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."[12] It will be observed that this resolution was in much stronger terms than the one submitted by Mr. Bingham, for this one declared that all citi-

[9] Globe, 39th Cong., 1st Sess., p. 1082.

[10] The Reconstruction Committee (or the Committee of Fifteen) consisted of the following: Senators: Messrs. Fessenden (Chairman), Howard, Harris, Williams, Grimes and Johnson.

Representatives: Messrs. Stevens (Chairman on part of House), Conkling, Boutwell, Blow, Bingham, Morrill, Washburne, Grider and Rogers. Messrs. Johnson, Grider and Rogers were Democrats.

[11] Journal of the Reconstruction Committee, p. 7.

[12] Ibid., p. 9.

zens should be given the same political rights and privileges, thereby conferring, or making it possible for Congress to confer, the elective franchise and the right to hold office upon the negro. Since no record of the proceedings of this sub-committee was kept, we can only conjecture how its members voted on the above resolution. From his subsequent action, we may feel safe, however, in saying that Mr. Conkling opposed the whole measure, though he never betrayed or made known the real motives which actuated the committee. This sub-committee was doubtless appointed to formulate and consider partisan measures, since no Democrat was placed upon it, thus enabling the Radicals to discuss freely their purposes and the best means or methods of obtaining them without any danger of revelation.

The resolution, as reported back by the sub-committee, was not considered, however, by the full Committee until its next meeting, January 24. At this time Mr. Howard moved to amend the resolution by inserting "and elective" after the word "political," but this seemed unnecessary, no doubt, and was rejected, only two, Messrs. Howard and Rogers, voting for it, the latter no doubt to make it as obnoxious as possible.

Mr. Boutwell then moved the following as a substitute for the first clause of the resolution: "Congress shall have the power to abolish any distinction in the exercise of the elective franchise in any State which by law, regulation, or usage may exist therein." This was also rejected, and, indeed, it is difficult to see where his substitute would secure more than was secured by the words "political rights and privileges." The resolution was again referred to a select committee composed of Messrs. Bingham, Boutwell, and Rogers.[13]

At the next meeting, three days later, Mr. Bingham reported the resolution 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

[13] Ibid., p. 12.

of the United States, the same immunities and also equal political rights and privileges." Mr. Johnson moved to strike out the last clause, but his motion was lost by a vote of 4 to 6, five being absent.[14] The resolution was not considered at the meeting January 31, but on February 3, Mr. Bingham moved, by way of amendment, the following as a substitute: "The Congress shall have power to make all laws which shall be necessary and proper to secure to citizens of each State all privileges and immunities of citizens in the several States (Art. IV, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment)." After a discussion of the question, a vote was taken on the substitute, with the following result: Yeas, Messrs. Howard, Williams, Washburne, Morrill, Bingham, Boutwell, and Rogers (7); Nays, Messrs. Fessenden, Grimes, Harris, Stevens, Grider and Conkling (6). Messrs. Johnson and Blow were absent. The question then recurred on agreeing to the proposed Amendment as amended, and on this question there were nine in the affirmative and four in the negative, the four negative votes being cast by Messrs. Harris, Grider, Conkling and Rogers, while Messrs. Johnson and Blow were not present.[15]

When the Committee met again, a week later, Mr. Stevens moved that the Amendment or resolution, as amended February 3, be reported to Congress. The vote on this motion was the same as that by which the resolution was adopted at the previous meeting with the exception that Mr. Johnson was present and voted in the negative, while Mr. Blow voted in the affirmative, Mr. Washburne being absent.[16] It is to be noted that only two Republicans, Messrs. Harris and Conkling, both of New York, were opposed to the resolution. As we have already seen, the resolution was brought before the House February 13, but was postponed on February 28. As to the reason or rea-

[14] Ibid., p. 12.
[15] Ibid., p. 14.
[16] Ibid., p. 15.

sons for the opposition of Messrs. Harris and Conkling, there is no record.

It would be assuming too much to attempt to say why so many changes were made in the resolution, but it seems that one is warranted in asserting that the resolution as finally agreed upon February 3, and reported to the House February 13, was so worded as not to give Congress power over the elective franchise, or political rights in general, or at least not to have it expressed so baldly as Messrs. Howard, Boutwell, and others wanted it. With the exception of the probably intended exclusion of political rights, the various forms in which the resolution was brought before the Committee breathed the same spirit and purpose, the only object or purpose in making the changes being to get it into the best possible form to accomplish the desired end or ends. It may also be well to note the fact that on one occasion Mr. Bingham indicated in parentheses the sources of his resolution, since this may aid in a later consideration of the Amendment. It is to be regretted that no record of the discussion which took place in the Committee was kept, for such a record would be very valuable in ascertaining the purposes of the various resolutions, though of course the statements or declarations of the members of the Committee in the debates which took place in Congress will, in part at least, supply this want.

It is especially important to note the fact that there was no suggestion of a clause declaring who were citizens of the United States, and that two classes of persons were recognized in all the resolutions. To the one class, citizens, were to be secured the privileges and immunities, whether specifically stated to include political rights or not, of citizens of the United States. It is perfectly evident, from the limited debate which was had on the resolution in the House, that the term "citizens" was intended to include the freedmen, they being regarded as citizens since the abolition of slavery. To the other class, designated as "persons," was to be secured equal protection in the rights of life, liberty, and property. "Persons" included, of

course, all citizens as well as those who were not citizens, this being a broader term. This same distinction was made in the first section of the Fourteenth Amendment as finally ratified.

There seems to be little doubt, as shown by its form and the debates, as to the main purpose or effect of the resolution which was postponed on the 28th of February, for it declares in unmistakable terms, "Congress shall have power." Had it become a part of our Constitution, even a Supreme Court, composed entirely of strict constructionists of the old régime, could hardly have found any pretext for limiting the power of Congress to enact any legislation which it deemed "necessary and proper" to secure the privileges and immunities of citizens, even to the extent of defining those privileges. It would have conferred upon Congress positive, and not merely corrective legislative power as was claimed by some, and while "political rights" was finally omitted, it seems possible that Congress could, under the broad power given by the general terms used, properly have determined the qualifications of electors, and fixed other political rights. The legislation of the States would have been subject to the will of Congress, for there would have been created a centralized Government, with nearly all power in the Legislative Department.

It was undoubtedly the intention of Mr. Bingham and the members of the Committee who supported him, to give Congress power to act when the States had passed laws which violated the principles stated in the resolution. From the declaration of Messrs. Hale and Davis when the resolution was before the House, and especially from the context of the resolution itself, it seems that we may properly infer that they intended to confer what is still more important, the power to take the initiative in legislation and to pass laws which were not in the strict sense corrective. Congress, and not the Courts, was to judge whether or not any of the privileges or immunities were not secured to citizens in the several States. The believers in States Rights may well feel grateful that the resolution was not

incorporated into the fundamental law of our country, though it may properly be asked whether it really did not become a part of it with a mere change in dress, but not in meaning.

It is nearly two months after the postponement of the resolution, February 28, before we hear of any resolution, either in Congress or before the Committee, that is at all similar to the one postponed. During this time the Civil Rights Bill had been passed, had been vetoed, and had been declared law, notwithstanding the President's objections. Mr. Bingham and others, as we have seen, opposed that bill as being without warrant in the Constitution, stating that the resolution which had been postponed was intended to authorize such legislation.

It could not be expected that a man of the ability, determination, and zeal of Bingham would easily succumb to defeat. With his measure apparently under the ban, he set to work with a stronger determination to overcome the obstacles in his path. He exercised all the ingenuity of his legal and astute mind to put his cherished scheme into such form as to secure its adoption by making it acceptable to his colleagues. He did not make it weaker, as he himself stated at a subsequent time, but stronger, though it was in a form that seemed less objectionable.

It was not until the meeting of the Committee, April 21, that Mr. Bingham again brought forward his resolutions. It was at this meeting that the first sign of the composite character of the Fourteenth Amendment was presented. Mr. Stevens submitted a plan, which, he stated, had been framed by some one else, but which received his approval. This was the plan of Robert Dale Owen, as will be shown later, and consisted of five sections. Prior to this time the various propositions as to the privileges and immunities of citizens, the basis of representation, the Confederate debt, etc., had been submitted as separate and distinct Amendments. But now for the first time is revealed the intention

of the leaders to combine all the propositions into one Amendment.

Section 1 of the plan submitted by Stevens read as follows: "No discrimination shall be made by any State, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude." Mr. Bingham at once moved to amend this section by adding: "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 compensation." This amendment was discussed, Mr. Bingham no doubt explaining its purpose, but it was rejected by a vote of 7 to 5, receiving the votes of Messrs. Johnson, Stevens, Bingham, Blow, and Rogers. The section as submitted by Mr. Stevens was then adopted with only two votes, those of Messrs. Grider and Rogers, in the negative. After sections two, three and four had been adopted, Mr. Bingham moved to insert the following as section five: "No State shall make or enforce any law which shall abridge the privileges and 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." The Journal of the Committee states that this proposition was discussed, and adopted by vote of 10 to 2, Grider and Rogers again being the only members who voted in the negative, while Messrs. Fessenden, Harris, and Conkling were absent.[17] At the meeting of April 25, Mr. Williams, who had voted for the section proposed by Mr. Bingham, April 21, moved to strike it out. After some discussion this was done by a vote of 7 to 5, those voting to retain it being Messrs. Stevens, Morrill, Bingham, Rogers, and Blow; Messrs. Fessenden, Grimes, and Washburne were either absent or did not vote. A motion was then made to report the resolution or plan as amended to both Houses. This prevailed by a vote of 7 to 6. On this motion Messrs. Conkling, Boutwell, and Blow voted with the Democrats against reporting it. Un-

[17] Ibid., pp. 24–26.

daunted by successive defeats, Mr. Bingham at once brought forward his favorite scheme, proposing it as a separate amendment, but again, after discussion, it was rejected, receiving only the votes of the Democrats in addition to his own. It is rather difficult to account for the votes of the Democrats at this time unless it was for the purpose of disgusting the people with so many amendments, or to cause division within the ranks of the majority, thereby hoping to defeat all amendments. A motion to reconsider the order to report the proposed plan to Congress was carried, Messrs. Stevens and Howard being the only ones who objected to this.[18] The vote was reconsidered on account of the absence of the Chairman, Mr. Fessenden, who had the varioloid,[19] since it might not be considered very respectful to him to report the final plan of reconstruction in his absence. Who knows what effect this delay had on the final form of the Amendment? The plan submitted by Robert Dale Owen, through Mr. Stevens, might have become a part of the Constitution instead of the present Fourteenth Amendment, though this is rather doubtful.

At the meeting three days later, Mr. Bingham again brought his oft-rejected measure before the Committee by moving to strike out section one of the proposed plan and to insert his favorite measure in its place. It was again discussed, and was finally accepted by a vote of 10 to 3, Messrs. Grimes, Howard, and Morrill voting against it. Mr. Conkling for the first time gave his assent to it. Messrs. Fessenden and Harris did not vote.[20] It would be both interesting and valuable if we only knew what was said in regard to this measure, which had so often been rejected. Whether the Committee was won over to Bingham's view by his arguments or persistence, we do not know, but we may imagine the satisfaction which Mr. Bingham must have experienced at having his measure finally accepted by a large majority of his colleagues on the

[18] Ibid., pp. 31–32.
[19] Atlantic Monthly, June, 1875, p. 660. See also Wilson, The Rise and Fall of the Slave Power in America, III, p. 650.
[20] Journal of the Reconstruction Committee, p. 35.

Committee. It was this same proposition, with the addition of the clause defining citizenship, which, in the identical form in which he introduced it before the Committee, April 21, finally passed Congress, June 13, and was eventually ratified by the States as section one of the Fourteenth Amendment. The whole plan or proposed Amendment was then ordered to be reported to Congress, the vote being strictly partisan, 12 to 3.[21]

We have thus traced the changes, in the form of section 1, which were made in the Committee of Fifteen; no reasons were given for these various changes, but it may be asserted, we think, that the main object in view was the same throughout, the only difficulty being so to frame or word the section as to accomplish that object and yet secure the Amendment's adoption. The Radical leaders were as aware as any one of the attachment of a great majority of the people to the doctrine of States Rights—not the right of secession to be sure, but the right of the States to regulate their own internal affairs, including the question of suffrage. The form in which the measure was first brought before the Committee, and afterwards introduced in the House, was too bald, and it was seen that some change was necessary. This was the problem that Mr. Bingham set himself to solve, and there seems little, if any, doubt but that he kept the same object in view, and thought that the section, as finally reported and adopted, was as strong as the first one, and intended it to accomplish the same purpose, to remedy the same evils, and to confer the same powers upon Congress. His subsequent declarations and actions only confirm this view.[22] As the author of the proposition, his testimony should be given much weight, and he was furthermore one of the best, if not the best, constitutional lawyer in the House of the Thirty-ninth Congress. A man of strong conviction, strongly attached to his party, Mr. Bingham was, however, guided in his actions by his convictions, as was illustrated by his vote on the Civil

[21] Ibid., p. 38.
[22] See the fourth chapter.

Rights Bill. Strong Radical that he was, nothing but a sincere and deep conviction on his part would have induced him to vote against a party measure.

The original Constitution was framed under very difficult and trying circumstances. The Fathers were very careful to word it so as to confer great power and yet to have it in such a form that the people might not fully realize the power that was being conferred. We are venturing little, we believe, in saying that this was apparently the problem that confronted the Radical leaders of the Thirty-ninth Congress, and that their main purpose in proposing the first section of the Amendment was to increase the power of the Federal Government very much, but to do it in such a way that the people would not understand the great changes intended to be wrought in the fundamental law of the land. Their failure to do this is due to the strained construction put upon their work by the Supreme Court.

The authorship of the Fourteenth Amendment has been ascribed to, or claimed by, several persons. In June, 1905, on the death of Judge Stephen Neal, of Indiana, the statement was made in the leading papers of the country that he was its author. The Indianapolis *News* went so far as to give a picture of the room in which he wrote it. The only evidence to support the claim made for Judge Neal is a letter from Mr. Orth, who was a member of Congress at the time, to Judge Neal stating that he had submitted the plan sent him by the Judge to the Committee and that it had been adopted by the Committee almost verbatim. It was stated that this letter was lithographed and preserved by Judge Neal. The Journal of the Reconstruction Committee shows that a plan was submitted by Mr. Stevens, but this plan consisted of five sections, and not of four, as Judge Neal stated his did. Furthermore, there is strong evidence that another man from Indiana, Robert Dale Owen, was the author of the plan submitted by Mr. Stevens on April 21. Mr. Owen, in an article in the *Atlantic Monthly* for June, 1875, under caption of "Political Results from the Varioloid," gives a copy of the plan which he submitted to Mr. Stevens. This copy is iden-

tical, word for word, with the plan submitted by Mr. Stevens, as given in the Journal of the Committee. Since the Journal was not published for several years and was kept by Mr. Fessenden, the Chairman of the Committee, and by his heirs, it would hardly have been possible for Mr. Owen to have given the proposed Amendment had he not really been the author of it. Mr. Owen's plan was also published in the newspapers at the time, and it was stated that it was being considered by the Committee. This seems sufficient to show that the claim for Judge Neal's authorship of the Amendment falls to the ground, for no other plan similar to the one submitted by Mr. Stevens on April 21 was brought before the Committee, the other propositions being separate and distinct Amendments. No doubt Judge Neal sent a plan to Congressman Orth, and Mr. Orth may have given it to a member of the Committee, but it seems perfectly evident that it was not submitted to the Committee as a whole or acted upon by it. It may have been very similar to the plan agreed upon, thus leading Mr. Orth to infer that it was Judge Neal's plan that had been accepted.

Mr. Owen never claimed that the Amendment as finally adopted was his, though unquestionably the plan was his. But for such a plan we would not have had such a heterogeneous Amendment as the Fourteenth. The same or similar sections might have been proposed separately, but had this been done, there is little doubt but that some of them at least would have been rejected either by Congress or by the States. Owen's plan had been accepted and ordered to be reported to Congress without any changes whatever. And this would have been done but for the illness of Fessenden. The delay was fatal to Owen's plan, scarcely any vestige of the original form being retained. He states in the article to which we have referred, that Stevens gave the reason for the changes, especially that in regard to suffrage. The action of the Committee leaked out, and caucuses were held by the members from New York, Illinois, and Indiana. Each of these decided against negro suffrage in any shape.

The statement was made several times during the cam-

paign of 1866 that Mr. Bingham was the author of the Amendment. This was true only as regards the first section.

It is to be especially noted that at no time was the question of citizenship considered by the Committee, no proposition to define citizenship being submitted. This fact alone, it seems, is sufficient to show that the principal object of the Amendment was not to declare who were citizens, for the Committee evidently regarded the freedmen as citizens, since the purpose of the whole reconstruction measure was more or less bound up with that class. This conclusion, reached after a careful examination of the Journal of the Reconstruction Committee, is reënforced by the report of the majority of that committee, for it is stated specifically in that report that negroes were no longer slaves, but free men and citizens. This being the view of the Committee, how can it reasonably be maintained that the first section had for its principal object the conferring of the status of citizenship upon negroes?

Before tracing the course of the Amendment in the House and the Senate, it may be well to consider the report of the Committee, for it should be a valuable source in aiding us to determine or to discover the reasons given for proposing the Amendment. The report was drawn up by Mr. Fessenden and is an able document. Senator Grimes, a member of the Committee, in a letter to his wife at the time, June 11, 1866, stated that he regarded it as the ablest paper, either as a report or in the form of a speech, that had been submitted to Congress during his membership of the Senate.[23]

After declaring that, instead of being mere chattels, the former slaves had become free men and citizens; that they had been true and loyal to the Union, and that it would be the basest ingratitude to abandon them to their former masters without securing them in their rights as free men and citizens, the report says: "Hence it became important to inquire what could be done to secure their rights, civil and political. It was evident to your Committee that adequate

[23] Salter, Life of Grimes, p. 299.

security could only be found in appropriate constitutional provisions." [24]

The Committee then cites incidents and testimony to show the condition of the South, saying that the southern people haughtily demanded, as a right, the privilege of participating in the government which they had been striving to overthrow; that the leaders were prominently put forward to fill the highest places, many of them, including A. H. Stephens, the Vice President of the Confederacy, being elected to Congress in face of the test-oath; that the whole conduct of the people displayed a feeling of hostility to the Federal Government; that there was "no general disposition to place the colored race, constituting at least two fifths of the population, upon terms even of civil equality"; that Union men were detested and northern men going South were proscribed; and that to have fought against the Union was considered a virtue. With such an array of evidence as this, the Committee was of opinion that "Congress would not be justified in admitting such communities to a participation in the government of the country without first providing such constitutional or other guarantees as will tend to secure the civil rights of all citizens of the republic."

The closing paragraphs of the report are worthy of being quoted in full, for they express briefly, but cogently, the objects which the Committee desired to accomplish by the Amendment.

"The conclusion of your Committee, therefore is, that the so-called Confederate States are not, at present, entitled to representation in the Congress of the United States; that, before allowing such representation, adequate security for future peace and safety should be required; that this can only be found in such changes of the original law as shall determine the civil rights of all citizens in all parts of the republic, shall place representation on an equitable basis, shall fix a stigma upon treason, and protect the loyal people against future claims for the expenses incurred in support of rebel-

[24] Reports of Committees of House, 39th Cong., 1st Sess., Vol. II, p. xiii.

lion and for manumitted slaves, together with an express grant of power in Congress to enforce those provisions. To this end they offer a joint resolution for amending the Constitution of the United States, and the two several bills designed to carry the same into effect, before referred to.

"Before closing this report, your committee beg leave to state that the specific recommendations submitted by them are the result of mutual concession, after a long and careful comparison of conflicting opinions. Upon a question of such magnitude, infinitely important as it is to the future of the republic, it was not to be expected that all should think alike. Sensible of the imperfections of the scheme, your Committee submit it to Congress as the best they could agree upon, in the hope that its imperfections may be cured, and its deficiencies supplied, by legislative wisdom; and, that when finally adopted, it may tend to restore peace and harmony to the whole country, and to place our republican institutions on a more stable foundation." [25]

All the Republican members, except Messrs. Blow and Washburne, signed this report, which was submitted to Congress June 8, 1866. It is important to note that not a word was said about the necessity or desirability of defining citizenship, and that it was specifically declared that negroes were citizens, although the report was submitted ten days after Mr. Howard had proposed to amend the first section by adding a clause declaring who were citizens, and over a week after that amendment had been accepted by the Senate. This seems to be almost conclusive evidence that the question of citizenship was not regarded as the most important object of the first section of the Amendment.

The report of the minority of the Committee, written by Reverdy Johnson, and signed by him and the other two minority members, was made June 20. This report was confined principally to a legal discussion of the status of the Southern States and their rights under the Constitution. This report declared that no further demands should be made as a condition precedent to the admission of Representatives

[25] Ibid., pp. xvi–xxi.

from those States, but that there was no objection to the fourth section of the proposed Amendment. Objection was also made to the manner in which the Amendment was submitted, it being maintained that the different sections should have been submitted as separate articles so that the people might accept or reject such as they saw fit without accepting or rejecting all.[26]

The resolution proposing an Amendment to the Constitution was reported to both Houses of Congress April 30, in the form finally agreed upon April 28. Mr. Stevens introduced it in the House and Mr. Fessenden in the Senate, and both of them introduced at the same time the bills which were to accompany it. One of these bills was in regard to admitting the Southern States to a participation in the government on adopting the proposed Amendment, while the other one declared certain persons ineligible to hold office under the Federal Government.

The resolution was not considered, however, by the House until May 8, when Mr. Stevens opened the debate. He stated that it was not all that the Committee desired, but that after a careful survey of the whole ground, it was decided that a more stringent proposition could not be ratified by nineteen States, three fourths of the so-called loyal States, repudiating the idea that it should be submitted to the Southern States or "disorganized communities" as the Committee characterized them. The report of the Committee also states that the proposition was not all that they desired, and Mr. Grimes,[27] in a letter to his wife, April 30, states the same thing. These references, however, relate more particularly to the second section, for many were in favor of securing negro suffrage.

In reference to the first section, Mr. Stevens stated that all of its provisions were asserted either in the Declaration of Independence or in the Constitution, and added: "But the Constitution limits only the action of Congress, and is not a limitation on the States. This Amendment supplies that

[26] Ibid., pp. 1–13.
[27] Salter, Life of Grimes.

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." He evidently had reference to the Bill of Rights, for it is in it that most of the privileges are enumerated, and besides it was not applicable to the States. Under his construction, moreover, Congress would only have power to interfere in case of discrimination by the States, but even then Congress would judge as to whether there was discrimination or not, and could, therefore, exercise great power. To the answer that the same things were secured by the Civil Rights Bill, Mr. Stevens replied that that was partly true, but that a law was repealable by a majority, and that it should be put beyond the power of Congress to repeal it.[28]

The debate was limited to thirty minutes to each speaker, and it was said to have been the intention of the leader to call the previous question the day the resolution was introduced, April 30. It was predicted, however, that had this been done the previous question would not have been seconded.[29]

Mr. Finck, of Ohio, followed Mr. Stevens by declaring that if the first section was necessary to confer power upon Congress to legislate about the matters contained in it, the Civil Rights Bill was clearly unconstitutional.[30]

Mr. Garfield denied the position taken by Mr. Finck that those who voted for this section thereby acknowledged the unconstitutionality of the Civil Rights Bill, maintaining, as did Mr. Stevens, that it was to put that bill beyond the possibility of repeal by Congress.[31] His view was, therefore, that the first section merely incorporated the Civil Rights Bill in the Constitution.

Mr. Thayer, of Pennsylvania, held the same views in this regard as did Messrs. Garfield and Stevens, but also stated that it was putting into the Constitution what was

[28] Globe, 39th Cong., 1st Sess., p. 2459.
[29] Ibid., p. 2433 and N. Y. Herald, May 1, 1866.
[30] Globe, 39th Cong., 1st Sess., p. 2461.
[31] Ibid., p. 2462.

already in the Bill of Rights of every State in the Union.[32] Mr. Thayer evidently thought the first section of the Amendment was as effective and as strong as the proposition submitted by Mr. Bingham in February, for in a speech on the Civil Rights Bill, March 2, he declared that he would support Mr. Bingham's proposition which proposed to put the same protection in the Constitution that was to be secured by the bill. He practically made the same statement in regard to the first section in his speech, May 8.

The view taken of the first section by the first three speakers, all Republicans, was likewise held by Mr. Boyer, of Pennsylvania, a Democrat. He thought it did more than put the Civil Rights Bill into the Constitution, and that it was intended to secure ultimately and to some extent indirectly, the political equality of the negroes. It was also objectionable, in his opinion, in that it was ambiguous and admitted of conflicting construction.[33]

Messrs. Kelley and Schenck followed Mr. Boyer, but their speeches were confined to the general policy of Reconstruction, with especial reference to the third section.

Mr. Broomall, of Pennsylvania, the next day, May 9, declared that the object of the first section was "to give power to the Government of the United States to protect its own citizens within the States, within its own jurisdiction." He evidently thought that Congress would be empowered to pass laws protecting citizens of the United States, and in order to do this it would be necessary for Congress to determine what were the privileges and immunities to be protected. He also stated that it was the Civil Rights Bill in another shape, but that it was desirable to have it in the Constitution to make assurance doubly sure, since some thought the bill unconstitutional, among the number being Mr. Bingham.[34]

Mr. Broomall was followed by a Democrat, Mr. Shanklin, of Kentucky, who said that the purpose of the first section was to destroy the rights which the framers of the Constitu-

[32] Ibid., p. 2465.
[33] Ibid., p. 2467.
[34] Ibid., p. 2498.

tion declared to belong exclusively to the States and to vest all power in the General Government.[35]

Mr. Raymond, a conservative or Johnson Republican, had voted against the Civil Rights Bill because he thought it unconstitutional, but now supported the Amendment. He stated that the first section had been first embodied in the Amendment proposed by Mr. Bingham giving Congress power to secure an absolute equality of civil rights in every State of the Union, and that it had then come before Congress in the form of the Civil Rights Bill. He furthermore stated that it was the purpose of this section to confer upon Congress the power to pass the Civil Rights Bill and that he would, therefore, support it.[36] It is significant that Mr. Raymond stated that the object of this section was the same as the resolution submitted by Mr. Bingham in February, especially since he had opposed the Civil Rights Bill.

Mr. Eldridge, a Democrat, said that the incorporation of the first section in the proposed Amendment was an admission that the Civil Rights Bill was unconstitutional,[37] evidently thinking that its purpose was to authorize such bills as that one. We have already noted the answer that was given by Messrs. Garfield and Stevens to a similar statement.

Mr. Eliot, of Massachusetts, supported the Amendment because he thought the doctrines contained in it were right, saying that if Congress did not have the power to prohibit discriminating legislation on the part of the States, such power should be distinctly conferred. He had voted for the Civil Rights Bill, he continued, thinking that Congress had ample power to enact the provisions of that bill, but declared his willingness to incorporate into the Constitution provisions which would remove the doubts entertained by some on that question.[38]

On the third and last day of the debate in the House on the resolution, Mr. Randall, of Pennsylvania, one of the leading Democrats of the House, and who afterwards was

[35] Ibid., p. 2500.
[36] Ibid., p. 2502.
[37] Ibid., p. 2506.
[38] Ibid., p. 2511.

several times Speaker of the House, asserted that the first section proposed "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." He also seemed to think that the section would confer power upon the Federal Government to interfere in behalf of every character of rights save suffrage, and that even the privilege of determining who could vote in the States would soon be assumed.[39]

Mr. Rogers, a minority member of the Reconstruction Committee, closed the debate for the Democrats, and his speech is of sufficient importance to justify a somewhat extended quotation. His speech was, in part, as follows:

"Now, sir, I have examined these propositions with some minuteness, 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 destroys the elementary principles of the States; it consolidates everything into one imperial despotism; it annihilates all the rights which lie at the foundation of the Union of the States, and which have characterized this Government and made it prosperous and great during the long period of its existence."

Mr. Rogers characterized the proposal as an "attempt to embody in the Constitution of the United States that outrageous and miserable Civil Rights Bill" which was vetoed because it was an attempt to consolidate the power of the States. He also declared that the term "privileges and immunities" embraced every right which anyone had under the laws of the country, including the right to vote, to marry, to contract, to be a juror and to hold office; and added: "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." He stated that if a negro was refused the right to be a juror, that the Federal Gov-

[39] Ibid., p. 2530.

ernment would step in and interfere.[40] This last statement has been fulfilled.

Mr. Farnsworth, of Illinois, said that all of the first section except the last clause was already in the Constitution. That was true, but he evidently overlooked the fact that the Fifth Amendment was not binding upon the States, for he regarded the first two clauses of the section as mere surplusage.[41]

Mr. Bingham, the author of the first section, said that the necessity of that section was one of the lessons taught by the war, and that there had been a want hitherto in the Constitution which it would supply. That want he declared to be "The power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State."

He denied that this section conferred power upon Congress to regulate suffrage in the several States, and in answer to a suggestion made elsewhere that if it did not confer this power the need of it was not perceived, declared: "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 violations 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 within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy

[40] Ibid., p. 2538.
[41] Ibid., p. 2539.

and could provide none." This quotation makes it perfectly evident that he intended to confer power upon the Federal Government, by the first section of the Amendment, to enforce the Federal Bill of Rights in the States, for the citation he made from the Constitution is to be found in the Eighth Amendment. If the section under consideration had this effect as to that Amendment, it necessarily follows that it would apply equally to the other seven Amendments. A comparison of these statements with those he made in February while his original resolution was before the House clearly demonstrates that the two resolutions, in his mind at least, were identical, and that the first section of the Amendment conferred the same powers that he intended to confer by the original resolution.

It is to be inferred from what he said at this time that Congress was only to interfere in cases where some of the privileges or immunities were abridged or denied by the unconstitutional acts of the States. This seems to be confirmed by another statement made in the same speech, where he declared that the "great want of the citizen and stranger, protection by national law from unconstitutional state enactments,"[42] would be supplied by this section. While these statements might seem to justify the conclusion that Congress was not empowered to act until the States had actually passed discriminating or unconstitutional laws, Mr. Bingham evidently did not intend to leave that impression, for he stated specifically at this time that no State ever had the power, by law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privilege of any citizen, though stating that this had been done, and that without remedy. It can be inferred properly, we think, that he meant by this that no State could abridge, or could allow to be abridged or denied, any of the privileges of citizens. Besides, he had stated on a former occasion, while the resolution was still before the Committee, that the Constitution declared that no person should be deprived of life without due process

[42] Ibid., pp. 2542–43.

of law, but that notwithstanding this life had never "been protected, and is not now protected, in any State of this Union by the statute law of the United States."[43] This clearly shows that he intended that Congress should have the power to pass laws declaring what rights should be secured to the citizens. Anyway, it matters little whether Congress was to exercise the power before the States had denied those privileges, either by acts of omission or of commission, since Congress was unquestionably empowered to define or declare, by law, what rights and privileges should be secured to all citizens.

Mr. Stevens closed the debate with a short speech, after which the previous question was ordered. The vote then was taken immediately after Mr. Bingham had spoken, and his position must have been understood by all the members present. His statement of the need and purpose of the section must, therefore, have been acquiesced in by those who supported it, especially since Mr. Bingham was the author of it as well as a member of the Committee which ordered it to be reported, and thus could speak with authority. Furthermore, his statements do not at all contradict the position taken by Mr. Rogers and others of the minority, but rather strengthen it. In fact, there seems to be little, if any, difference between the interpretation put upon the first section by the majority and by the minority, for nearly all said that it was but an incorporation of the Civil Rights Bill. It might be expected that the minority would ascribe certain motives to it on partisan grounds, but this does not seem to have been the case in regard to this particular section, for there was no controversy or misunderstanding as to its purpose and meaning. The minority opposed it because they objected to increasing the power of the Federal Government, while the majority supported it for this very reason.

It may be said, in conclusion, that the House believed and intended that the purpose and effect of the first

[43] Ibid., p. 429.

section of the Fourteenth Amendment would be to give Congress the power to enact affirmative legislation, especially where state laws were unequal, and that it would also make the first eight Amendments binding upon the States as well as upon the Federal Government, Congress being empowered to see that they were enforced in the States. It also seems proper to say that Congress would be authorized to pass any law which it might declare "appropriate and necessary" to secure to citizens their privileges and immunities, together with the power to declare what were those privileges and immunities.

Many Republicans wanted the previous question voted down to give an opportunity for amendments, though amendment was only desired as to the third section, the first section being acceptable to all who advocated the Amendment. By a rather strange combination of the extremists of both sides, the previous question was ordered by a vote of 84 to 79, thus preventing all amendments.[44] The Democrats who voted with the extreme Radicals to prevent an opportunity of amending the resolution did so no doubt to make the Amendment as objectionable as possible in order to secure its defeat either by the Senate or by the States, but their party tactics were of no avail.

The proposed Amendment was then passed, May 10, 1866, in the form in which it was reported, by a vote of 128 to 37, only five Republicans, all from the border States of Maryland, West Virginia, and Kentucky, voting in the negative. The announcement of the vote was received with applause on the floor and in the galleries. Mr. Raymond's vote for the measure was also applauded.[45] Of the Republicans who voted against the Amendment, none had

[44] A newspaper reporter, describing the vote on ordering the previous question, said: "Thad, confident of his strength, sat in his seat, grinning sardonically and chatting with the crowd of his admiring friends gathered about him." Herald, May 11, 1866.

[45] Globe, 39th Cong., 1st Sess., p. 2545. A reporter stated that Mr. Eldridge wanted the speaker to stop the applause, but that "Jack Rogers hoped the colored brethren and sisters in the galleries would be allowed to wave their pocket handkerchiefs." Herald, May 11.

expressed any objection to the first section except Mr. Phelps, of Maryland, though he and Mr. Smith, of Kentucky, were the only ones who spoke on the question.

We have already observed that Messrs. Bingham and Raymond, who had opposed the Civil Rights Bill, supported the Amendment, and it is probably worth while to point out that Messrs. Hale, Davis, and Conkling, all of New York, supported the Amendment, though they had opposed it in another form at an earlier date. Their apparent inconsistency may be explained by saying that the first section did not attempt to confer as much power as did the resolution which they opposed, but this explanation is very much weakened when it is recalled that they must have heard what Messrs. Rogers and Bingham had said in regard to it, and without any statement whatever as to what they understood it to mean, they voted for it. Mr. Conkling also must have been aware of what Mr. Bingham intended to accomplish by it, for he was present in the Committee when it was submitted, and had always opposed it there. He had stated his objections to such a plan early in the session, declaring that it would trench upon the principle of local sovereignty by denying "to the people of the several States the right to regulate their own affairs in their own way."[46] The plan of which he was speaking included both civil and political rights, but the principle was the same.

Probably one of the most important things to be noted, however, is the fact that the Amendment, in the form in which it passed the House May 10, 1866, contained no clause defining citizenship. If the main purpose of the first section was to declare who were citizens, why was it not added in the House? The question of citizenship does not appear to have been raised during the three days' debate on the Amendment, it evidently being taken for granted that negroes were citizens. In fact, the Civil Rights Bill had declared them citizens, and that part of the bill seems to have been acquiesced in, for it was apparently recog-

[46] Ibid., p. 358.

nized by all that the negroes were henceforth to be citizens of the United States. It cannot, then, be maintained, so far as the House is concerned, that the question of citizenship was at all involved.

The joint resolution proposing the Fourteenth Amendment had been introduced in the Senate April 30, the day on which it was brought before the House, but no action was taken in regard to it until nearly two weeks after its passage by the House. Mr. Fessenden, the Chairman of the Reconstruction Committee, and consequently the one to take charge of it in the Senate, was too ill to open the debate. This duty was assigned to his colleague on the Committee, Senator Howard, of Michigan, who opened the debate May 23.

In beginning his speech, Mr. Howard said that he proposed to present, in a succinct form, the views and motives which influenced the Committee to propose the Amendment, so far as he understood those views and motives. The Journal of the Committee shows that he was generally present and took part in the proceedings and he was, therefore, fully qualified to speak for the Committee. He was furthermore selected to open the debate on the resolution and to take charge of it in the Senate. The views which he expressed, in view of his own statement, as well as his position, must be regarded as those of the Committee, unless they were contradicted by some of the other members of the Committee. He spoke at considerable length as to the purpose and effect of the first section, saying that it was a general prohibition upon the "States, as such, from abridging the privileges and immunities of the citizens of the United States." The privileges and immunities spoken of, he declared, were those belonging to "citizens of the United States, as such, and as distinguished from all other persons not citizens of the United States." These privileges and immunities had never been defined, and it was not his purpose, he said, to undertake to define all of them, though he regarded those spoken of in section two of the Fourth Article of the Constitution as being among them.

He quoted the decision of Justice Washington in Corfield *vs.* Coryell (4 Washington Circuit Ct. Repts., p. 380) to show what some of those privileges were. The Court did not, in that decision, undertake to enumerate all the privileges and immunities secured by that section, but said that they might be included under the following general heads: "protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through or to reside in any other State, for purposes of trade, agriculture, professional pursuits, and otherwise; to claim the benefit of the writ of *habeas corpus;* to institute and maintain actions of any kind in the Courts of the State; to take, hold, and dispose of property, either real or personal, and an exemption from higher taxes or impositions than are paid by other citizens of the State."

After quoting this decision at some length, Mr. Howard said: "Such is the character of the privileges and immunities spoken of in the second section of the Fourth Article of the Constitution. To these privileges and immunities, whatever they may be, for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight Amendments to the Constitution." He then gave a full statement of the rights secured by those Amendments, among which were the freedom of speech and of the press, etc.[47]

[47] His statement of those rights was as follows: "Such as the freedom of speech and of the press, the right of the people peaceably to assemble and petition the Government for a redress of grievances a right appertaining to each and all the people; a right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the

These privileges, immunities and rights, guaranteed by the second section of Article Four and by the first eight Amendments, had been, he declared, by judicial construction, secured to the citizen solely as a citizen of the United States and as a party in the Federal Courts, and added: "They (the provisions of the Constitution referred to) do not operate in the slightest degree as a restraint or prohibition upon state legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon state legislation, but applies only to the legislation of Congress."

Congress did not have the power to enforce these guarantees, he declared, since they were not powers conferred upon Congress by the Constitution, nor embraced by that sweeping clause which authorized Congress to pass all laws necessary and proper for carrying out the powers granted by the Constitution. They were, in his opinion, merely a Bill of Rights in the Constitution without power on the part of Congress to enforce them. The States were not restrained from violating those guarantees, he continued, except by their own Constitutions, which might be altered at any time. "The great object of the first section of this Amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."

Mr. Howard stated, however, that the first section of itself did not confer any power upon Congress to carry out those guarantees, but that this power was conferred by the fifth section, of which he said: "Here is a direct affirmative delegation of power to Congress to carry out all of these guarantees, a power not found in the Constitution." According to his opinion suffrage was not one of the privileges secured by the Amendment.

The clause of the first section of which Mr. Howard had

vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments." Globe, p. 2765.

been speaking applied merely to citizens of the United States, and did not secure any of those privileges to aliens and other persons. The last two clauses of section one were applicable to all persons, and prohibited the States from depriving any one of life, liberty, or property without due process of law, or from denying any one the equal protection of the law. These clauses, declared Mr. Howard, abolished all class legislation in the States and subjected all to the same laws and to the same punishments. He evidently regarded the negroes as citizens, for at this point he stated that they were protected by the Amendment in their fundamental rights as citizens to the same extent as white men. In concluding his remarks on the first section, Mr. Howard stated that if the Amendment were adopted by the States, the first section taken in connection with the fifth would prevent the States from trenching upon the fundamental privileges which pertained to citizens of the United States.[48]

The declaration of Mr. Howard in explaining the first section of the Fourteenth Amendment could hardly have been stated more clearly and squarely, and there could be no doubt, it seems, as to its object and purpose. No one could reasonably say, after reading or hearing his speech, that he had been misled as to the purpose and effect of the Amendment. This had been said in regard to the Thirteenth Amendment, and, with some justification, it must be admitted, but in regard to the Fourteenth Amendment the same cannot be said, for its purpose was clearly and fairly set forth by Mr. Howard and others. His interpretation of the Amendment was not questioned by any one, and in view of his statement made at the beginning of his speech, this interpretation must be accepted as that of the Committee, since no member of the Committee gave a different interpretation or questioned his statements in any particular. Nor was his position denied by any of the minority, for in fact the minority opposed the Amendment for the very reasons which he gave in support of it, this especially being the objection given by Mr. Rogers in the House.

[48] Ibid., pp. 2765–66.

Mr. Wade, on the same day that Mr. Howard spoke, moved a substitute for the entire resolution, but the only change in the first section was to substitute "persons born in the United States or naturalized by the laws thereof" instead of "citizens of the United States." [49]

This substitute was proposed on account of uncertainty which was involved in the term "citizens." Mr. Wade himself, so he says, had no doubt about who were comprehended by the term "citizens," but since the Courts had thrown some doubt over the question, he thought all doubt should be removed. His substitute would thus make the privileges and immunities applicable to negroes whether they were held to be citizens or not. In this respect he regarded his substitute as an improvement over that of the Committee, and this was true in so far that no doubt could be entertained as to the persons who were to be protected in their rights and privileges. Mr. Wade was not the first to observe that the very people whom they intended to reach by the resolution might be excluded on the ground that they were not citizens, since the Civil Rights Bill might not be held to be constitutional, for Mr. Stewart had, on May 14, 1866, proposed an amendment to the resolution defining what was meant by the term "citizens" as used in the first section.[50]

Mr. Howard evidently saw the weight of the observations of Mr. Wade and of the suggestion in the amendment of Mr. Stewart, for when the resolution was before the Senate, May 29, he moved, by way of amendment to section one, that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside." [51] This was to form the first part of section one, and with that added, no further changes were made as regards that section, for with this exception, it stands in our Constitution today in the form which was given it by Mr. Bingham in the Committee. This amendment of Mr.

[49] Ibid., p. 2768.
[50] Ibid., p. 2560.
[51] Ibid., p. 2869.

Howard was important in this respect, not that it conferred any power upon Congress, but that it put beyond doubt and cavil in the original law, who were citizens of the United States. The first clause of section one thus makes federal citizenship primary, since residence is all that is necessary to state citizenship if one be a citizen of the United States. When that clause became a part of the fundamental law, the States could no longer determine its citizenship and thus the citizenship of the United States as in former years.

Mr. Doolittle seemed to fear that Indians born in the United States would become citizens by this Amendment, and so amended it by saying "excluding Indians not taxed."[53] Mr. Howard replied that this was unnecessary since Indians, who maintained tribal relations, were and always had been regarded as *quasi* foreign nations, thus not being embraced by the Amendment. Mr. Doolittle said that citizenship, if conferred, would carry with it all the privileges, rights, duties, and immunities which it was the object of this Amendment to extend. While recognizing the importance to be attached to the clause defining "citizens," he did not lose sight of the main object of the Amendment. Mr. Trumbull claimed that "subject to the jurisdiction" of the United States meant subject to the complete jurisdiction, thus not including Indians.[54] Mr. Howard said that Mr. Doolittle's amendment, if accepted, would result in an actual naturalization whenever any State saw fit to tax an Indian, and that this objection was sufficient to secure its rejection. He was not prepared, he declared, to have the Indians become his fellow-citizens, to vote with him, and to hold lands and deal in every other way that a citizen of the United States had a right to do.[55] It would seem from this statement that Mr. Howard regarded suffrage as a privilege of citizenship, though he had stated in his opening speech that it was not.

Senator Johnson, of Maryland, approved both Mr. Doolittle's amendment to exclude Indians and the clause defin-

[53] Ibid., p. 2890.
[54] Ibid., p. 2893.
[55] Ibid., p. 2895.

ing citizenship. He thought that the latter was a wise and necessary provision, since, according to commentators and the decisions of the Courts, a citizen of a State became *ipso facto* a citizen of the United States, and since there was no definition as to how federal citizenship could exist except through the medium of state citizenship.[56]

Mr. Doolittle also charged that the first section was intended to give validity to the Civil Rights Bill, pointing to the fact that Mr. Bingham, who had opposed that bill, had introduced it. Mr. Fessenden replied that the Committee of Fifteen had never discussed it in his presence with the view of making that bill valid, and that furthermore that bill was not discussed in that connection at all, the section being based on entirely different grounds. Since Mr. Fessenden was frequently absent from the meetings of the Committee, it is possible that references may have been made to the Civil Rights Bill during his absence. Mr. Howard, moreover, stated that it was the purpose of the Committee to put the Civil Rights Bill beyond the legislative power of those who wished to deprive the freedmen of their rights, thus apparently acknowledging that it was one of the purposes of the Amendment to incorporate that bill into the Constitution.[57]

Mr. Williams, of Oregon, pointed out the fact that the second section precluded the idea that the first section conferred citizenship upon Indians, since only Indians that were taxed were to be counted in the basis of representation. Mr. Saulsbury, of Delaware, who was opposed to the whole Amendment, opposed Mr. Doolittle's amendment on the ground that Indians were as much entitled to citizenship as the negroes. The amendment was then rejected by a vote of 30 to 10. Mr. Howard's amendment defining citizenship was then agreed to without a division.[58] This amendment, with the others which he submitted, was sufficient to attach his name to the Fourteenth Amendment, for it was often referred to merely as the Howard Amendment.

[56] Ibid., p. 2893.
[57] Ibid., p. 2896.
[58] Ibid., p. 2897.

Mr. Hendricks, who was later the Democratic nominee for Vice President, said that the first section failed to define the rights and duties, the obligations and liabilities of citizenship, but that they were left as unsettled as they had been during the entire course of our history, though he declared that negroes, coolies, and Indians would be admitted to citizenship by it.[59]

Mr. Poland, of Vermont, said that the privileges and immunities to be secured by the second clause of the first section were those found in the second section of the Fourth Article of the Constitution, but since there was no power in Congress to enforce them, it was desirable that such power be given. The last two clauses were said to be in the Declaration of Independence and in the Constitution, evidently meaning some or all of the first eight Amendments, since one of the clauses was taken from the Fifth Amendment. But state laws, he continued, existed in violation of those principles. Congress had shown its desire and intention of uprooting such partial legislation as existed in certain States by passing the Civil Rights Bill, but since there were doubts in the minds of some as to the constitutionality of that bill, he thought those doubts should be removed by putting this section into the Constitution, thereby empowering Congress to enforce the fundamental principles of our government.[60]

Mr. Howe, of Wisconsin, said that among the rights and privileges of citizens were the right to hold land, to collect wages by process of law, to appear in Court as a suitor for any wrong done or right denied, and to give testimony, but that these were not the only rights that certain States had denied or might deny. He cited a law of Florida where only negroes were taxed to support their own schools, and declared that such laws as this would not be possible under the Amendment.[61]

Mr. Henderson, of Missouri, said that the persons declared to be citizens by the first section were already citizens

[59] Ibid., p. 2939.
[60] Ibid., p. 2961.
[61] Ibid., Appendix, p. 219.

under a fair and rational interpretation of the Constitution of 1789, and that the remaining clauses or provisions of that section merely secured the privileges and rights which attach to citizenship in all free governments. The aim of the Freedmen's Bureau and Civil Rights Bills, he declared, was to break down the system of oppression that existed in the South. The Civil Rights Bill was to carry out section two of Article Four, he declared. Had the proposition which he introduced earlier in the session been adopted, he continued, the necessity for the whole Amendment would have been removed. This proposition was to inhibit the States as to discrimination against persons on account of race or color in prescribing the qualifications of voters.[62]

Mr. Johnson, who usually affiliated with the Democrats, favored all of the first section except the clause which prohibited States from making or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States." His objection to this clause was that he did not know what its effect would be, though he was present when Mr. Howard gave his exposition of it. He therefore moved that the clause referred to be struck out, but his amendment was rejected.[63]

An effort was made by the opponents of the Amendment to have the various sections of it submitted as separate amendments, hoping thereby to secure the rejection of some of them, but the advocates of it refused to grant this. This was the first instance in which either Congress or the States had to accept or reject an Amendment composed of such disconnected subjects.

The resolution was then passed by the Senate, June 8, 1866, by a vote of 33 to 11, 5 being absent, with Stockton's seat still vacant.[64]

The resolution, as amended in the Senate, was brought before the House the next day, June 9, at which time Mr. Boutwell gave notice that the amendments made by the Senate would be called up June 13. Immediate action was doubt-

[62] Ibid., pp. 3031–35.
[63] Ibid., p. 3041.
[64] Ibid., p. 3042.

less postponed to give the majority time to consult and decide as to the course which they should pursue in regard to the amendments. When the question was called up by Mr. Stevens on the appointed day, one hour was given to the minority, to be used as they saw fit, notice having been given that the previous question would be called at 3 or 3:30 o'clock. Mr. Stevens stated that the Union portion of the Reconstruction Committee had examined the amendments proposed by the Senate, and that they unanimously reported that the House ought to concur in them.[65]

Very little was said in regard to the first section, but what was said only corroborated the expressions previously made as to its effect. Mr. Harding, of Kentucky, an opponent of the measure, said that it transferred to Congress all the powers of the States over their citizens, and that Congress would then have all legislative power.[66] Mr. Baker, of Illinois, speaking of it at a later date, July 9, said that he considered it important as clearing away bad interpretations which had been given to the Constitution rather than as adding a positive grant of new power.[67]

The amendments of the Senate were concurred in by the House by a vote of 120 to 32, 32 being absent.[68] Not a single Republican voted in the negative this time, since the Senate amendments were considered more favorable than the original sections.

We have already noted what the members of the House thought and intended to accomplish by the first section of the Amendment, and since that section was not modified in the Senate except by the prefixing of the clause declaring who were citizens of the United States, thereby merely determining to whom the privileges and immunities guaranteed in that section should apply, we may say that there is no cause or reason to change the conclusion which has been previously given.

If the analysis of the debates in the Senate be closely fol-

[65] Ibid., p. 3144.
[66] Ibid., p. 3147.
[67] Ibid., Appendix, p. 256.
[68] Ibid., p. 3149.

lowed, the reader will see that the expressions or declarations in the two Houses corroborate and strengthen each other. Mr. Howard, the spokesman of the Committee, stated clearly and openly what evils were to be remedied and what objects were to be obtained by it, and there was no contradiction from any source. Many of the Senators and speakers did not refer to the first section at all, while several barely mentioned it. The speeches of Messrs. Poland, Henderson, Johnson, and Howe, while not saying that the Amendment would have the effect ascribed to it by Mr. Howard, support the position taken by him, especially since none of them questioned his statements.

In conclusion, we may say that Congress, the House and the Senate, had the following objects and motives in view for submitting the first section of the Fourteenth Amendment to the States for ratification:

1. To make the Bill of Rights (the first eight Amendments) binding upon, or applicable to, the States.

2. To give validity to the Civil Rights Bill.

3. To declare who were citizens of the United States.

As to the first object—the making of the Bill of Rights a force throughout the country by giving Congress power to enforce it—there remains little to be said. We have already observed the statements made in regard to this purpose in the course of the debates, and we feel little hesitancy in saying that it was unquestionably one of the leading motives for the inclusion of this section in the Fourteenth Amendment. Congress was also given power to enact such legislation as it might deem "appropriate" to enforce this purpose. We will have much evidence to support this conclusion when we come to consider the legislation which Congress enacted to enforce the provisions of the Fourteenth Amendment.

As to the second purpose or motive, to give validity to the Civil Rights Bill, we may state briefly the following facts. We have already referred to Mr. Fessenden's statement, but even granting that many or most of the majority believed in the validity of that bill, it remains to be said

that some of the best constitutional lawyers, notably Messrs. Johnson and Bingham, thought quite differently. There is also evidence to show that the friends of the measure were not so certain of its constitutionality, for they thought it advisable to put that question beyond dispute and cavil. This attitude on the part of many is shown by the debates, though there is another motive which should not be lost sight of. This was the fear that the Civil Rights Bill would be repealed as soon as the Democrats came into power, which contingency, it was feared, would take place at an early day. This reason was quite frequently stated, and no doubt it had some weight.

It cannot fairly be said, however, as was charged by some in the debate, that the men who supported the first section of the Fourteenth Amendment thereby acknowledged the unconstitutionality of the Civil Rights Bill, thus stultifying themselves, for it is quite possible that a man may be practically certain in his own mind that a measure is constitutional and yet may fear that the Courts will take a different view of it. It is no doubt true that some, who doubted the constitutionality of the bill, voted for it, for several acknowledged that they had their doubts about it, and a few, blinded by partisan jealousy and sectional hate, may have voted for it while believing it to be unconstitutional.

It was a time when party spirit was at its height, but it is absurd to make a wholesale charge that the great majority of those who voted for the bill believed that they had no power to pass it. There is little doubt that the bill was unconstitutional, and that the Federal Supreme Court would have so declared it, had it come before that body, but the fact remains that the vast majority of those voting for it must have thought they had the power to pass it.

It may be well to consider the causes which induced Congress to engraft the first section upon the Constitution. We have considered some of these reasons in connection with the report of the Reconstruction Committee, but principally in connection with the passage and enactment of the Freed-

men's Bureau and Civil Rights Bills. The debates show that frequent reference was made to the discriminating legislation of the Southern States, the oppressive and unequal laws as regard the negroes. Of course these laws were the excuses, if not the causes, for passing such bills and for the final incorporation into our fundamental law of that section which forbids all manner of discrimination and requires that all shall have the equal protection of the laws. These causes—the so-called "black laws" of the South—were unquestionably exaggerated, only the worst instances being given and then no allowance whatever being made for the altered position of the negro. Apparently the Radicals did not see, or, if they did see, ignored the fact that there was any need of stringent vagrancy laws under the conditions in which the South was placed after the surrender of Lee. The political theories and philosophy of Sumner and other Radicals never took into consideration the well-known fact that the best of theories often do not work well in practice. Only in the highest developed and most advanced of enlightened communities can abstract ethical and political theories be applied with safety. The laws of many of the Southern States may have appeared, on their face, to be unjust, and some probably were, but it was equally certain that they did not work as badly and unjustly as was charged by the reformers and renovators.

Finally, it may be said that the following objects and rights were to be secured by the first section: Life, liberty, and property not to be denied to any one without due process of law; trial to be by jury; the accused to be confronted by the accuser; property not to be taken without compensation; the right peaceably to assemble, to bear arms, etc.; soldiers not to be quartered on any one without his consent; and cruel and unusual punishments not to be inflicted nor excessive bail to be required. These, in addition to the rights specifically mentioned in the Civil Rights Bill, were to be secured to every citizen, and it was furthermore declared who were citizens. It also seems quite evident that it was intended to confer upon Congress, by the fifth sec-

tion, the power to determine what were the privileges and immunities of citizens, thereby being enabled to secure equal privileges and immunities in hotels, theaters, schools, etc., but this phase of the question will be considered in connection with the subsequent legislation of Congress to enforce the Fourteenth Amendment.

This partial enumeration shows to some extent what Congress intended to accomplish by the first section. We shall not consider here the part it was to serve as a political platform with which to go before the people in the exciting campaign which was soon to follow. The political questions will be considered in connection with the other sections which were almost entirely political in their nature.

Section Two of the Amendment.

While the first section of the Amendment is the one about which we are chiefly concerned, it is necessary to consider the other sections in order to be able to understand the motives, which might otherwise be obscured, underlying the action of Congress in proposing and the people in ratifying that Amendment. In the consideration of the first section, the speeches, reports and discussions have clearly demonstrated that a great increase of the Federal powers was to be brought about by that section, and that notwithstanding the fact that a great majority of the people at the time believed that the States should exercise most, if not all, of the rights and powers which they had up to that time exercised, the Amendment had been ratified. Considered alone, it would, under these circumstances, be somewhat difficult to understand why the people and the States had deliberately given up their powers to the Central Government. The chief purpose in considering the second, third, and fourth sections of the Amendment is, therefore, to discover, if possible, any cause or causes which might have had weight in inducing the people to accept the Amendment, and not so much for their intrinsic value. The same is not true of the fifth section, for it was intended to authorize Congress

to enforce the other sections. With the exception of the first and fifth sections, which may be regarded as one section, the second section is by far the most important of the remaining sections for the purpose of this study, though it has never had any effect whatever since it became a part of the fundamental law of the land. This is due, however, to the fact that the Fifteenth Amendment practically superseded it, or, as some have said, nullified it.

The second section was political both in origin and design, and it must be said to the discredit of the 39th Congress that the political part of the Amendment received the first consideration. It is true that the first section was also introduced on the second day of the first session of the 39th Congress, but Mr. Stevens was the only one in the House to propose an Amendment which in any way resembled the first section, while we find three, Messrs. Schenck, Stevens, and Broomall, who introduced resolutions proposing an Amendment to the Constitution in regard to representation.[69] These resolutions had the same object in view and all were referred to the Judiciary Committee. They differed materially from the second section as finally incorporated in the Fourteenth Amendment, but the spirit and purpose were the same. A few days later Messrs. Blaine and Pike also introduced joint resolutions proposing an Amendment to the same effect, but with this striking difference in form.[70] The Amendments proposed by Messrs. Schenck, Stevens and Broomall based representation on legal voters, while Mr. Blaine's proposition was more nearly in accord with the section as it now stands in the Constitution, which makes neither population nor voters the basis of representation.

The object of all these resolutions was twofold: primarily, to reduce Southern representation, and secondarily, to enfranchise the negro,[71] the party in power gaining in either case, for it correctly anticipated that the negro would,

[69] 39th Cong., 1st Sess., pp. 9–10.
[70] Ibid., pp. 135–36.
[71] Ibid., p. 141.

if given the franchise, support the party which gave it to him. It was somewhat freely admitted in the debates that these were the chief objects of the proposed resolutions, for only by this means was it thought possible to keep the control of the government in the hands of the Republican party. Although it was clearly evident that an Amendment making legal voters the basis of representation would result advantageously to the Republican party whether the negroes were enfranchised or not, the measure was destined to receive opposition from some of the members of that party.

The compromise in the original Constitution which permitted three fifths of the slaves to be counted in determining the basis of representation was a concession to the South, but the adoption of the Thirteenth Amendment had nullified that provision and had made not only possible but necessary the real aim of the framers of the Constitution, namely, the basing of representation on population. The counting of three fifths of the slaves had been in violation of this principle.

Whether voters or population should constitute the true basis of representation is a question still open for discussion, though there is very little doubt but that we would now have representation based on male electors had it not been for sectionalism. The resolutions introduced by Messrs. Stevens, Broomall, and Schenck were acceptable to the majority in Congress until it was discovered by some of the Representatives of New England that that section would lose some of its power in Congress if either of the proposed measures was engrafted upon the Constitution. It was to overcome this difficulty that Mr. Blaine introduced his resolution, and the opposition of the New England Representatives was sufficient to change the form of the resolutions which were introduced on the second day of the session.

As stated by Mr. Blaine, his proposed substitute would not alter the effect of the original measure so far as the South was concerned, but that for all practical purposes the North would be exempt from its provisions. Mr. Blaine,

although candid enough to state what effect the change in the form of the proposed Amendment would have, tried nevertheless to give some plausible reason for it. The reason which he gave was that to make voters the basis of representation would tend to cheapen suffrage and break down the barriers which made an enlightened electorate possible, since each State would desire to have as many voters as possible, and would, therefore, remove all qualifications as to education, citizenship, etc. Some of the New England States made education a qualification for suffrage and most, if not all the States, at that time did not permit aliens to vote. It seems impossible to harmonize Mr. Blaine's reason for not making voters the basis of representation and his advocacy and support of a proposition, the avowed purpose of which was to force the South either to put the ballot into the hands of an ignorant and illiterate class or to diminish its representation in proportion to the number of this class who were disfranchised.

Mr. Blaine made his statement as to the effect which the proposed Amendment making voters the basis of representation would have in New England on January 8, and when Mr. Stevens, two weeks later, although he had introduced a resolution making voters the basis, presented the following resolution from the Reconstruction Committee:

"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 persons in each State, excluding Indians not taxed: *Provided,* that whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation."[72] This resolution was essentially the same as the one proposed by Mr. Blaine, and Mr. Wilson, of Iowa, Chairman of the Judiciary Committee, stated that that Committee, to whom the several resolutions on this subject had been referred, had determined to report a resolution identical with that which Mr. Stevens

[72] Ibid., p. 351.

had reported.[73] This coincidence makes it apparent that the New England members had brought pressure to bear to secure a change in the form of the resolution so as not to affect that section. The resolution as reported on January 22 also provided that direct taxes should be apportioned in the same manner, but this was omitted when it was reported back by the same Committee on January 31, 1866.

At the time the resolution was reported Mr. Stevens stated that he wanted it to pass before the sun went down in order that it might be acted upon by the state Legislatures, twenty-two of which were in session at the time. The minority charged that this haste was due to the fact that the party in power did not dare to submit the question of negro suffrage openly and boldly to the people. There would seem to be some basis for this charge, since most, if not all, of the Legislatures had been chosen at an exciting time when party feelings were most likely to be predominant. It was highly probable, therefore, that almost any measure could be passed under the party whip, and it was to avoid this that the minority wanted the proposed Amendment submitted to conventions chosen to pass on this specific question.[74] The measure met opposition not only from the minority but also from the extreme Radicals, the latter opposing it on the ground that it permitted the States to disfranchise on account of race or color.[75]

The Radicals, especially those who had advocated the abolition of slavery, were not slow to realize that the South would gain several representatives by the emancipation of the slaves, and that with this increased power, together with what support the minority of the North would give, their own power would soon be destroyed. Mr. Conkling gave a table showing the gain or loss of each State under the proposed Amendment, provided the suffrage remained as it was in 1860. According to this table the North would

[73] Ibid., p. 351.
[74] Ibid., p. 355.
[75] Ibid., pp. 386, 406, and Appendix, p. 56.

gain 13 while the South would lose 13, being equivalent to a net gain of 26 for the North or a net loss of 26 for the South.[76]

The original proposition to base representation on voters would have increased the power of the middle and western States at the expense of New England. This plan seems to have been the one favored by the majority of the Republicans, but it was realized that it could not receive the necessary majority in Congress and certainly could not become a part of the Constitution without the support of New England. Consequently the West yielded in order to secure a measure that would keep the majority in power.

Mr. Eliot, of Massachusetts, submitted an amendment which differed from the others in that it contained a proviso that suffrage should not be denied or abridged on account of race or color.[77] This proposition was not popular at the time, but it was later incorporated into our fundamental law by the Fifteenth Amendment. Mr. Pike approved of the measure, but stated that it was generally acknowledged that such an amendment would be rejected by the States and that it would be useless, therefore, to submit it. In regard to the Blaine proposition, which was then before the House, Mr. Pike, a member of the majority, declared that its purpose, as he understood it, was to coerce the South into giving what they (Congress) were unwilling to do directly. In his opinion, there could be but two objects in view: the lessening of the political power of the South and the protection of the negroes, the latter of which would not be accomplished by adopting the Amendment, he declared, and the former might be evaded on other grounds.[78] Others took also the position that it was not the proper thing to try to accomplish something indirectly which should be done directly.[79] The protection of the negro was made the cloak under which some hoped to conceal their partisan motives, but it was too

[76] Ibid., p. 357.
[77] Ibid., p. 406.
[78] Ibid., p. 407.
[79] Ibid., Appendix, p. 56.

transparent to deceive any one who gave the least attention to the subject. It is interesting to see how the negro was made use of for the most contradictory legislation. In the first place, the Thirteenth Amendment was urged as a necessity to give freedom to a class which slavery had degraded and made ignorant; we next see negro suffrage in the District of Columbia advocated as if the freedmen were capable of exercising the highest functions and privileges of citizenship; the Freedmen's Bureau was then declared to be necessary, as the negroes were weak and ignorant and needed a guardian as it were; and then finally universal suffrage was urged as the panacea for all their troubles.

Mr. Stevens, speaking of the proposed resolution, after it had been reported back January 31, declared boldly that he preferred it to one declaring for universal suffrage, as the latter would give the South full representation, a thing which might interfere with Radical plans, unless there were loyal men enough to control the representation from that section. "But I do not want them to have representation," he stated unequivocally, "I say it plainly—I do not want them to have the right of suffrage before this Congress has done the great work of regulating the Constitution and laws of this country according to the principles of the Declaration of Independence."[80] He seemed to fear that the South might be able to control the negro vote at the time and was unwilling to take any risks until the Constitution had been so amended as to intrench the Radicals in power.

Mr. Schenck, of Ohio, moved a substitute for the resolution as reported by Mr. Stevens. This substitute was to base representation on voters, but it was defeated by a vote of 131 to 29, those in favor of it being almost entirely from Ohio, Indiana, Illinois and a few other States in the Middle West and West. It is more than probable that a majority of the Republican party favored the Schenck substitute, but the statement of Mr. Stevens that the Amendment could not be ratified in that form carried great weight and this was also made evident by the position of the New England members.

[80] Ibid., p. 536.

The resolution as reported by Mr. Stevens from the Reconstruction Committee was adopted by a vote of 120 to 46.[81] Mr. Stevens stated that he had at first favored a proposition similar to the substitute offered by Mr. Schenck, but that when he saw that it was impossible to secure it he gave it up. He also expressed the desire that his proposition that "all national and state laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race or color" would be brought forward. In his opinion it was unwise to join it with the proposition in regard to representation,[82] and this statement should be remembered when we come to consider this question later. Mr. Benjamin, of Missouri, opposed Mr. Schenck's proposition on the ground that the representation of Missouri would be reduced from 9 to 4, since the Confederates had been disfranchised in that State.

The resolution was destined to meet such opposition in the Senate as to foreshadow its defeat. The extreme Radicals, like Sumner and Yates, joined with the Democrats, made it impossible to pass it by the necessary two thirds vote, but what a strange combination! To think of Saulsbury and Garrett Davis voting with Sumner, Yates and Pomeroy! The Democrats were opposed to the measure *in toto,* while the extreme Radicals opposed it because it seemed to sanction the right of the States to disfranchise on account of race or color. It was openly acknowledged in the debate that an Amendment denying the right of the States to deny suffrage on account of race or color, which Mr. Henderson had proposed, could not possibly be ratified by the necessary three fourths of the States. This opinion was held by such men as Fessenden, Wilson, Williams, and others.

Mr. Henderson, who was in a sense an extreme Radical, yet apparently an honest one, fearlessly attacked the position of those who were for steering a middle course, showing that at the beginning of the session they had appeared enthusiastic for an Amendment basing representation on voters,

[81] Ibid., p. 538.
[82] Ibid., p. 537.

but that this enthusiasm had suddenly grown cold and that the proposition was in disfavor. The proposition basing representation on voters was at least fair and equal, leaving each State to settle the question of the franchise for itself, putting no stigma on any State, and applying equally to the North and to the South, though of course its main purpose was to affect the South. If the provision in the Constitution basing representation on population was to be changed at all, then it seems that no fairer or more just basis than that of legal voters could be obtained. Mr. Henderson stated that this met with the hearty approval of the members of Congress, they being as "ready to accept it, as they would accept a demonstration of Euclid." As has been noted, the discovery of Mr. Blaine that the New England States would lose slightly if this plan were accepted caused this sudden change of feeling, for of course the suffrage laws and the representation of the loyal States must not be affected. Consequently the new plan was concocted.

Mr. Henderson clearly pointed out the sectionalism and partisanship in the change which was made in the form of the proposition in that the South would be made to bear the penalty for denying suffrage to the negro, while the North and East could deny it with impunity. The second difficulty to be overcome was the selection of words which would have this effect on the South, while at the same time not arousing the prejudices of the North against negro suffrage. Mr. Henderson stated that both of these difficulties had been surmounted in the proposition which had been reported from the Reconstruction Committee and passed by the House, and emphatically declared that its purpose was to enfranchise the negro in the South while keeping him disfranchised in the North. It appeared equal, yet operated unequally continued the Senator, and began by "assuming that the object to be attained by its adoption was wrong. The object is negro suffrage." According to Mr. Henderson the predominant motive was not the elevation of the negro for his own good, but the punishment of the South,[83] and in this view he

[83] Ibid., Appendix, pp. 115–22.

was undoubtedly correct. More weight is to be given to his statements in this respect from the fact that he affiliated with the Radicals, usually voting with them, and so not so likely to exaggerate when exposing his own colleagues.

In fact, as Mr. Hendricks pointed out, the resolution based representation on neither population nor voters, but was rather a mingling of the two, being a political hybrid purely to serve political purposes, since some States were permitted to count the non-voting population, while others were not.[84] The resolution was to be so arranged that appeal could be made to Northern prejudices and self-interests without inspiring any antipathy as regards the racial question. The motion to put the resolution on its third reading, which was really a test vote, received only 25 yeas to 22 nays, far short of the necessary two thirds.[85] This was reconsidered of course in order to give an opportunity to withdraw or drop the resolution, and so prevent its actual defeat.

This action on the part of Congress is sufficient to show that the first subject to be considered was a political one, for during this time we hear nothing of the resolution which later became the first section. It was also demonstrated that a proposition basing representation on voters would be acceptable to most of the Republicans with the exception of the New England members. Before proceeding further with this question in Congress, it may be well to see what was taking place in the Reconstruction Committee on this particular phase of reconstruction, for it was this Committee which really decided what form the different propositions should take. All proposed measures as to reconstruction were referred to this Committee without debate.

By the journal of that Committee, further evidence is given to show that the question of party, and not of right and justice, was given precedence. At the first meeting of the Committee, January 6, 1866, a committee of three was appointed to wait upon the President and request him to defer further Executive action until the Reconstruction Commit-

[84] Ibid., p. 878.
[85] Ibid., p. 1289.

tee should take action or decide on some plan. At the next meeting, January 9, this sub-committee reported orally that the President had been informed "that the Committee desired to avoid all possible collision or misunderstanding between the Executive and Congress in regard to the relative positions of Congress and the President," and that the President, while saying that it was desirable to advance reconstruction as rapidly as possible, consented to do no more for the present in order to secure harmony of action. The following resolution was submitted at this meeting by Mr. Fessenden, its chairman, and unanimously adopted. "*Resolved,* That all the resolutions submitted to or adopted by this Committee, the views expressed in Committee by its different members, all votes taken, and all other proceedings in Committee, of whatever nature, be regarded by the members of the Committee and the clerk as of a strictly confidential character, until otherwise ordered."

It was also at this second meeting that the first resolution proposing an Amendment to the Constitution was submitted. It was to base representation on legal voters and was submitted by Mr. Stevens. This resolution was discussed, but further consideration postponed until the meeting of the Committee that evening. The entire evening session was devoted to a discussion of it, but no agreement was reached. Mr. Fessenden introduced a resolution which is quite significant, since it proposed that the Southern States should not be allowed to participate in the government until the basis of representation had been modified and the rights of all persons amply secured by constitutional provisions. This resolution was not considered at the time, however.[86]

At the third meeting, three days later, thirteen of the Committee voted that the basis of representation, as then provided in the Constitution, ought to be changed. Mr. Grider, of Kentucky, was the only vote in the negative, Mr. Rogers being absent. After the vote on this proposition had been taken, Mr. Johnson, of Maryland, submitted this resolution: "*Resolved,* That in the opinion of this Com-

[86] Reconstruction Committee Journal, p. 5.

mittee, Representatives should be apportioned among the several States according to their respective number of legal voters." This must have been in substance the same as the one submitted by Mr. Stevens at the previous meeting, and the vote on it is rather interesting. Messrs. Grimes, Johnson, Stevens, Washburne, Bingham, and Blow voted for it, while Messrs. Fessenden, Harris, Howard, Williams, Morrill, Grider, Conkling, and Boutwell voted against it. Mr. Rogers was absent.[87] It will be noticed that every one from New England voted in the negative, and it may properly be inferred that they had been influenced by the statement of Mr. Blaine just four days before as to the effect of such an Amendment on New England. Mr. Grider's opposition to any change in the basis of representation was probably due to the fact that it would cause his State to have fewer Representatives.

A sub-committee consisting of Messrs. Fessenden, Stevens, Howard, Conkling, and Bingham was appointed at this meeting, to which all propositions relating to the question of representation were to be submitted. The partisanship of the Committee was strikingly shown in the composition of this sub-committee, for the minority was given no representation at all. It is all the more noticeable from the fact that Mr. Johnson was favorably disposed towards a change in the method of apportionment, as was disclosed by his votes in the Committee. The minority was no doubt denied recognition on the sub-committee in order that an opportunity might be given to discuss the effect of the several propositions upon the party interests without any danger of their reasons being made public.

When the Committee met January 20, the sub-committee reported two propositions for the consideration of the Committee. To the proposition which was selected by the Committee was to be joined the favorite section of Mr. Bingham. Mr. Stevens opposed uniting the two, and moved that the proposed section be separated from the resolution which might be selected by the Committee. This motion prevailed

[87] Ibid., p. 7.

by a vote of 10 to 4, with 1 absent, thus clearly showing that the consensus of opinion at this time was that the two sections were so dissimilar and unrelated as to make it advisable to report them as separate articles.

The first of the proposed resolutions submitted by the subcommittee is as follows: "Representatives and direct taxes shall be apportioned among the several States within this Union according to the respective number 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." The second one reads as follows: "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective number, 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."[88] The second resolution was chosen by a vote of 11 to 3, one being absent. The negative votes were cast by Messrs. Fessenden, Howard, and Grider. No reason was given for this choice, but it seems proper to infer, from what had been said in Congress, that it was due to the fact that the Committee feared that the first one was too strong in regard to negro suffrage, since it would nullify nearly every state law in respect to that subject.

It was perceived almost immediately that the measure which had been decided upon was drawn too loosely to accomplish the purpose of those who were most anxious to change the basis of representation, since it might affect the North as well as the South, for aliens were not citizens. Furthermore, the Dred Scott decision had not been reversed, and consequently negroes were not citizens. Mr. Stevens proposed an amendment to the measure declaring who were to be considered citizens of the United States, but Mr. Conk-

[88] Ibid., p. 9.

ling's proposal to strike out the words "citizens of the United States in each State" and to insert in lieu thereof "persons in each State, excluding Indians not taxed" was adopted by a vote of 11 to 3, Messrs. Fessenden, Stevens, and Bingham casting negative votes. The word "creed" was stricken out on motion of Mr. Morrill. The proposed article as amended, was then adopted by a vote of 13 to 1, Mr. Rogers casting the only negative vote. Mr. Johnson was absent. Messrs. Howard and Grider stated that they retained the right to support a proposition more in accordance with their views if the opportunity presented itself in their respective houses. It was then ordered that the resolution be reported to the Senate and House.

No reason was given in the Committee for substituting "persons" for "citizens," but we do not have to rely entirely upon our own minds in stating what the change on its face suggests, for we have the testimony of the person who made the motion which resulted in the change. The reasons given by Mr. Conkling when the matter was under discussion in the House are as follows: (1) Because "persons," not "citizens," had always constituted the basis; (2) because it would narrow the basis of taxation on account of the unequal number of aliens in the several States; (3) because many of the States held representation in part by reason of their aliens, and that the Legislatures and people of such States would not ratify an Amendment which would reduce their representation. It needs but a cursory glance to see that the third reason is the only one which really had any weight. If the first reason was to be given any consideration, it would be equally applicable to the question of changing the basis of representation at all, since it might be said with equal force that the basis given in the Constitution should not be changed. The second reason needs no remark, since the phrase "and direct taxes" was afterwards stricken out by the Committee, and besides direct taxes have been used so infrequently by the Federal Government as to make it of little moment. There seems to be little doubt but that the word "citizens" would have re-

mained had it not been for the third reason. It might be stated with almost equal accuracy that the change would have been made even if the Amendment could have been adopted without the change, since it was not the desire or purpose of the majority to reduce their own power. Mr. Conkling stated that they wanted to change the Constitution as little as possible—just enough to secure the object aimed at, which was evidently the reduction of the political power of the South.[89]

The resolution, after some debate in the House, was referred back to the Committee, and was laid before the Committee by Mr. Stevens, January 31. After discussion, Mr. Stevens moved to strike out "and direct taxes," which was agreed to by a vote of 12 to 2. Mr. Johnson moved to amend the proviso to read as follows: "*Provided*, That whenever the elective franchise shall be denied or abridged in any State on account of race or color, in the election of the members of the most numerous branch of the state Legislature, or in the election of the electors for President or Vice President of the United States, or members of Congress, all persons therein of such race or color shall be excluded from the basis of representation." This was rejected, but Mr. Johnson, in order to test the sense of the Committee submitted another amendment to the effect that the condition of slavery should be included among the grounds of disqualifications referred to in relation to the elective franchise. This amendment was rejected by a vote of 7 to 6. Mr. Stevens moved that the resolution as amended be reported back to the House with the recommendation that it do pass. This motion prevailed by a vote of 10 to 4, Mr. Fessenden voting with the Democrats against reporting the resolution. It was this bill which was passed by the House and practically killed in the Senate, and we hear nothing more of it in either House until it was reported April 30, as a part of what became the Fourteenth Amendment. While the resolution in the form in which it passed the House in February was being discussed, Mr.

[89] Globe, 39th Cong., 1st Sess., p. 359.

Lawrence, of Ohio, a Republican, asked with what grace the North could say to the South "you shall have no representation for freedmen not enfranchised" while insisting upon representation for aliens, women, and children.[90]

Although the records of Congress are silent as to what was transpiring during the interval between the defeat of the proposed Amendment in the Senate, there is much evidence to show that the majority were often in consultation to devise ways and means by which their measures might be passed. The great problem was so to frame and unite the several measures as to secure the necessary two thirds in the Senate, for it had been clearly demonstrated on several occasions that practically any measure could be forced through the House.

Five months had passed since the assembling of Congress without any definite plan from the Reconstruction Committee. Not until April 30 was there any plan which attempted to deal with the question of reconstruction. To be sure two separate resolutions had been reported from the committee, but the one fathered by Mr. Bingham did not even reach a vote in the House, so great was the opposition to it by members of the majority, and the other one met a similar fate in the Senate. The people were getting restless and dissatisfied with the progress made by Congress, since they wanted to know what conditions Congress was going to require. The party leaders realized the danger of permitting this dissatisfaction to grow and of going before the people in the fall election with no plan for the restoration of the Southern States. The great mass of the people thought the Union should be restored as soon as possible, and it became necessary to submit some plan, whether a plan that could be ratified or not.

With two failures to the credit of the Reconstruction Committee, it was easily perceived that a third one might be disastrous to the party. It was at such a time and under such circumstances that the Reconstruction Committee submitted the draft of the Fourteenth Amendment on April 30,

[90] Ibid., p. 405.

after five months of deliberation, consultation, and taking of testimony, as its plan for restoration, or as might be properly said of it, as its campaign platform, for it was to serve this purpose also.

It is necessary, therefore, to examine the proceedings of the Committee to see what steps were taken to unite the several propositions into one which was so entirely dissimilar and disconnected. The records as given in the Journal of the Reconstruction Committee show that the first proposal to bring the different resolutions together was made on April 21, only nine days before it was reported to Congress in this new form. The plan was submitted by Mr. Stevens, though its author was Robert Dale Owen, as has been stated in the earlier pages of this chapter. The question of suffrage was incorporated in the second and third sections, which were as follows:

"Sec. 2. From and after the 4th day of July, 1876, no discrimination shall be made by any State, nor by the United States, as to the enjoyment by classes of persons of the right of suffrage, because of race, color, or previous condition of servitude.

"Sec. 3. Until the 4th day of July, 1876, no class of persons, as to the right of any of whom to suffrage discrimination shall be made by any State, because of race, color, or previous condition of servitude, shall be included in the basis of representation."[91]

The first of these sections was adopted by a vote of 8 to 4, Mr. Boutwell voting with the Democrats, and the second one was adopted by a vote of 9 to 3, a strict party vote.[92] Messrs. Fessenden, Harris, and Conkling were absent. The entire resolution, including these two sections, was ordered to be reported to both Houses by a vote of 7 to 6, but this was later reconsidered by a vote of 10 to 2 on account of the absence of Mr. Fessenden, the Chairman of the Committee.[93] This was on April 25, and when the

[91] Reconstruction Committee Journal, p. 24.
[92] Ibid., pp. 25–26.
[93] Ibid., p. 32.

Committee met April 28, Mr. Stevens moved to strike out all of section 2 and "until the 4th day of July, 1876" of section 3. This motion prevailed by a vote of 12 to 2, Mr. Fessenden not voting. Mr. Williams then moved to strike out section 3, and to insert the following:

"Representatives shall be apportioned among the several States which may be included within this Union according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever in any State the elective franchise shall be denied to any portion of its male citizens not less than 21 years of age, or in any way abridged, except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than 21 years of age."[94]

Mr. Williams' proposition was debated at some length and finally adopted by a vote of 12 to 3, Messrs. Howard, Stevens, and Washburne being in the negative. The proposition as submitted by Mr. Williams was the one presented as section 2 of the proposed Amendment on April 30.

The phraseology of this section is quite different from that of the Amendment which passed the House January 31 and which was defeated in the Senate March 9, though the two measures are practically the same in essence. The main difference is that the South would be permitted, under the proposition of April 30, to extend the suffrage gradually to the negroes, and to get representation for those enfranchised. The difference was largely one of theory and principle, however, since all the negroes were practically in the same condition and the effect of both measures would be the same to all practical purposes. The change in the form of the measure would be more acceptable to those who demanded that the same rule should apply to all sections.

One of the objections of the extreme Radicals to the

[94] Ibid., p. 33.

resolution which passed the House January 31 was that it permitted the States to disfranchise on account of race or color, a principle which they declared they would never vote to engraft upon our Constitution. It must be said that this view of the resolution was rather far-fetched, since it certainly never recognized any principle or power which was not already in the Constitution or which had not always been exercised by the States. The change in the form of the resolution was no doubt made to meet the objections of such Radicals, however, since their votes were necessary in the Senate. The change in the resolution also met the objections of the men from the border State of Missouri where the Confederate soldiers had been disfranchised. The resolution as presented was so framed as to be as little objectionable as possible to the North, since it would not deprive that section of its representation for foreigners nor would the New England States lose anything on account of their greater number of women, while it at the same time practically made voters the basis of representation in the South.

The criticism of Senator Henderson when the other resolution was before the Senate is equally applicable to this one. It is objectionable in that in theory it bases representation neither on population nor on voters, but a mingling of both, though its effect, if the opportunity had been presented and the intention of the framers carried out, would have been practically to base representation on voters in some States and on population in others. For example, Missouri could disfranchise all who aided the South during the war and the Northern and Western States might disfranchise all foreigners who had not been naturalized without any loss of representation, but the South could not disfranchise the negroes on account of race or color or by an educational qualification which applied to all alike without having its representation reduced proportionally. The regulation of the suffrage was left to the States, as had always

been the case, but with such a limitation upon it that few States would exercise it to any great extent, since the penalty was so severe as to prevent it.

The resolution did not come up for discussion until May 8, when Mr. Stevens, who opened the debate, declared that the second section, the one now under consideration, was the most important section in the proposed Amendment, since it could compel the States to grant universal suffrage. He admitted that the prejudice in the South against the negro might prevent that section from granting the suffrage for some years, but that the fact that that section would have only thirty-seven Representatives in the House if the ballot were not given to the negro would soon force them to grant it. The delay, however, would not be injurious, in his opinion, since it would give Congress time to enact such legislation or propose further Amendments if needed. Furthermore, he thought that the negroes would be more capable of exercising the ballot at the end of five years. Mr. Stevens admitted that he preferred the resolution which had been defeated in the Senate.[95]

The minority characterized the section as sectional and partisan, its object being to postpone the restoration of the Union and to perpetuate the party in power.[96] Mr. Garfield, though preferring an out and out declaration for universal suffrage, thought that the section was free from the objection which defeated the former resolution in the Senate.[97] Mr. Thayer advocated the proposition on the ground that the South would receive thirteen additional Representatives by the abolition of slavery.[98] His remarks, as well as those of many of the speakers, would indicate that the section was intended to apply to the South only. The remark of Mr. Boyer, in the course of the debate, that the

[95] Cong. Globe, 39th Cong., 1st Sess., p. 2459.
[96] Ibid., p. 2461.
[97] Ibid., p. 2463.
[98] Ibid., p. 2464.

design of the Committee was to solve the problem "how not to do it," tersely expressed what many thought to be the real status of affairs at the Capitol. His remark had reference to the problem of preventing the restoration of the Southern States until after the presidential election, and he was of the opinion that the Committee had met with remarkable success. Mr. Boyer did not deny that the basis of representation needed changing, but he thought all the States should participate in it, and that since reform was undertaken, it should be impartially carried out; if the present system of apportioning Representatives gave the South undue weight in the House, it also gave a still greater disproportion of power to the New England States in the Senate, for that section, with a less population, had 12 Senators while New York had only 2.[99]

The argument of Mr. Kelley, of Pennsylvania, an able Representative, was that one red-handed rebel in South Carolina ought not to have equal power with three patriotic, loyal citizens of the North.[100] Mr. Boutwell, a member of the Reconstruction Committee, declared that he did not think that two rebel soldiers "whose hands were dripping with the blood" of Union men should have the same power in Congress as three Union soldiers.[101] The same sentiment was also voiced by Mr. Eckley and others.[102] Such arguments, arguments which would now have little or no weight, had great influence at the time, it must be said with regret. Mr. Raymond, a Johnson Republican, opposed the January resolution, but supported the second section as now before the House, believing that it was more just and in better form.[103] Mr. McKee candidly acknowledged that he

[99] Ibid., p. 2466.
[100] Ibid., p. 2468.
[101] Ibid., p. 2508.
[102] Ibid., p. 2535.
[103] Ibid., p. 2502.

supported the measure in order to perpetuate his political party,[104] but this was of course an unusual admission.

Mr. Miller, of Pennsylvania, regarded the second section as the most important section of the proposed Amendment, declaring that it was the "corner-stone of the stability of our Government."[105] The time was opportune for securing amendments to the Constitution, he continued, since there were large majorities in both branches of Congress; he furthermore hoped that the Governors of the States whose Legislatures had adjourned would convene them as soon as the Amendment was passed by Congress, thus preventing its submission to the people.

Mr. Stevens closed the debate, though he made no reference at all to the second section. The measure was then passed, May 10, 1866, by a vote of 128 to 37.[106]

The resolution was not considered in the Senate until May 23. There seems to be no reason for this delay except that Senator Fessenden, the Chairman of the Reconstruction Committee, was too unwell to take charge of it. When it was brought before the Senate, Mr. Howard opened the discussion and took general charge of the debate, since Mr. Fessenden's health was such as to prevent him from doing so. Mr. Howard, who was also a member of the Reconstruction Committee, seems to have been well qualified to act as Mr. Fessenden's substitute, though he was more radical than Mr. Fessenden. He admitted that the second section was not all that he desired, thinking that suffrage should be secured to some extent at least to the negroes. According to him, the question of suffrage was left with the States. The reason for this was that it was unlikely that three fourths of the States could be induced to ratify an Amendment which granted the right of suffrage, in any degree or under any restrictions, to the negroes. The

[104] Ibid., p. 2535.
[105] Ibid., p. 2510.
[106] Ibid., p. 2545.

Amendment was to apply to all the States, but he admitted that it was so drawn as to make it the political interest of the South to extend the suffrage to negroes, otherwise losing twenty-four Representatives in Congress. To his mind it was unfair and unjust that the Southern States should come back into the Union stronger by ten Representatives than when they withdrew in 1861.[107]

Mr. Wilson, of Massachusetts, submitted the following in lieu of the second section:

"Representatives shall be apportioned among the several States according to their respective numbers, but if in any State the elective franchise is or shall be denied to any of its inhabitants, being male citizens of the United States, above the age of twenty-one years, for any cause except insurrection or rebellion against the United States, the basis of representation in such States shall be reduced in the proportion which the number of male citizens so excluded shall bear to the whole number of male citizens over twenty-one years of age." Mr. Wilson regarded the distinction between "citizens of the State" and "inhabitants, being citizens of the United States," as a vital one,[108] and this was the only real difference between the original section and the one he submitted. His suggestion was afterwards incorporated into that section, and for what purpose we will hereafter consider.

Mr. Stewart took the position that the section could be justified on no other theory than that the negro should be allowed to vote and that this theory must be vindicated before the people, since it did not exclude the non-voting population of the North. The section, he declared, recognized that there was no wrong in excluding aliens and others from the suffrage, while at the same time declaring that if suffrage was denied to the negro, he would not be included in the basis of representation. It was perfectly

[107] Ibid., pp. 2766–67.
[108] Ibid., p. 2770.

proper, therefore, for him to ask "Why this inequality? Why this injustice?" He asserted, furthermore, that the world would brand their efforts as a struggle for partisan power if they relied too much on expediency.[109]

On the same day, May 24, Mr. Sherman proposed an amendment to strike out sections three and four and to insert in their stead a section basing representation on the qualified voters in each State, including those disfranchised on account of rebellion; and a section to the effect that direct taxes should be apportioned among the several States according to the taxable property in each State.[110]

Mr. Sherman proposed his amendment on May 24, but the resolution was not considered again until May 29. The intervening time was not idly used, however, since the Senate remained in session but a short time on the two days, Friday and Monday, in which it was in session, in order to give the Republicans an opportunity to discuss the whole measure in caucus.[111] The several propositions, by way of substitutes or amendments, had made it evident that there was danger that the entire resolution might again be defeated or so radically altered as to render it valueless in the eyes of the party leaders or subject it to an almost certain rejection by the States. The latter event was especially to be avoided, since, if a proposition which the people disapproved were submitted, the reaction might be so great as to involve the loss of the control of the next House by the Radicals. Consequently it was decided to defer further debate or action in the Senate until a definite programme had been decided upon by the majority. Unity of action was necessary if anything was to be accomplished, and it was soon perceived that so many objections had been or would be raised as to endanger its passage by the Senate or its ratification by the States.

[109] Ibid., pp. 2800–03.
[110] Ibid., p. 2804.
[111] N. Y. Herald, May 26, 1866.

A party caucus was called, therefore, to decide just what changes, if any, were to be made in the plan as submitted by the Committee of Fifteen. It would be both interesting and valuable to know what took place in the caucus, for no doubt there was a free expression as to what was to be accomplished by the proposed Amendment, since the meeting was behind closed doors and only those Republicans being present who were pledged to abide by the action of the caucus. Party caucuses had been held before this time, but never before had such policy been pursued, either in framing or amending the Constitution. It is possible, by such methods, to amend the Constitution by an actual minority of Congress instead of the two thirds which is required by the Constitution, since a majority of the two thirds can bind the others. In this way an amendment might be submitted by Congress which a majority of its own members, if acting and voting independently, might disapprove. This was very probably true of the second section, for there seems to be evidence to show that a majority of the Senators preferred a measure basing representation on voters. It is unnecessary to remark that no purely party measure should ever find a place in a Constitution.

Mr. Barnes, a contemporary writer, says of this caucus: "The several days during which the discussion was suspended in the Senate were not fruitless in their effect upon the pending measure. The Amendment was carefully considered by the majority in special meetings, when such amendations and improvements were agreed upon as would harmonize the action of the Republicans in the Senate."

The Republican party consisted of two divisions of factions—the extreme Radicals like Sumner, Wade, and Yates, and the conservative Radicals like Fessenden, Trumbull, and Morgan. It was necessary to harmonize these two factions if anything was to be accomplished in the way of

amending the Constitution. This condition may, to some extent, justify the caucus, but approval should seldom, if ever, be given to a party caucus upon which such an important thing as changing the fundamental law depends.

When the Amendment was again before the Senate, May 29, certain amendments were made as the result of the caucus. The second section was amended by striking out "citizens" and inserting "inhabitants, being citizens of the United States." This was the amendment which had been submitted by Mr. Wilson a few days before. Mr. Howard stated that the change was made in order to harmonize sections one and two, but it was evidently done to make sure that the Southern States could not evade the measure by holding that negroes were not citizens of the several States even if declared to be citizens of the United States. The amendment was agreed to without a division.[112]

Mr. Hendricks pointed out the fact that the section did not rest upon the principle that those who were regarded as unfit to vote by the States should not be represented, as had been claimed by the advocates of the measure, since it was so framed as to permit the Northern and Eastern States to retain their twenty Representatives based upon a non-voting population. It also permitted Maryland, West Virginia, Tennessee, and Missouri to have representation for those they regarded as unfit to vote. His amendment, however, was rejected.[113]

A favorite argument with the majority was that the South would come back with increased power if the basis remained unchanged. To test the sincerity of that argument, Mr. Hendricks proposed an amendment to the section providing that only three fifths of those who had been released from servitude should be counted in the basis, thus

[112] Cong. Globe, 39th Cong., 1st Sess., p. 2897.
[113] Ibid., p. 2939.

restoring the *status quo* in regard to representation as it existed prior to the war, but this was not accepted.[114]

Mr. Doolittle moved as a substitute for the section an amendment identical in meaning to that proposed by Mr. Sherman on May 24, that is, basing representation on male electors over 21 years of age. He discussed his amendment at length, showing that New England would lose 4 while the Northwest would gain 12 Representatives. If suffrage laws remained unchanged, the South would lose 15 and the North would gain 15 Representatives on a voting basis, but the amendment was rejected by a vote of 31 to 7.[115] An objection brought against Mr. Doolittle's amendment was that it would tend to degrade suffrage by inducing the States to grant the privilege to aliens and others. To test the sense of the Senate and to avoid that objection, he submitted another amendment in which "male citizens" who were qualified by state law to vote for members of the most numerous branch of the Legislature was substituted for "male electors," but this was defeated by the same vote, 31 to 7.[116]

Mr. Poland thought that population, not voters, should constitute the basis of representation, though he was opposed to having the negroes included in the basis unless they were allowed to vote. In case suffrage was granted to them, there would be some Republicans from the South, thus insuring the continued dominance of his party, he declared, and that there would be no reasonable fear of losing control of the Government if the ballot was not put in the hands of the negro and the South's representation reduced accordingly.

The rejection of the amendments submitted by Mr. Doolittle clearly brought out the fact that the Republicans were bound by the caucus. Mr. Sherman did not hesitate to

[114] Ibid., pp. 2940 and 2942.
[115] Ibid., pp. 2942–44 and 2986.
[116] Ibid., p. 2991.

express his opinion in favor of Mr. Doolittle's amendment, holding that it embodied the true principle upon which representation should be based, and that if it were adopted, the South would feel no local jealousy, since it would apply to all sections alike. "Then every citizen," he continued, "would stand equal before the law, with precisely the same political power, no more and no less. I say, therefore, that this is the only amendment to the propositions now submitted to us that I desire to make; but I feel bound by the action of my political friends to vote against this amendment. I place my vote distinctly on this ground." For political reasons, therefore, he voted for a proposition which he knew to be unfair and unjust, for he said of it: "It endeavors to save representation for certain portions of our country where they have a population whom they deprive of the right to vote; but it deprives the South of representation for a population which has no right to vote."[117]

Mr. Wilson, of Massachusetts, in reply to Mr. Sherman's remarks, stated, as his reason for opposing the amendment offered by Mr. Doolittle, that it would strike over 2,000,000 unnaturalized foreigners from the basis, thus diminishing the representation of the loyal States 17 and correspondingly increasing the power of the disloyal States. This statement by Mr. Wilson reveals, if we were otherwise lacking in information, the main purpose of the section, for it will be remembered that it was Mr. Wilson who suggested the change in the form of the section which was finally adopted. Mr. Sherman had no difficulty in answering Mr. Wilson's argument by saying that if 4,000,000 blacks were denied representation because they were not allowed to vote, then all other classes which were denied the right of suffrage should also be denied representation.[118] His position was that an Amendment to the Constitution

[117] Ibid., p. 2986.
[118] Ibid., p. 2987.

should rest upon some fundamental principle, and not upon how it would affect this or that community or section, but how it would affect the country at large.

Mr. Henderson thought the section was objectionable in that it inflicted a punishment upon the States for excluding negroes from the suffrage, while at the same time permitting white citizens and alien inhabitants to be excluded without loss of representative power. He was also of the opinion that it offered too great an incentive to the States to extend the elective franchise to those incompetent to exercise it intelligently. Notwithstanding these and other objections, Mr. Henderson voted for the measure.[119]

Mr. Doolittle, a short time before the final vote was to be taken, presented an amendment, of which he had given notice, providing that each of the sections be submitted to the States as separate Amendments, any one or all of which might be adopted or rejected by the States. He cited the fact that when Amendments were first submitted to the States, the policy of submitting them as separate Amendments was inaugurated and that it should not now be departed from. At that time twelve Amendments were submitted, of which ten were adopted and two rejected. The sections of the proposed Amendment were distinct and independent propositions, he contended, and should, therefore, be submitted as such. It has already been noted in the preceding pages that Mr. Stevens had at first opposed uniting the various propositions and that the Committee, by a vote of 10 to 4, had also placed itself on record against such a course. His amendment was rejected by a vote of 33 to 11.[120] No reason was given for the action of the majority, but it takes very little discernment to discover it.

Mr. Sherman asked that the sections be voted on separately in the Senate, though he had voted a few minutes

[119] Ibid., pp. 3033–35.
[120] Ibid., p. 3040.

before against the proposition of Mr. Doolittle to allow the States the same privilege, but his request was denied on the ground that all the sections constituted but one resolution and must be voted on as such.[121] The resolution proposing the Fourteenth Amendment was passed by a vote of 33 to 11.[122]

The resolution as amended in the Senate was brought before the House on June 13, when Mr. Stevens announced that the Union part of the Committee of Fifteen had examined the amendments made in the Senate and were unanimously of the opinion that they should be adopted. These amendments were concurred in the same day by a vote of 120 to 32.[123]

From the above examination of the discussion of the second section, it is quite obvious that its chief purpose was to weaken the power of the South, and so of the Democratic party, and to keep the Republican party in power. It is also equally evident that it was not based upon any fundamental principle, and this was not only recognized but stated by some of those who voted for it. The one distinctive principle, that basing representation on legal male electors, was rejected. This would have affected the South to a far greater extent than any other section of the country, but it could not have been attacked on the ground of unfairness and of sectionalism. Party expediency was the determining factor, however, and for the first time in the history of our country there was engrafted upon the Constitution a purely partisan proposition, a proposition to perpetuate a political party.

The section was obnoxious in that it permitted the alien to be represented and denied that right to the negro. In this respect the alien was given preference over the citizen, though it might be answered that the alien would become a

[121] Ibid., p. 3041.
[122] Ibid., p. 3042.
[123] Ibid., p. 3149.

citizen, when, if not granted suffrage, he would no longer be represented. The principle that those classes which had not the right of suffrage should not be represented, the principle upon which the section pretended to be based, was violated nevertheless. Even the answer given above does not apply to the case of the Chinese, for here were aliens who were not expected to become citizens and could not become such under the laws of the United States, and yet under the section they would be represented.

Section Three of the Amendment.

The third section may be called the punitive section of the Amendment, for by it the leading men of the South were prevented from holding office, either federal or state. In this way it was hoped to weaken, if not to destroy, the influence of those who had shaped the policies of the South up to this time. The section was also to serve a political purpose, being a concession to those who desired to see the Southern leaders punished. As an indication of the animosity held by many toward the South, the resolution submitted by Mr. Sumner on the first day of the session, December 4, 1865, may be cited. The fifth proposition of the resolution, which was in reference to the restoration of the Southern States, is as follows: "The choice of citizens for office, whether state or national, of constant and undoubted loyalty, whose conduct and conversation shall give assurance of peace and reconciliation."[124] The acceptance of this proposition would mean the exclusion of all who aided the South. On the 20th of December, 1865, Mr. Broomall submitted a resolution to be referred to the Reconstruction Committee, a part of the sixth section of which provided "and forever exclude from all political power the active and willing participants in the late usurpation."[125] With the same purpose in view, Mr. Spalding, in a speech, January 5, 1866, suggested that a measure should be adopted

[124] Ibid., p. 2.
[125] Ibid., p. 98.

to prevent anyone who had taken up arms against the United States from being admitted to a seat in Congress. Mr. Conkling submitted a resolution to this effect on January 16, 1866.[126]

The resolutions, which were generally referred to the Reconstruction Committee, and the remarks made in debate, go to show that there was a feeling on the part of many that the participants in the hostilities against the Federal Government should be denied political rights for some time at least. The reasons given were that treason was a crime and should be made odious, and that it would be unsafe to trust the Government in the hands of those who had waged war against it. It must also be remembered that there was a political aspect to these resolutions, for it can readily be perceived that if a large number of those in the South were disfranchised, it would make it much easier for the party in power to continue in control of the Government.

The Reconstruction Committee seemed in no great haste, however, in regard to this particular phase of reconstruction, for it was not until April 28, 1866, just two days before the proposed plan was reported from that Committee, that Mr. Boutwell submitted a proposition almost identical with the third section as finally adopted. His proposition was rejected by a vote of 8 to 6. Mr. Harris then moved to insert after section two the following: "Sec. —. Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President and Vice-President of the United States." This proposition was rejected at first by a vote of 8 to 7, but was subsequently reconsidered and adopted by 8 to 7—Mr. Grimes having changed his vote.[127] This is the only reference to the third section in the Journal of the Committee, and it was reported in the form given above on April 30. On the same date, Mr. Stevens reported two bills from the Reconstruction

[126] Ibid., pp. 133 and 252.
[127] Reconstruction Committee Journal, p. 34.

Committee, one of which declared certain classes of persons ineligible to office.

During the debate on the resolution proposing the Fourteenth Amendment, it developed that there was considerable opposition to the third section. Mr. Blaine thought that it would override the pardons granted by the President, thereby subjecting the Federal Government to the charge of bad faith. Mr. Stevens replied that a pardon would release any one from the penalty, whereupon Mr. Blaine observed that the section would become practically useless since all below the rank of Colonel had already been pardoned, and that at the proper time he would move to strike out the third section.[128] Mr. Garfield said that the section was obnoxious in that it was susceptible of a double construction and not founded on a principle. He further asserted that it would be regarded everywhere as a piece of politics for the purpose of carrying the presidential election, and moved that the resolution be recommitted to the Committee with instructions to strike out the third section.[129] Mr. Thayer, who advocated the other sections, thought the third section both improper and inexpedient, and added: "I am opposed to it because it looks to me like offering to the people of the States lately in rebellion peace and restoration with one hand, while you snatch it from them with the other."[130] Mr. Boyer declared that the section furnished convincing evidence that the Amendment was not intended for adoption, but was to serve as an excuse for the indefinite exclusion of Southern Representatives, since the South could not be expected to accept such terms as those contained in this section. He also contended that it was in the nature of an *ex post facto* law, thereby being contrary to the great principle incorporated in the Constitution.[131] Mr. Shanklin asserted that the purpose of the section was to disfranchise the people of the South until the party in power could so

[128] Cong. Globe, 39th Cong., 1st Sess., p. 2460.
[129] Ibid., p. 2463.
[130] Ibid., p. 2465.
[131] Ibid., p. 2466.

hedge themselves in as to be able to control that section at will, and that if the Southern people accepted the degrading conditions imposed by the section, they would be unworthy to be American citizens.[132]

Mr. Raymond opposed the section on the ground that it rendered his party obnoxious to the charge of amending the Constitution for the purpose of controlling the election of 1868. He thought Mr. Blaine's objection a very strong one, but to his mind, the fatal objection was that it was inserted for the express purpose of preventing the Southern States from adopting any Amendments submitted by Congress. The result would be, he said, to keep the States out, since the adoption of the Amendment was to be the condition precedent to their re-admission. The concession which the States of the South would be called upon to make in adopting the Amendment were then recited by Mr. Raymond, which concessions were an equality of civil rights, a great reduction of political power in the change of the basis of representation, the repudiation of their debts, and the surrender of all claims for compensation for slaves. After summarizing these concessions, he pertinently asked: "What do we offer them in return for all these concessions?" We cannot do better than give his own answer, which was in these expressive words: "The right to be represented on this floor, provided they will also consent not to vote for the men who are to represent them! It is not merely a sham, it is a mockery."[133] Notwithstanding his severe arraignment of this section and his belief that it would cause the defeat of the proposed Amendment, Mr. Raymond voted for the entire resolution. Many Republicans doubted the expediency or propriety of the section, especially as a part of the Fourteenth Amendment, and suggested that it be submitted as a separate and distinct proposition.[134] Several of the majority leaders thought that it would endanger the entire Amendment, among them being Mr. Bingham, who also stated that

[132] Ibid., p. 2500.
[133] Ibid., p. 2503.
[134] Ibid., pp. 2508–10.

it might subject their party to the charge of inserting it for the purpose of controlling the next presidential election.[135]

Of all the speakers, Mr. Stevens was the only one who stated that he regarded the third section as the most important and vital, and that it was necessary to save the Union party. He had no hesitancy in saying that it was a party measure pure and simple. He admitted, however, that Congress would have to pass registry laws and other laws to enforce it, just as would have to be done in regard to the other sections. This is probably the most important statement made in regard to the third section, since it shows very clearly that he thought congressional legislation was necessary to make the first section effective. Before closing his speech he moved the previous question, but Mr. Garfield and others opposed this motion with the view of moving to strike out the third section. The previous question was seconded, however, only by a union of the partisan Democrats with the partisan Republicans, and then by the close vote of 84 to 79. The entire resolution was then adopted by a vote of 128 to 37.[136]

When the resolution was under discussion in the Senate, May 23, Mr. Howard stated that he had not favored this section in the Committee. The Journal of the Committee shows, however, that he voted for its insertion and that without his vote that section would not have been reported to Congress. In fact, it was only included after some pressure or influence had induced Mr. Grimes to change his vote. Mr. Howard's objection to the section, as disclosed in his speech, was that it would be of no practical benefit in the presidential election.[137] There seemed to be no one in the Senate to advocate the section as it passed the House, and the Republican caucus decided to strike it out. In place of the deleted section, there was submitted on May 29, a substitute in the form of the present third section. The Senate, by a vote of 43 to 0, voted to strike out the original section. The change was no doubt made for the purpose of strength-

[135] Ibid., pp. 2540–43.
[136] Ibid., p. 2545.
[137] Ibid., p. 2768.

ening the Amendment before the people. Several amendments were offered to limit the effect of the section to those who had taken the oath to support the Constitution within the ten years preceding January 1, 1861, to those who had voluntarily aided the Confederacy, etc., but all were rejected by the usual Republican majority.[138] The section was also characterized as *ex post facto*.[139] The amendment to the third section as made in the committee of the whole was adopted by the Senate by a vote of 42 to 1,[140] since it was regarded as much more satisfactory than the form in which it had passed the House.

The amendment made in the Senate was agreed to in the House, June 13, by a vote of 120 to 32. Mr. Finck called attention to the position taken by Mr. Stevens when an attempt had been made to strike out the third section in the House, and his present position.[141] It will be recalled that Mr. Stevens stated that he regarded the third section as the most important of the Amendment, and that without it, it would be of little value.

There may be said to be two underlying motives which caused the insertion of the third section in the Amendment—the one penal, the other political. Undoubtedly it was to serve as a punishment for the Southern leaders, but it is equally true that it was to serve a political purpose as well. The chief political features were eliminated in the Senate, for some of the leading Republicans admitted that it was largely political in the form in which it came from the Committee and was adopted by the House. The penal features, however, probably bore more heavily on the South in the amended form, since it prevented those most capable from holding any office. As was repeatedly charged in debate, the chief political value of the section was that it would prevent the acceptance of the Amendment until after the election. Some of the majority were also of the opinion

[138] Ibid., pp. 2897, 2900 and 2918.
[139] Ibid., pp. 2915, 2940 and 2990.
[140] Ibid., p. 3042.
[141] Ibid., p. 3146, 3149.

that the entire Amendment would be endangered by it and desired to have it submitted as a separate proposition.

One result of the third section was the defeat of the proposed Amendment in the South, though to be sure it may be questioned whether the Southern States would have adopted it with this section omitted, but there can be no doubt that it caused greater irritation and opposition than any other section. There was probably one factor in connection with this section which was not mentioned in the debates, and this was the fact that it would afford the opportunity later on to offer an inducement to the Southern leaders—those proscribed by the section—in the way of amnesty as a return for aid given to the party in power. A *quid pro quo* agreement of this kind might prove effective at times, and the fact that attempts were made to reach a compromise along these lines, the granting of amnesty to the Southern leaders to be linked with the so-called Civil Rights Bill of Sumner gives weight to this view. The section as originally proposed limited the time to four years, but as passed there was no time limit, and it required a vote of two thirds of Congress to exempt any one from its provisions. Although the section did not apply to the mass of the people, it could hardly be expected that those who had followed their leaders so loyally would abandon them under the circumstances. The section was impolitic to say the least of it, and it really made those affected by it more popular, since they were regarded as unjustly singled out to bear the punishment for all those who had participated in or sympathized with the struggle for Southern independence.

Section Four of the Amendment.

The fourth section of the Amendment declaring that the public debt of the United States should be inviolable, but that neither the United States nor any State should assume or pay any debt incurred by the Confederate States in aid

of the war against the United States, or any claim for the loss or emancipation of any slave, aroused the least opposition of any of the sections. In fact, there was very little opposition to the section, for a resolution introduced by Mr. Randall, of Pennsylvania, December 5, 1865, declaring that the national debt should be held sacred and inviolable, was agreed to by a vote of 162 to 1.[142] Two weeks later, December 19, a resolution proposing an Amendment to the Constitution was reported from the Judiciary Committee and adopted the same day under call of the previous question by a vote of 150 to 11.[143] This proposed Amendment declared that neither the United States nor any State should pay any debt contracted in aid of war against the United States, and the above vote shows that there was a general feeling that such debts should not be paid. The resolution was sent to the Senate the following day, but no action whatever was taken in regard to it until June 20, 1866, when it was indefinitely postponed on the ground that it had been incorporated into the fourth section of the Fourteenth Amendment.

The number of resolutions submitted to Congress on the subject clearly indicates that it was thought advisable to secure the national debt against any future danger and to put it beyond the power of Congress or any State to assume or pay any part of the Confederate debt or to pay for any of the emancipated slaves. The provisions in regard to the Confederate debt and the compensation for slaves were perfectly proper to prevent action by any future Congress, but the provision in regard to the national debt seems of doubtful value. The consideration of this subject was at first almost entirely free from politics, but it was made to serve the politicians at a later stage. Just as was the case with the other sections, there was no idea of combining this sec-

[142] Ibid., p. 10.
[143] Ibid., pp. 84–87.

tion with any other proposition until the plan of Robert Dale Owen was submitted to the Reconstruction Committee April 21, 1866.

Very little time or attention was given to this section, being hardly mentioned by some, never alluded to by others, and little discussed by any. Mr. Stevens probably gave the Republican view of it in the following sentence, which was all he said in regard to it: "I need say nothing of the fourth section, for none dare object to it who is not himself a rebel."[144] No opposition to speak of was manifested by the Democrats, except to the provision in regard to the compensation for slaves, and the opposition to this provision was almost entirely limited to its effect upon Maryland, Delaware, Kentucky, and Missouri—States which had remained loyal to the Union. Mr. Shanklin, of Kentucky, declared that it repudiated the pledge of the National Government to pay $300 for each slave enlisted from the loyal States. According to his statement, Kentucky was entitled to $10,000,000.[145] Mr. Randall, who was several times Speaker when the Democrats came into power, said that if this section were submitted as a separate proposition that it would be adopted almost unanimously.[146]

Mr. Howard, who had charge of the Amendment in the Senate, stated, May 23, when it was under discussion, that he did not suppose there was any one in that body who would oppose the fourth section. He said it was necessary to prevent future political squabbling and wrangling and to put it beyond the field of discussion and to avoid all agitation of the subject in the future.[147] Although admitting all were in favor of this section, he was unwilling to submit it as a separate proposition, evidently desiring to use it as a means to strengthen the other sections or to secure votes

[144] Ibid., p. 2460.
[145] Ibid., p. 2501.
[146] Ibid., p. 2530.
[147] Ibid., p. 2768.

for his party, thereby being made political to that extent.

Mr. Davis offered an amendment to the section for the purpose of securing the bounties provided to the owners of slaves who enlisted, but this was rejected.[148] The only serious objection which might be brought against the section was that in regard to this part of it, since many slaves of those who were loyal to the Union had enlisted under the Act of Congress of February 29, 1864. By adopting this section, Congress violated its plighted faith, but aside from this the section probably served a good purpose by removing all agitation in the future in regard to compensation for slaves or the payment of any debts contracted in aid of the Confederacy. Of course this statement has nothing to do with the question whether, as a matter of fact, compensation should have been given for the slaves or not, though the condition of the public finances at the time would hardly have warranted the assumption of such an enormous obligation.

Section Five of the Amendment.

Section five declares that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article." It was never deemed necessary to add a section similar to this to any proposed Amendment to the Constitution prior to the Thirteenth, so that it is essential that a brief account be given of the reason for adding it to the War Amendments. It is of little importance for the purpose of this study whether the section really gave any additional power to Congress or not, but it was evidently added for some reason, and that reason does concern us.

Very little was said of it when the Thirteenth Amendment was before Congress, though the subsequent legislation elicited statements which revealed the purpose of the section. Some of the Southern States seemed to fear that some danger was concealed in the second section of the

[148] Ibid., p. 3041.

Amendment, and made objection on account of it. Gov. Perry, of South Carolina, wrote President Johnson that there was no objection to the Thirteenth Amendment except the second section. The objection to this section was that it might be held to give Congress power to legislate for the freedmen. Secretary Seward replied to this letter, saying that the effect of the second section was to restrain, not to enlarge, the power given by the first section.[149] North Carolina and other States made the same objection.

The opinion given by Mr. Seward was evidently that of Mr. Stevens also, for when Mr. Cook introduced a resolution, January 5, 1866, declaring that it was the sense of the House that the second section conferred power upon Congress to legislate for the freedmen in the way of securing the rights of freemen, he stated that it was contrary to the opinion of the Secretary of State, and added: "We all know that the second section is restraining."[150] Although this was the view at first taken by the Federal Government, it was not consistently adhered to, for it has already been noted that the power to pass the Civil Rights Bill was claimed to be derived from this section. The passage of that bill over the veto of the President declared, so far as Congress could do so, that the second section of the Thirteenth Amendment did confer legislative power upon Congress. Whatever claim was made in regard to the second section of that Amendment applies with equal force to the fifth section of the Fourteenth Amendment.

Mr. Howard gave a more complete statement in regard to the fifth section than any other member. After referring to the privileges and immunities to be secured by the first section, stating that the provisions of that section were merely restrictions upon the States and not grants of power to Congress, he made the following declaration in regard to

[149] Hollis, Reconstruction in S. C., p. 44.
[150] Cong. Globe, 39th Cong., 1st Sess., p. 130.

the fifth section: "Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution." [151] Thus according to Mr. Howard the power which Congress has under the Fourteenth Amendment is not derived from either or all of the first four sections, but entirely from the fifth section. His statement in regard to it was not questioned by any one, evidently being acceded to by all as a true statement of its purpose. Indeed, there could be little doubt as to the purpose of the section, especially in view of the legislation enacted under the second section of the Thirteenth Amendment. With a single exception, the minority in the Senate gave no attention to the section, but it so happens that the views expressed by Mr. Howard and Mr. Hendricks agree. Mr. Hendricks sounded the danger of the section, that is, according to the view of the minority, when he said that it "provides that Congress shall have power to enforce, by appropriate legislation, the provisions of the Article. When these words were used in the Amendment abolishing slavery, they were thought to be harmless, but during this session there has been claimed for them such force and scope of meaning as that Congress might invade the jurisdiction of the States, rob them of their reserved rights, and crown the Federal Government with absolute and despotic power. As construed, this provision is most dangerous. Without it the Constitution possesses the vital-

[151] Ibid., p. 2766. Speaking further of it, he said: "It (5th sec.) gives to Congress power to enforce by appropriate legislation, all the provisions of this Article of Amendment. Without this clause, no power is granted to Congress by the Amendment or any one of its sections. It casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the Amendment are carried out in good faith, and that no State infringes the rights of persons or property. I look upon this clause as indispensable for the reason that it thus imposes upon Congress this power and duty. It enables Congress, in case the States shall enact laws in conflict with the principles of the Amendment, to correct that legislation by a formal Congressional enactment" (p. 2768).

ity and vigor for its own enforcement through the appropriate departments." [152]

These unequivocal statements by the representatives of the two parties leave little room for doubt as to the purpose of the section or of the power to be conferred on Congress. What the one regarded as essential to the Amendment to make it effective, the other regarded as dangerous. Practically the same declaration was made in the House by Mr. Harding, of Kentucky, for he asserted that it transferred all power over their citizens from the state Governments to Congress, and that Congress would thus hold all power of legislation over the citizens of the States in defiance of the States.[153]

[152] Ibid., p. 2940.
[153] Ibid., p. 3147.

CHAPTER III.

The Amendment Before the People.

The Amendment having passed Congress June 13, 1866, was formally presented to the Secretary of State, June 16, and was by him submitted to the several States for ratification or rejection.

Before considering the action of the several Legislatures, it may be well to see what the people in general thought of it, what they understood it to mean, what powers were to be given to Congress and the Central Government, and what evils were to be remedied by it. Our source of information, on this particular question, is, with few exceptions, limited to newspapers, both editorial and correspondence. This will also include the open letters of public men and the speeches made during the campaign.

When the nature of the Amendment proposed by the Committee April 30 became known, it was declared that the object of the first section seemed to have been secured by the Civil Rights Bill, and that the main purpose of the Amendment was, therefore, to keep the South out until after the election.[1] Even as early as December 15, 1865, the purpose of the first section was, it was said, to "confer upon Congress all the powers now exercised by the state Legislatures, and to reduce the States to the conditions of counties."[2] The same writer also asserted that it was proposed to give "Congress absolute power over the social and civil laws of each State."

[1] N. Y. Herald, April 30, 1866. The Herald claimed to be an independent paper but usually supported the administration.

[2] N. Y. World, December 15, 1865. To show that reference was had to what finally became the first section, the following resolution introduced by Mr. Bingham was given in the same editorial: "The Congress shall have power to make all laws necessary and proper to secure to all persons in every State of the Union, equal protection in their rights of life, liberty and property."

This same paper, which was strongly opposed to the entire Congressional plan of reconstruction, on April 30, following, stated that the whole plan of the Committee had two objects in view: (1) To keep the South out of the Union. (2) To put the *onus* of its remaining out on the States of that section. The aim of the first, it continued, was to prevent those States from participating in the Presidential election of 1868, and that of the second was to retain their supporters in the North—the cardinal principle thus being to keep the Radicals in control of the Government. The Amendment, after its passage by Congress, was declared to be a mere party platform, since it was neither intended nor desired to be ratified.[3] A rather conservative organ said that if the Amendment passed Congress and was submitted to the States, it would secure the next President to the party in power whether it were ratified or not, but stated that the scheme was milder than had been expected.[4] It was predicted that, if the third section as proposed by the Reconstruction Committee, which was to keep the South out until after the presidential election, could practically be nullified by the pardons of the President, and many thought it could be, something else would be substituted to accomplish the same purpose.[5] As a matter of fact this was done, but probably because the original section seemed too radical and severe, though the above view doubtless had some weight since several members of the House were of the same opinion. The section, as has been stated previously, was retained by the House only by a combination of the extremists of both sides. The Amendment was also declared to be an ingeniously contrived scheme for popular support in the North, while unnecessarily reënacting the Civil Rights Bill.[6] The paper gave a correct expression of the popular impulse and feeling when it said that the great majority of the people would approve the scheme, which was declared to be a "powerful platform for the approaching fall elections,"

[3] Ibid., June 15, 1866.
[4] N. Y. Herald, May 1, 1866.
[5] Ibid., May 10, 1866.
[6] Ibid., June 2 and 10, 1866.

while the proposition that all should be equal before the law was calculated to have "a pleasing effect upon the popular ear."[7]

The New York *Times,* a Republican paper, agreed with the *Herald* and the *World* that the main purpose of the Amendment, was to secure the presidential election of 1868, though declaring that most of its propositions or provisions were sound, but that the South could not be expected to subscribe to some of them.[8] In fact it went so far as to say that Mr. Stevens and the Radicals did not want the South restored until after that election and that the Committee evidently did not want it accepted by the States.[9] Four days later this same paper stated that all of the sections of the Amendment, except the third, had been acted upon as separate measures, and that the third section had been added for partisan purposes. Mr. Howard's speech of May 23 was declared to be frank and satisfactory and his exposition of the need for securing, by constitutional Amendment, the privileges and immunities of citizens to be "cogent and clear."[10] It was in this speech that Mr. Howard said that one of the purposes of the first section was to give Congress power to enforce the Bill of Rights. By declarations of this kind, by giving extracts or digests of the principal speeches made in Congress, the people were kept informed as to the objects and purposes of the Amendment. The Senate's substitute for the third section was said to be more acceptable, but that it was too exacting for the South to accept;[11] and that though the Amendment, *per se,* was just and reasonable, it should not have been made a condition precedent for the admission of the Southern States, since its ratification was practically impossible.[12]

The New York *Evening Post,*[13] a conservative Republican paper, practically stated the same view as that stated

[7] Ibid., June 15 and 19, 1866.
[8] April 30, 1866.
[9] Ibid., May 14, 1866.
[10] Ibid., May 25, 1866.
[11] Ibid., June 2, 1866.
[12] Ibid., Sept. 13, 1866.
[13] Ibid., May 1, 1866.

by the *Times,* but furthermore declared that the first section was unnecessary since the Civil Rights Bill secured the same thing.[14] It also stated that the most thoughtful press either disapproved the Amendment altogether or gave faint praise to it, the third section especially being the object of attack.[15] Extracts from other papers were given in this issue to substantiate this statement. This paper objected to the third and fourth sections on the ground that only permanent things should be put in the Constitution, while the first section was thought unnecessary unless the Civil Rights Bill was unconstitutional. The Southern whites should be conciliated, it continued, without sacrificing equal justice, free speech, and free press, evidently thinking these things were secured by the Civil Rights Bill.[16] This bill, in the opinion of the *Post,* was approved by the people.[17]

The New York *Tribune,* one of the strongest Radical journals in the country, never discussed the different sections of the Amendment, though it published them several times. It also published speeches made in advocacy of the Amendment and of course advocated its adoption, though its appeals for votes were made more to the passions and selfishness of the people than to their judgments. Moreover, it never denied the statements which were made as to the effect or result on the States in case it were adopted.

The leading organ of the Radicals at Washington declared that the first section embodied the principles of the Civil Rights Bill.[18] This same organ declared, after the Amendment had been adopted by Congress, that " appropriate legislation " would be necessary to give real vitality to it, and that it would be monstrous, " after such an auspicious restoration of peace among men of common sentiments and common obligations " to have differences as to legislation imperatively necessary to enforce an Amendment which had cost

[14] Ibid., May 11, 1866.
[15] Ibid., May 7, 1866.
[16] Ibid., June 5, 1866.
[17] Ibid., July 5, 1866.
[18] The Washington Chronicle, April 29, 1866. It was published by D. C. Forney, but his brother, J. W. Forney, the Secretary of the Senate, seems to have written or inspired many of the editorials.

"so much time, reflection, and research."[19] This was a plain declaration by a Radical organ, and may be accepted as stating the position of the majority, that "appropriate legislation" ought to be passed to enforce the Amendment when it became a part of the original law. The second section was, however, declared to be the most important—the statement that the North would gain 10 representatives and that the South would lose 10, making a total gain of 20 for the North, if the Amendment were adopted, and just the opposite if rejected, being inserted in every issue of the paper from September 20 to October 10, 1866.[20] In an editorial on Secretary Browning's letter, it was declared that the independence of the States "within their appropriate and constitutional spheres" was not to be interfered with, though the Federal Government (Congress) would decide as to the spheres.[21] If Congress could say what were the "appropriate and constitutional spheres" of the States, was it not practically admitting the statements made in Browning's letter? In this same editorial it was stated that so long as the States provided for the protection of life, liberty and property of the citizens the Federal Government would be relieved of an obligation, but the opinion was expressed that federal protection was imperatively needed in certain States.

The Cincinnati *Commercial,* a conservative Republican paper, said that the proposal of the first section, while right in principle, was a recognition of a doubt as to the constitutionality of the Civil Rights Bill.[22] The object of the Amendment was declared to be to throw the protecting arm of the Constitution around all classes, native and naturalized. Under the first section no special codes could be passed, as had been done by several States, but all citizens were to be equal before the law, to have the same rights and privileges, and, added the writer, the only way this could be obtained was by an Amendment to the Constitution which would enforce it. The people had the right, he continued,

[19] Ibid., June 14, 1866.
[20] Ibid., September 20, 1866.
[21] Ibid., October 26, 1866.
[22] May 3, 1866.

to change the organic law when their judgment thought it necessary.[23] It was not denied but that the tendency of the Amendment was towards centralization, but that the people had the right to do this if they saw fit.

Even a New England paper said that the third section would be fatal to the Amendment, and that the object of the Amendment, taken as a whole, was to prevent the restoration of the Southern States until after the presidential election.[24]

Mr. Tremain, president of the Republican State convention of New York, declared, in a speech before that body at Syracuse, September 5, 1866, that the first section was necessary on account of the Dred Scott decision and to make the Civil Rights Bill permanent by putting it beyond the power of repeal or of the Courts to declare it unconstitutional.[25] The Convention adopted the resolutions advocating the Amendment and declaring that the New Orleans riot was due to the President's policy of reconstruction.

The *Herald,* which had at first made *quasi* objections at least to the Amendment, said that there was nothing very objectionable in it, but that every principle of it had, at one time or another, been recommended by the President to some Southern State or to Congress, and that he should have accepted it.[26] In this same issue a correspondent had written that the first section would only extend federal protection over, and provide equal laws for all classes of citizens in the several States.

Thus it will be seen that the Northern press, with few exceptions, if any, took the view that the first section of the Amendment reënacted, or gave authority for, the Civil Rights Bill, and conferred citizenship upon the negro, there-

[23] Ibid., June 21, 1866. "It is sheer nonsense to talk about a centralized despotism making inroads upon the Constitution, changing the form and sweeping away ancient prerogatives and immunities. The people have a clear right to make changes in their organic law as in their judgment are demanded."

[24] Ibid., May 6, 1866. Quoted Springfield (Mass.) Republican.

[25] N. Y. Herald, September 6, 1866.

[26] Ibid., September 13, 1866.

by nullifying that portion of the Dred Scott decision which had denied this under the original Constitution. As a general thing the press did not go into any elaborate discussion of the Amendment itself, but spoke of the possibility of its ratification. Many speeches and letters were, however, published in regard to it.

Probably the strongest and most illuminating letter giving an exposition of the Amendment was that written by Secretary Oliver H. Browning to Colonel W. H. Benneson and Major H. V. Sullivan. It was written October 13, 1866, and was given a wide publication, with much comment on it by the leading papers. In this letter Mr. Browning, who was a member of the President's Cabinet, declared that new and enormous powers would be conferred upon Congress by the proposed Amendment; that it would be possible to destroy the judiciaries of the States under it; and that the object and purpose of the clause "nor shall any State deprive any person of life, liberty, and property without due process of law" was to subordinate the state judiciaries to federal supervision and control, thereby totally annihilating the independence and sovereignty of state courts in the administration of state laws, as well as destroying the authority and control of the States over purely local affairs. He also asserted that, since the federal judiciary already had jurisdiction of all questions arising under the Constitution and laws of the United States, this new provision would make possible the drawing of every matter of judicial investigation, civil and criminal, however insignificant, into the vortex of the federal judiciary. For it was certainly possible, he continued, for either party to a controversy to claim that he was being deprived of life, liberty, or property, as the case might be, by the States without due process of law, and that this question would be cognizable in a Federal Court, resulting in delay if nothing else. There will be a tendency, he says, on the part of the Federal Government to take away the control of local affairs from the people, the States, and the local municipal bodies, and to concentrate it in its own hands.[27]

[27] Cincinnati Commercial, October 26, 1866. The letter was given in full.

The editorial comment in the paper from which the letter was taken never controverted the statements of Mr. Browning as to the effect of the first section, but rather admitted them by saying that the danger to our country was disintegration, not consolidation.

The editorial comment of the New York *Times,* October 25, in regard to this same letter did not deny any of the statements made in it, but said that it was impolitic to publish it since it was supposed to express the views of the President. The same paper, three days later, seemed to admit Browning's contentions by saying that the dangers set forth in his letter could be avoided if the States would act justly—would deprive no one of life, liberty, or property without due process of law. It evidently agreed, however, with the declaration made in that letter that any one who alleged that he was deprived of either of those things, could bring his case before the Federal Courts. If that much be granted, then the whole case falls, and Mr. Browning's position becomes unanswerable. To show further the view taken by the *Times* in regard to the Amendment, citation was made in the same editorial of the case of James Lewis, colored, which had been decided by Justice Hardy, of Alabama. In that case the Civil Rights Bill was declared unconstitutional, the decision of the lower court fining the negro for carrying arms being sustained. The *Times* added that this could not have been done had the Amendment been a part of the Constitution, and that its object was to prevent such legislation and such decisions.

The *Herald* of the same date, also writing of Browning's letter, declared it to be the old Southern State's Rights argument with secession eliminated, though it did not contradict any of the statements made in the letter. The *Tribune* practically acknowledged that the position taken by Mr. Browning was unassailable, but declared that the arguments used by him to reach his conclusion were too trivial to be refuted. This seems contradictory, but in regard to the clause which Mr. Browning especially attacked, it declared: "It is enough to say that fact as well as theory requires that this principle

should be embodied in the national Constitution. The Rebel States have repeatedly and grossly outraged it, and it is because life, liberty, and property have been illegally taken away in spite of mere state laws, that the Federal Government is bound to extend equal protection to all citizens."[28] The editorial also states that it was the purpose of the Amendment, that is of the first section, to extend the equal protection of the laws, not only in cases where the laws are unjust and unequal, but in cases where people are denied equal treatment in spite of state laws. The laws might be fair and just, but their execution might not be. In other words, the Federal Government was to see to it that all were equally protected, whether this equal protection was denied by the States or by individuals. This distinction is very important as will be seen in the chapters that are to follow.

It was feared by some that the Amendment would have the effect of postponing reconstruction and that what had been gained by the Civil Rights Bill, which secured freedom of speech in every part of the Union, might be lost.[29] It was later asserted that the first section was the same as that bill,[30] thus being unnecessary unless the latter was unconstitutional, a concession which was not admitted.[31]

In a previous chapter we have given the opinion of the Civil Rights Bill which was generally held by the press of the country and by the people. We have in this chapter given some instances where it was stated that the first section was but a reënactment of that bill. It is but proper, however, that further evidence should be given to see whether that was the general impression. The press, with few, if any, exceptions, either held this view or uttered no opinion on it. We find that no one denied this contention, though many claimed that it did more than merely reënact that bill.

The views expressed by the papers were verified by the speakers during the Campaign, many of whom were members of Congress. Senator Trumbull, in a speech at Chi-

[28] October 25, 1866.
[29] N. Y. Evening Post, May 1, 1866.
[30] Ibid., May 11, 1866.
[31] Ibid., June 5, 1866.

cago, August 1, said that the first section was a reiteration of the Civil Rights Bill, probably a needless reiteration, but that it was thought proper to put it in the fundamental law.[32] Mr. Colfax, Speaker of the House, expressed the same view at Indianapolis a week later, saying that the Amendment was necessary to keep the Southern judges from declaring the bill unconstitutional.[33] General Lane, at Indianapolis, and General Schenck, at Dayton, declared the same thing on August 18.[34] Both of these were members of Congress. Senator Sherman, at Cincinnati, September 28, said that the first section embodied the Civil Rights Bill. Hannibal Hamlin, who later became a Senator, made the same declaration at Philadelphia, October 13.[35] Carl Schurz, in an Article in the *Atlantic Monthly* for March, 1867, asserted the same thing. Mr. E. P. Whipple, in the same magazine for November, 1866, gave expression to a similar view.

Since the Amendment was, in theory at least, the main issue of the Campaign, the speeches which were made should be of much help to us in determining what the people understood by it, for a vigorous campaign was waged and great crowds attended the rallies. Mr. Colfax, in the speech to which we have already referred, seemed to think that freedom of speech would be secured by the Amendment, for he said: "I desire that in this free land every freeman shall speak his honest sentiment without fear of molestation." Mr. Hendricks, who was one of the few Democratic Senators, declared on the next day at the same place that negroes would demand to hold office and to sit on juries if the Amendment were adopted, and that even suffrage might be granted under the first section.[36] Mr. George W. Morgan, the Democratic nominee against Columbus Delano, who was a candidate for reëlection, declared in a speech August 21, that the first section was a bold stride towards centralization; that under it the Federal Government

[32] Cincinnati Commercial, August 3, 1866.
[33] Ibid., August 9, 1866.
[34] Ibid., August 22, 1866.
[35] N. Y. Herald, October 6, 1866.
[36] Cincinnati Commercial, August 9, 1866.

would claim the power to define the rights of citizens of the States; and that there would in a short time be negro jurors, voters, judges, and legislators in Ohio by virtue of laws of Congress. He then asked the people if they were prepared for such a state of affairs, and that if they were, advised them to vote for Delano, who would aid in putting them on an equality with the negroes.[37] Mr. Bingham, the author of the first section, asserted in a speech at Bowerstown, Ohio, August 24, that that section was a strong, plain declaration that "equal laws and equal and exact justice" should be secured in every State "by the combined power of all the people of every State."[38] Mr. Hannah, a former United States District Attorney for Indiana, said that those who opposed this section sanctioned class legislation and were willing to permit States to deprive American citizens of life, liberty, and property without due process of law.[39] Judge Perkins, of the same State, declared that the Amendment was a stab at the right of the States to control their own affairs, and asked where was to be the limit of the power of the Federal Government.[40] Hon. George H. Pendleton, Democratic nominee for Vice President in 1864, said in a speech at Edinburg, Indiana, that the effect of the Amendment would be to make a consolidated government.[41] Mr. Delano, in a speech at Coshocton, Ohio, August 28, where his opponent, Mr. Morgan, had spoken a week before, declared that suffrage was not granted by the Amendment, but that it was a guarantee that the Federal Government would protect its citizens in their civil rights.[42] General M. F. Force, who was a candidate for a judicial office, said, in a speech, September 22, in reply to the objection that the clause about due process of law would give the Federal Courts occasion to interfere in local affairs, that in the first place federal judges were as good as state judges; and in the second place, that it

[37] Ibid., August 23, 1866.
[38] Ibid., August 27, 1866.
[39] Ibid., August 27, 1866.
[40] Ibid., August 28, 1866.
[41] Ibid., August 30, 1866.
[42] Ibid., August 31, 1866.

was no new phase, since the Constitution already provided that the National Government should not deprive any citizen of life, liberty, or property "without due process of law," and that he desired to see this cornerstone of liberty the law in every State.[43] He evidently thought that the first section would make the national "due process of law" the law of every State. Since this clause, as used in the Constitution and exercised in the Courts, requires a jury trial, it would follow that the States could not deprive any one of life, liberty, or property without a trial by a jury composed of twelve men. This was no doubt the general understanding of the clause. Judge T. W. Bartley, at Cincinnati, September 29, in reply to Mr. Sherman's speech of the night before, said that the first section, together with the fifth, practically made the Federal Government absolute, since Congress was given the power to define and determine the privileges and immunities of American citizens, thereby being able to confer suffrage.[44]

Mr. George W. Weston, of Bangor, Maine, who was said to be the founder of the first Republican newspaper, in a letter to the editor of the New York *Tribune,* June 25, 1866, gave his approval to the first clauses of section one, saying that it was desirable that they become a part of the Constitution. It was a great misfortune, he declared, that these clauses were inextricably mixed up with a clause having no relation to the rights or interests of the negroes. The last clause was the objectionable one. The words of it, he said, had a pleasing sound to the ear, but that the people should not on that account be deceived as to their effect in this new form. He called attention to the fact that Congress and the Federal Government were already restrained in this particular by a similar clause in the Bill of Rights, which was enforceable by the federal judiciary. Similar provisions in the Constitutions of the several States restrained their respective Legislatures, while these safe-

[43] Ibid., September 24, 1866.
[44] Ibid., September 30, 1866.

guards were enforceable by the state judiciaries. This had been the case since 1789, he continued, and, with no grievance to which public attention had been called, it was now proposed, in the third generation after the Fathers, by a provision applicable to 30,000,000 of whites as well as to 4,000,000 of blacks, "to place the protection of life, liberty, and property as against state legislation, under a national guaranty, which will be enforceable by the federal judiciary." The clause which declared that no State should "deny to any person within its jurisdiction the *equal* protection of the laws" was sufficient to put an end to all caste distinctions and was all that was necessary for the security of the blacks. Under the last clause, he asserted, nearly every case could be brought before the Federal Supreme Court under the plea that "due process of law" had been denied. Furthermore, it involved a revolution of our judicial system, being "an alarming concentration of power in the central tribunals, and a prostitution of the independence of the States in many and vital particulars. It is in all respects as wholly uncalled for and gratuitous as it is indefensible and dangerous." He also objected to the third section, and concluded by saying: "The terms of settlement which are offered are shameful, both to the victors and the vanquished, and are more so to us than to them." It was also stated in the letter that he was in sympathy with the Republican party, but that he could not support the Amendment on account of the dangers in it.[45]

The *National Intelligencer,* of Washington, declared that the fifth section authorized Congress to enact any law which a mere majority might deem necessary to secure equal rights to all classes of citizens, and that this would result in an invasion of the power of the States to legislate, with a consequent centralization of power in the hands of Congress.[46] This same paper said that, under the first and fifth

[45] National Intelligencer, July 10, 1866.
[46] Ibid., October 25, 1866.

sections, Congress might declare that suffrage was a privilege, thereby annulling state laws requiring residence, payment of taxes, etc. This might also be made to include the right to hold office. Congress could also constitutionally extend the jurisdiction of the Federal Courts, continued the writer, to include all manner of cases, even so far as practically to destroy the local governments and state judiciaries. The opinion was also expressed that the people did not intend to clothe Congress with such power nor did they intend to express by their votes a desire that the Federal Government should be put in a position so to cripple the power of the States. He seemed to give his approval to the other provisions of the Amendment, but said that his objections to these were invincible.[47] This declaration was made after the overwhelming victory of the Radicals, and cannot, therefore, be charged with a partisan motive.

The great object of the Amendment, another paper asserted, was to take away the power of the people and to place it in the hands of a political party in Congress. "In its whole tenor, scope, and design, it is opposed to every conceded and sound principle of Republican government. It belongs only to a fatherless despotism." [48]

The declarations and statements of newspapers, writers and speakers, which have been given, show very clearly, it seems, the general opinion held in the North. That opinion, briefly stated, was that the Amendment embodied the Civil Rights Bill and gave Congress the power to define and secure the privileges of citizens of the United States. There does not seem to have been any statement at all as to whether the first eight Amendments were to be made applicable to the States or not, whether the privileges guaranteed by those Amendments were to be considered as privileges secured by the Amendment, but it may be inferred

[47] Ibid., November 17, 1866.
[48] Pittsburg Post, September 26, in World, November 5, 1866.

that this was recognized to be the logical result by those who thought that the freedom of speech and of the press as well as due process of law, including a jury trial, were secured by it.

It is proper, at this place, to see what view was taken of the Amendment in the South. Only a few references are necessary to show that the opinion which prevailed generally in the South was similar to that held in the North. The Charleston *Courier* approved the interpretation which Mr. Browning gave of it, in that it conferred new and enormous powers upon Congress and was fraught with evil.[49] This same paper published, with apparent approval, the messages of Governor Jenkins, of Georgia, and Governor Walker, of Florida, to the same effect.[50] Another leading Southern paper took an even stronger position than did the *Courier*. It was declared that the negro, being made a citizen by the first section, was to be placed on an *equality* with the whites as well as to be given protection before the courts in all his civil rights, the latter of which Georgia had already done. It was then asked where was the limit to the power bestowed upon Congress by the fifth section. The following statement of Governor Sharkey, of Mississippi, was also quoted approvingly: "Should the Amendment become a part of the Constitution, we shall have a far different government from that inherited from our fathers," and to this the editor added: "Then indeed will the Sun of Liberty have set in the South."[51] In another issue the editor discussed and approved the interpretation given in the letter of Mr. Browning.[52]

Another very influential paper asserted that the first section, which struck at the foundation of American liberty, changed the character of the government, transferred from

[49] November 1, 1866.
[50] November 7, 1866.
[51] Atlanta Intelligencer, October 4, 1866.
[52] Ibid., October 30, 1866.

the States to the General Government the right to define the qualifications of their citizens, and obliterated the rights and powers of municipal authority in the States. It was also declared to be clearly evident, from the language of the section, that the Civil Rights Bill, the provisions of which ignored and set aside the jurisdiction of the civil courts of the States over their own internal municipal regulations was to be given constitutional validity or authority.[53] The editor called attention to the fact that little attention was given to the first section, though he regarded it as the most dangerous part of the whole Amendment. Two days later this same writer, who was an exceptionally strong man, declared that the States would be made the executive dependencies of a consolidated despotism by the Amendment and that the conclusion was inevitable that the designs of the Radicals, as shown in the Amendment, were to merge all the reserved powers of the States in the Central Government.

Later in the campaign, the same paper said that the New York *Herald,* the Raleigh *Standard,* and the Newbern *Times* proceeded upon the idea that the third section was the most offensive to the South, but again reiterated its statement of an earlier date that this was not the case, but that the first section was the objectionable one.[54] *"The Radicals,"* continued the *Sentinel, "who understand the bearing of the Amendment upon the organic law and genius of the Government, keep their deep and revolutionary designs out of the view of the people, North and South, altogether, and only dwell upon the demagogical features of the Amendment.* They know that to talk of *disfranchising* 'rebels and traitors' is a sweet sound to the ears of the Northern people. But we repeat what we have before said,

[53] Raleigh Sentinel, June 20, 1866.

[54] Ibid., September 19, 1866, in the World of October 29. Italics in the original.

the *disfranchising clause is the least objectionable feature of the Howard Amendment.*"

The first sentence of this quotation is an admirable statement of the actual condition at the time, as the aftermath clearly shows. It has already been noted that most of the attention of the speakers during the campaign was given to the second, third, and fourth sections, the "demagogical features" or partisan elements of the Amendment, and that little stress was put upon the first and fifth sections. It would seem that the *Sentinel* had given the proper reason for this. A later statement of the same paper is almost equally as significant.[55]

The same writer also maintained that the first and fifth sections contained the germ of consolidation as well as the destruction of the efficiency, if not the very existence, of the state governments. Congress was empowered by the fifth section, he continued, to pass any law necessary to enforce the Amendment, and might, under this provision, declare that suffrage was a privilege which could not be denied by state law. There was nothing, he asserted, in the Constitution which would render such a law unconstitutional, and that it would clearly be within the province of Congress to define citizenship and the privileges with which it should be endowed. Congress would also be empowered, he added, to organize such courts and bureaus as it might deem proper, to give jurisdiction over a particular class of persons to these courts, and to permit them not only

[55] Ibid., October 8, in World of October 29, 1866.
The editorial is in part as follows: "That Amendment, we hold, is adverse to the inherent and rightful powers of the States, provides for and looks to a solid sovereignty, instead of a government of limited powers, breaks down the wholesome checks of the Constitution and the state governments, and must inevitably result in universal negro suffrage, not by the free, voluntary consent of the people of the States, but by the future forced action of Congress and the consequent transfer of municipal control of the state governments over their internal affairs into the hands of Congress. We believe that this is a *wrong*—a *wrong* which neither Providence indicates nor the results of war render necessary or proper."

to sue and be sued, and to testify, but to be jurors, lawyers, and judges. In conclusion he asked: "*What evil, then, could Congress fasten upon the Southern States which is not constitutionally and legally provided for in this Amendment? Is there not more reason to hope for a change of a bad law than to change a bad constitution?*" This writer was not opposed to an Amendment fixing a just ratio of representation, an Amendment defining treason and its punishments for the future, an Amendment declaring the Union indissoluble, or an Amendment preventing the States from abridging in any manner the *civil* rights of the negroes, but was opposed to Amendments like the Howard Amendment which, he asserted, clearly violated "the *principles* of the Constitution as it now is." [56]

The Nashville *Union* and *American* said the Amendment was the initial step of the Radical plan for centralizing power in the Central Government and for keeping the government in control of the Radical States, and that one who could not see this was incompetent to advise men of intelligence as to their rights and interests.[57] The *Florida Union,* of Jacksonville, declared that the Amendment would destroy the old Constitution, with its system of checks and balances, would tear away the safeguards of the States, and would give the Federal Government power to control the local affairs of the States, even to the extent of declaring who should hold office.[58] The *Louisville Journal,* October 9, 1866, said it tended towards centralization and encroached upon the domestic independence of the States, and was furthermore partisan, unequal, unjust, and inexpedient.[59] The Memphis *Avalanche,* November 13, 1866, said that it had been the "war cry of the partisan leaders in the late struggle on the hustings and at the ballot-box,"

[56] Ibid., in World for October 29, 1866.
[57] In World for October 29, 1866.
[58] Ibid., also in McPherson's Scrap Book, "The Fourteenth Amendment," p. 40.
[59] Ibid., p. 27.

and that it meant, to Northern people, negro equality, social and political, but not applicable to themselves.[60] The Montgomery *Mail,* February, 1867, said the chief objection to the Amendment was the first section, which " forbids a State from depriving him (a negro) of any rights or privileges which a white man may possess." [61]

The *Picayune,* of New Orleans, said that the first section was but an incorporation into the Constitution of the Civil Rights Bill.[62] An opponent of the Amendment said that it secured the negro the right to vote, to sit on juries, to enter hotels, lecture rooms, etc.[63] The Vicksburg *Herald* was of the opinion that the Radicals neither expected nor desired the South to adopt the Amendment, its object being to keep that section out until after the presidential election.[64]

A press correspondent, seemingly a Republican, said that the Democrats of Kentucky feared that Congress would be empowered by the Amendment to confer the suffrage. The writer further said that the Amendment admitted negroes to the witness stand, the jury box, street cars, good seats in public conveyances, good accommodations at hotels, the public schools, and all other civil rights which white people enjoyed, and that if it went this far, the Democrats reasoned that it might go further.[65] It was stated by the Vicksburg *Republican,* after the Amendment had been declared a part of the Constitution, that under the first section negroes were entitled to sit on juries and advised them to see that they were granted this right.[66] The Philadelphia *News,* July 31, 1868, maintained that the elective franchise was one of the privileges secured by the Amendment, not only to negroes, but to women and children.[67] This

[60] Ibid., p. 43.
[61] Ibid., p. 9.
[62] Ibid., p. 26.
[63] Ibid., p. 24.
[64] Ibid., p. 27.
[65] Ibid., p. 84.
[66] Ibid., p. 83.
[67] Ibid., p. 77.

was an unusual view, however, and while the paper seems to have bitterly opposed the Radicals, this statement can hardly be said to have been made for partisan purposes since it had been announced more than a week before that the Amendment had been ratified.

Mr. Benjamin H. Hill, of Georgia, who was later elected Senator, stated, in an open letter to the editor of the New York *Herald,* that the South accepted the conditions of the President without complaint as well as the Freedmen's Bureau and Civil Rights Bills without representation, but that they objected to the requirement of Congress that they disfranchise their leaders.[68] Mr. Hill was a Union man.

The statements which have been given seem amply sufficient to show that the Southern press and people discerned the tendency of the Amendment and pointed out their objections to it. The objection to the third section was probably the one which influenced the great mass of the people more than any other. That section was easily understood and its effect could be seen and felt, and as becomes a brave and noble people they would not willingly consent to the degradation and punishment of their own leaders, for they were unable to see that their leaders were more deserving of such treatment than were they themselves. But for this section, the South, under the circumstances, might have been induced to give its assent to the Amendment in order to regain its position in the councils of the nation, though this may be doubted. With that section in, however, it preferred to endure military rule rather than humiliate itself by deserting its brave and loyal leaders.

It is a rather striking coincidence that the thoughtful men, North and South, regarded the first section, in connection with the fifth, as the most objectionable of the entire Amendment, for in it they saw the possibility, and no doubt the purpose, of a strong consolidated Federal Government,

[68] Herald, October 10, 1866.

with greatly enlarged powers put into the hands of Congress. These views were presented to the people in able letters and editorials, and many were undoubtedly aware of the dangers pointed out. So many questions, however, were presented that some of these dangers were lost sight of, but we shall not at present consider the motives which induced the great majority of the people to give their assent to the Amendment.

CHAPTER IV.

The Amendment Before the States.

It now becomes our duty to trace the course of the Amendment before the Legislatures of the several States and to determine, if possible, what they thought it meant and what reasons were given for its approval or disapproval.

Connecticut was the first State to take action on the Amendment, which had been submitted to the Secretary of State on June 16, 1866, and by him submitted to the several States. There was no delay in Connecticut, for the Governor of that State sent it to the Legislature on June 19. A motion was made in the Senate that the consideration of the Amendment be postponed until the next General Assembly. This was done no doubt for the purpose of giving the people an opportunity to express their opinion, but the motion was defeated. The Amendment was ratified in the Senate by a vote of 11 to 6, June 25, after a short debate. The House, two days later, ratified it by a vote of 125 to 88. It was a party vote in both houses, the Democrats opposing it on the grounds of expediency and policy, and declaring that Congress could not change the Constitution during the enforced absence of certain Representatives from Congress. The Republicans contended that Congress had all the powers of conquest against the conquered rebels.[1]

New Hampshire followed close upon the heels of Connecticut in taking action, for the Legislatures of these two

[1] Senate Journal of Conn., 1866, p. 374, and Annual Cyclopedia, 1866, pp. 255–56.

States were in session at the time. On June 26, 1866, the House Committee reported a resolution for the ratification of the Fourteenth Amendment, the minority submitting a report with their objections. The resolution was debated at some length, June 26, 27 and 28, and was adopted on June 28, by a vote of 207 to 112.[2]

The minority report gave the following reasons, among others, against the ratification of the Amendment:

1. Because the States most deeply interested were unjustly excluded from all participation in Congress on the subject of the Amendment.

2. Because there was nothing in the condition of any section of the country to render the Amendment necessary.

4. Because there were several amendments in one, each of which should be given separate consideration and action, and not be acted upon as a unit.

5. Because the proposed Amendment is ambiguous or contradictory in its provisions, the first section prohibiting any State from abridging the privileges of citizens of the United States, the right of suffrage being claimed as one of these privileges, and the second section, by inference, allowing the States to restrict the right of suffrage if willing to submit to the consequent disabilities.

"6. Because said Amendment is a dangerous infringement upon the rights and independence of all the States, North as well as South, assuming, as it does, to control their legislation in matters purely local in their character, and impose disabilities on them for regulating, in their own way, the right of suffrage,—clearly a state right,—a right vital to the theory of our government, and most sacredly guarded by the framers of the Constitution."

7. Because there was no corresponding reduction in direct taxes for loss of representation.

"13. And finally, because the only occasion and real de-

[2] N. H. House Journal, 1866, p. 231.

sign of the proposed Amendment is to accomplish indirectly what the General Government has and should have no power to do directly, namely, to interfere with the regulation of the elective franchise in the States, and thereby force negro suffrage upon an unwilling people." [3]

The fifth, sixth and thirteenth sections of this report show clearly what the minority thought would be the effect of the Amendment. The sixth reason is especially important since it shows that the view, which was later held by many eminent men to be the true interpretation of the Amendment, was perceived at this early date. It is to be regretted that we have no record of the debates which took place, for we are unable to know what answers, if any, were given to the above objections.

The Senate Committee reported the House resolution favorably on July 2, a minority report identical with that made in the House being submitted. The resolution was debated July 5 and 6, passing the Senate on the latter date by a vote of 9 to 3.[4]

The third State, strange to say, which considered the Amendment, was Tennessee. The Legislature of that State was not in session at the time, but a special session was called for the purpose of ratifying the Amendment. The Legislature met in accordance with the summons of Governor Brownlow, sometimes called Parson Brownlow, July 4.

In the Senate it was proposed to submit the question of ratification or rejection of the Amendment to the people, but this resolution was defeated. Senator Frazier then offered an amendment to the resolution proposing the ratification of the Amendment. This amendment was in the following terms: "*Provided,* that the foregoing proposed Amendments to the Constitution of the United States shall

[3] Ibid., pp. 176–178.
[4] N. H. Senate Journal, 1866, p. 94.

not be so construed as to confer the right of suffrage upon a negro, or person of color, or to confer upon such negro or person of color the right to hold office, sit upon juries, or to intermarry with white persons; nor shall said proposed Amendments be so construed as to prohibit any State from enacting and enforcing such laws as will secure these ends, not inconsistent with the present Constitution of the United States, nor shall said proposed Amendments be so construed as to abridge the reserved rights of the States in the election and qualification of their own officers, and the management of their domestic concerns, as provided and secured by the present Constitution of the United States." This amendment was rejected, and the Amendment was then ratified by a vote of 16 to 14.[5] There was very little, if any, debate in the Senate, but the amendment proposed by Senator Frazier shows what the minority thought would be the construction put upon the Amendment. It is of course evident that a State, through its Legislature or otherwise, cannot limit or extend the construction or interpretation of a proposed Amendment to the Constitution of the United States, but its effort to do so would be a clear indication of what it feared would be the construction of the proposed Amendment. The effort of the minority to do this in this particular case is of importance only as showing their views of the Amendment. It may not be altogether proper to say that the majority, by rejecting Senator Frazier's amendment, recognized that the Amendment would secure those things which his amendment proposed to include, and that they, therefore, intended to secure them. In ordinary cases, it would be perfectly proper to draw such a conclusion, but in this case the reason for the rejection of the amendment of the minority might properly have been that the Legislature had no right to pass such a restrictive resolution, or, in other words, to make a conditional ratification

[5] Tenn. Senate Journal (Extra Session), 1866, pp. 18 and 24.

of the Amendment. It is evident, however, that if Mr. Frazier's interpretation or limited construction were to be placed upon it, that the first eight Amendments would not be made binding upon the States.

There was no quorum in the House for some time, so that nothing could be done except to adjourn from day to day. After considerable effort, two of the recalcitrant members were arrested and brought into a committee room opening into the Chamber of the House. They refused to vote when their names were called, whereupon the Speaker ruled that there was no quorum. His decision, however, was overruled, and the Amendment was declared ratified July 19, 1866, by a vote of 43 to 11, the two members under arrest in the adjoining committee room not voting.[6]

New Jersey followed the example set by Tennessee in calling an extra session of the Legislature. In the latter case it was called ostensibly to elect a United States Senator, but really to pass upon the Amendment. Governor Ward urged its ratification "as the most lenient amnesty ever offered to treason, while every provision is wisely adapted to the welfare of the whole country." This message was sent to the Legislature September 10, 1866, and the Amendment was ratified the following day in the House by vote of 34 to 29; in the Senate it received 11 votes, the 10 Democrats not voting.[7]

The Democrats of New Jersey were successful in the election of 1867, securing a large majority in the House. The Legislature elected at this time met on January 14, 1868, and eight days later the Judiciary Committee of the Senate was instructed to report a joint resolution withdrawing the assent of New Jersey to the Fourteenth Amendment. On January 28, the Committee on Federal Relations (composed of the Judiciary Committees of both houses) reported a joint resolution rescinding the resolution approved September 11, 1866, relative to the Amendment, and withdrawing the assent of

[6] Tenn. House Journal (Extra Session), 1866, p. 25.
[7] Annual Cyclopedia, 1866, pp. 539–40.

New Jersey thereto.[8] The resolution declared that a State had the right to withdraw its assent to an Amendment until it had been ratified by three fourths of the States. The origin and object of the Amendment were declared to be unjust, and that the necessary result of its adoption would be "the disturbance of the harmony, if not the destruction of our system of self-government." It was also declared that eleven States had been excluded from Congress in order to secure two thirds of both Houses for it, and finding that two thirds of the remaining States would not be obtained, the design was deliberately formed and carried out by ejecting one of the Senators of New Jersey, Senator Stockton. The resolution further declared that no pretext or justification could be given for his ejection, and that it and the Amendment had the same object in view, namely, "to place new and unheard of powers in the hands of a faction." The immense alterations to be made in the fundamental law by the proposed Amendment, continued the resolution, were concealed by the gilded propositions of justice which were drawn from the Constitutions of the States. The third section was denounced on account of its *ex post facto* character as well as for the reason that it conferred upon the legislative branch of the government the pardoning power—a power which properly belonged to the executive.

The resolution further declared that it imposed new prohibitions upon the power of the States to pass laws or to execute such parts of the common law as the national judiciary might hold inconsistent with the vague provisions of the Amendment. The provisions were made vague, it was asserted, for the purpose of facilitating encroachments upon the liberties of the people. The federal judiciary, furthermore, was to be so enlarged as to bring within its jurisdiction every state law and every principle of common law relating to life, liberty and property. The whole Amendment was "couched in ambiguous, vague, and obscure language, the uniform resort of those who seek to encroach upon public liberty." It was also stated in the resolution that this Legis-

[8] N. J. Senate Journal, 1868, pp. 31 and 40.

lature had the support of the largest majority ever given expression to by the public will.[9]

The resolution passed the Senate February 19, 1868, by a vote of 11 to 8,[10] and the House concurred the next day by a vote of 44 to 11.[11] The Governor returned the resolution, February 24, without his approval, stating that he did not believe that a State could withdraw its assent to a proposed Amendment, and besides, that the people had approved the Amendment in the election after its adoption and that it had not been mentioned in the campaign preceding the election of the present Legislature.[12] The resolution passed the Senate a second time, March 5, by a vote of 11 to 9,[13] while the House passed it by a vote of 45 to 13.[14] In the House, Mr. Atwater presented a protest for himself and others against the passage of the resolution, but this protest was not allowed to be printed in the Minutes of the Assembly.

The General Assembly of Oregon assembled September 10, 1866, the same day on which the special session of the New Jersey Legislature met. The resolution ratifying the Fourteenth Amendment was adopted by the Senate four days later by a vote of 13 to 9, after having rejected an amendment to submit the question of ratification or rejection to the people.[15]

On the 17th the Senate resolution was reported to the House, where it had a somewhat checkered history. It was reported back from the Judiciary Committee on the 19th, and was agreed to the same day, apparently without debate, by a vote of 25 to 21. A protest was filed by the minority against the passage of the resolution on the ground that it was only considered one day by the Committee; that the minority of the Committee had not been consulted; that some of those holding seats were not entitled to them; and that such an important matter as the Amendment should receive

[9] N. J. Legislative Documents, 1868, pp. 951–55.
[10] N. J. Senate Journal, 1868, p. 198.
[11] N. J. Minutes of the Assembly, 1868, p. 309.
[12] N. J. Senate Journal, 1868, pp. 249–53.
[13] Ibid., p. 356.
[14] N. J. Minutes of the Assembly, 1868, p. 743.
[15] Oregon Senate Journal, 1866, pp. 34–36.

some consideration and deliberation.[16] In fact some of those holding seats were afterwards unseated, thus demonstrating the correctness of the declaration of the minority. Then on October 6, a resolution, declaring the passage of the resolution of September 19 illegal, was adopted by a vote of 24 to 18. This was done on the ground that the passage of that resolution was obtained by the votes of those not entitled to seats.[17] The resolution of October 6 was reconsidered on October 10, and was lost by a vote of 24 to 23, thus refusing to declare invalid the resolution of September 19.[18]

A resolution rescinding the ratification of the Amendment was introduced early in the session of 1868. It was stated in the resolution that the ratification by Oregon had been obtained by fraud, and that the Amendment was not properly a part of the Constitution, since the Southern States had ratified it under governments created by a military despotism.[19] The Committee on Federal Relations, in reporting the resolution September 23, 1868, declared that the ratification of the Amendment by the last Legislature was one of the reasons for the overthrow of the Radicals at the recent election. The report also stated that the people expected them to rescind the action of the last Legislature. The resolution was adopted October 5, by vote of 13 to 9.[20] The House concurred October 15, by vote of 26 to 18.[21]

Vermont was the sixth and last State to ratify the Amendment during the year 1866. The Legislature assembled October 11, 1866, and the resolution ratifying the Amendment was adopted unanimously by the Senate October 23, the vote being 28 to 0.[22] The resolution was agreed to by the House October 30, by a vote of 196 to 11.[23] There seems to have been no minority report nor any debate whatever.

New York was the first to ratify in 1867, the Legislature

[16] Oregon House Journal, 1866, pp. 74–77.
[17] Ibid., pp. 192–93.
[18] Ibid., p. 228.
[19] Oregon Senate Journal, 1868, p. 32.
[20] Ibid., pp. 66 and 131.
[21] Oregon House Journal, 1868, p. 273.
[22] Vt. Senate Journal, 1866, p. 75.
[23] Vt. House Journal, 1866, p. 140.

of that State meeting January 1. On the first day of the session resolutions were introduced in both Houses for the ratification of the Amendment. Little time was lost in the Senate, for the resolution was referred to a special Committee the next day, and was adopted the day following by a vote of 23 to 3.[24] The members of the Senate had been elected in November, 1865, but they doubtless considered the success of the Republican party at the polls in 1866 as an expression of the will of the people that the Amendment should be ratified since it had been made the issue in that election. The Senate resolution was received by the House January 9, and was adopted the next day by a vote of 71 to 36.[25] The members of the House had been elected the November preceding, and were, therefore, acting in accordance with the expressed desire of the people. Bernard Cregan, nicknamed "Tom Thumb" on account of his size, was the only Democrat in the House who voted for the Amendment.[26] In fact he seems to have been the only one in any of the Legislatures who did this.

Ohio was equally as prompt as New York in ratifying the Amendment, her ratification being one day later. Governor Cox,[27] in his message to the General Assembly, January 2, 1867, recommended the ratification of the Amendment, declaring that it was necessary to correct the evils remaining in the Southern States. The first section, he maintained, was a grant of power to the National Government to protect the citizens of the United States in their legal privileges in case any State should attempt to oppress any individual or class or to deny equal protection to any one. The necessity for this section, he asserted, had been manifested long before the war, since the freedom of speech and of discussion was not tolerated there prior to the war. The power conferred by the section would remain in abeyance so long as the States acted in good faith and gave equal protection. A resolution for the ratification of the Amendment was introduced in

[24] N. Y. Senate Journal, 1867, p. 34.
[25] N. Y. House Journal, 1867, p. 77.
[26] N. Y. Herald, January 11, 1867.
[27] Executive Doc. (Ohio), 1866, Pt. I, p. 281.

and adopted by the Senate the next day, the vote being 21 to 12.[28] The House agreed to this resolution the next day, January 4, by a vote of 54 to 25.[29] The resolution was not signed, however, until January 11, thus preventing Ohio from taking precedence over New York. A resolution was also introduced in the Senate January 3, to the effect that no Southern State should be admitted into the Union until a sufficient number of States had ratified the Amendment to secure its incorporation into the Constitution of the United States, but this failed to pass.[30]

Ohio has the distinction of being the first State to withdraw its assent to an Amendment to the Constitution of the United States. The Democrats were successful in the election of 1867, and when the Legislature assembled, January 6, 1868, resolutions were introduced in both Houses for the withdrawal of Ohio's assent to the Amendment and for rescinding the resolution adopted January 11, 1867.

The rescinding resolution declared, among other things, that the Amendment was *ex post facto* in its nature and operation, and that it conferred upon Congress the power "to legislate on subjects foreign to the original objects of the Federal Compact." It was also stated to be one of the objects of the Amendment to enforce negro suffrage and negro equality in the States, and the ratification of it by the previous Legislature was declared to be a misrepresentation of the public sentiment of Ohio and contrary to the best interests of the white race. The resolution passed the House January 11, 1868, by a vote of 52 to 37.[31]

The resolution was amended in the Senate so as to declare that no Amendment to the Constitution was valid until three fourths of all the States had duly ratified it, and that until it was so ratified, any State had the right to withdraw its assent. The President was to be requested to forward to the Governor of Ohio all papers on file in the Executive Department certifying the ratification of the

[28] Ohio Senate Journal, 1867, pp. 7–9.
[29] Ohio House Journal, 1867, p. 12.
[30] Ohio Senate Journal, 1867, pp. 9 and 446.
[31] Ohio House Journal, 1868, pp. 12 and 32.

Amendment by the General Assembly of Ohio, and copies of the rescinding resolution were to be sent to the President, to each of the Senators and Representatives of Ohio in Congress and to the Governors of the several States. The resolution as amended was adopted by the Senate January 13, by a vote of 19 to 17.[32] The House agreed to the amendment by a vote of 56 to 46,[33] and the resolution was signed January 15.

The statement made in the resolution that the Amendment had been ratified against the wishes of the people can hardly be sustained, for the Legislature which ratified it was elected in the fall of 1866 after a full discussion of the Amendment. Governor Hayes, in his inaugural address, 1868, said that the Amendment had been approved by the people and that there was no evidence to show that they desired the assent of Ohio to it to be withdrawn.[34] It was also stated that the Amendment had not been even a side issue in the campaign of 1867.[35]

Governor Oglesby, of Illinois, in his message to the General Assembly, January 7, 1867, said that the people had endorsed the Amendment most emphatically "after a full and deliberate discussion." The Amendment could have been made with propriety before the war, he asserted, but that the necessity for it might have grown out of the war. He thought all persons born or naturalized in the United States were citizens, and were, therefore, entitled to all the political and civil rights which citizenship conferred.[36] Four days after the reception of this message, the Senate, after a short debate, passed a resolution ratifying the Amendment by a vote of 17 to 8.[37] The House refused, by a vote of 57 to 24, to refer the resolution to the Committee on Federal Relations. It then agreed to the resolution by a vote of 60 to 25, January 15.[38]

[32] Ohio Senate Journal, 1868, pp. 33–38.
[33] Ohio House Journal, 1868, pp. 44–50.
[34] Executive Docs. (Ohio), 1867, Pt. I, p. 207.
[35] Cincinnati Commercial, January 15, 1868.
[36] Ill. Senate Journal, 1867, p. 40.
[37] Ibid., p. 76.
[38] Ill. House Journal, 1867, p. 134.

West Virginia was the fourth state to ratify the Amendment in January, 1867, giving her assent to it the 16th. The vote in the House was 43 to 11; in the Senate 15 to 3.[39]

Kansas disposed of the Amendment without delay. The Legislature met January 8, 1867, and on the following day the House adopted a resolution ratifying the Amendment by a vote of 76 to 7.[40] Two days later the Senate concurred, the vote being 23 to 0. Governor Crawford, in his message of the 9th, stated that the Amendment had been the platform submitted to the people in the canvass of 1866, from Maine to California.[41]

On January 11, 1867, the Committee on Federal Relations reported back to the House of the Maine Legislature the resolution proposing the ratification of the Amendment. The resolution was given the three readings on the same day, being adopted by a vote of 126 to 12.[42] The most prominent member of the House who voted for the resolution was the Hon. Wm. P. Frye, at present a United States Senator from Maine. The vote in the Senate four days later was unanimously in favor of the resolution.[43] The Republican State Convention[44] at Bangor, June 22, 1866, had emphatically endorsed the Amendment.

There was about as little opposition to the Amendment in Nevada as there was in Maine, for the House ratified it January 10, 1867, by a vote of 34 to 4,[45] and the Senate January 21, by 10 to 3.[46] The members of both Houses had been elected in November, 1866.

Governor Fletcher, of Missouri, in his message to the Legislature, January 4, 1867, said that the first section of the Amendment prevented any State "from depriving any citizen of the United States of any of the rights conferred

[39] Documentary History of the Constitution, II, p. 693, and Annual Cyclopædia, 1867, p. 765.
[40] Kansas House Journal, 1867, p. 79.
[41] Kansas Senate Journal, 1867, pp. 40, 76.
[42] Maine House Journal, 1867, p. 78.
[43] Annual Cyclopædia, 1867, p. 471.
[44] Ibid., 1866, p. 467.
[45] Nev. House Journal, 1867, p. 25.
[46] Nev. Senate Journal, 1867, p. 47.

on him by the laws of Congress," and secured to "all persons equality in protection of life, liberty, and property, under the laws of the State."[47] This is a specific declaration that no State could deprive any citizen of any right conferred upon him by Congress, and it may be inferred that the Legislature gave an implied sanction to it by ratifying the Amendment.

On the day following the reception of the Governor's message the Committee reported back the resolution ratifying the Amendment. There was little, if any, debate on it, and the resolution was adopted the same day, the vote being 26 to 6.[48] On January 8, the House agreed to the Senate resolution by a vote of 85 to 34.[49]

Governor Morton, in his message to the General Assembly of Indiana, January 11, suggested that schools be provided for negroes, and advised that separate schools be established on account of the dissatisfaction which would be engendered if they were required to be admitted to the schools for the whites.[50] Immediately after the delivery of the message a resolution was introduced in the Senate for the ratification of the Amendment. This resolution was favorably reported by the Committee on Federal Relations on January 16. The minority of the Committee filed a report stating that they did not believe that the public mind was at present in a condition for changing the organic law, and recommending that the question be submitted to the people at another time and under more auspicious circumstances. The resolution was adopted, however, on the same day, the vote being 29 to 18.[51]

No speech was made in the Senate in favor of the resolution and only two against it, the previous question having been called. Mr. Hanna spoke for one hour and a half in opposition to it, declaring that the Amendment would change the whole organic structure of the Government and that it

[47] Mo. Senate Journal, 1867, p. 14.
[48] Ibid., p. 30.
[49] McPherson, Reconstruction, p. 194.
[50] Ind. Documentary Journal, 1867, I, p. 21.
[51] Ind. Senate Journal, 1867, pp. 77–79.

put "the ax to the roots of the tree (the Constitution) itself."[52]

The House Committee, in reporting the resolution, stated that the people had emphatically declared for the adoption of the Amendment after it had been fully discussed. The minority report said that the purposes of the Amendment were partisan in that it was intended to perpetuate power in the hands of a minority of the people. The report further asserted that the first section placed all citizens on a political level, and conferred, therefore, upon the negroes the same political and civil rights enjoyed by white persons, including the right of suffrage. It was also stated that the people had been most thoroughly deceived by the Republican orators and that, if the Amendment were submitted to the people it would be defeated by 100,000 majority.[53]

Mr. Ross, discussing the Amendment in the House declared that it would have the effect of striking out the word "white" from the state Constitution and of repealing all state laws making distinctions on account of race and color. He also contended that it would make the negro eligible to seats in the Legislature, would open the jury box to him, and would permit him to send his children to the common schools with the white children.[54] Another speaker declared next day that the Amendment was not sincerely drafted and was intended to destroy the power of the States to determine the status of citizenship, and that its "ratification would be a dangerous, if not a crowning step toward that consideration against which the country has been warned by the Fathers." He also denounced it as a sectional, partisan effort to confer suffrage on the negroes.[55] Mr. Dunn, speaking in advocacy of the Amendment, said that the interpre-

[52] The entire sentence was as follows: "It (the Amendment) proposes to change the whole organic nature of our government. It does not purpose merely to lop off from the limb of the old oak a crooked and leafless limb that is thought useless, or to engraft upon some branch of its noble arms additional luxuriance and beauty, but it lays the ax to the roots of the tree itself." Ind. Brevier Legislative Reports, 1867, pp. 44–46.

[53] Ind. House Journal, 1867, pp. 101–105.

[54] Ind. Brevier Legislative Reports, 1867, p. 80.

[55] Ibid., p. 88.

tation put upon the first section in regard to suffrage by its opponents was opposed by the second section. In reply to the objection that it but repeated the principles of the Civil Rights Bill, Mr. Dunn said: "Well, we propose to make those principles permanent by writing them in the fundamental law." If the Amendment were not adopted, he added, and the Civil Rights Bill should be held unconstitutional, the negroes would be in a worse condition than before their emancipation.[56] Mr. Baker followed Mr. Dunn in opposition to the Amendment, quoting the words of Senator Trumbull to the effect that he hoped to see the day when the judges would declare that the Civil Rights Bill conferred suffrage on the negroes. He then pointed out the similarity of that bill to the first section of the Amendment.[57]

An advocate of the measure said that suffrage was not a privilege of citizenship, and was not, therefore, conferred by the first section.[58] The following significant declaration was made by Mr. Wolfe in explaining his vote. "And there never has been an Amendment to it [the Constitution] but it has been to take power from the General Government and to give it to the people. This Amendment is the reverse of that, therefore, I vote no.' "[59] The statement that suffrage was conferred by the first section was denied by the advocates of the Amendment, but no denial was made to the statement that negroes would be given the right to sit on juries, to hold office, and to attend schools on equal terms with the whites. The previous question was called and the resolution agreed to by the House January 23, by a vote of 56 to 36.[60]

Scarcely any time was given to the consideration of the Amendment in the General Assembly of Minnesota, for the resolution ratifying it was passed by the House the same day on which it was introduced, the vote being 40 to 15.[61]

[56] Ibid., p. 89.
[57] Ibid., p. 89.
[58] Ibid., p. 90.
[59] Ibid., p. 90.
[60] Ind. House Journal, 1867, p. 184.
[61] Minn. House Journal, 1867, p. 25.

The Senate, after refusing to submit it to the Committee, concurred the next day, January 16, 1867, by a vote of 16 to 5.[62] The Governor had declared in his message of January 10 that it would secure equal civil rights to all citizens of the United States.[63]

In Rhode Island the Senate ratified the Amendment February 5, 1867, with only two opposing votes, the vote being 26 to 2, while the House ratified it two days later by a vote of 60 to 9.[64]

Wisconsin and Pennsylvania ratified the Amendment on the same day, February 13, 1867. Governor Fairchild, of Wisconsin, in his message January 10, declared that the people were familiar with the provisions of the Amendment, and, "with a full understanding of them in all their bearings," had approved them by an overwhelming majority. He also stated that it had been the basis of the campaign and that most of the members of the Wisconsin Legislature were there because the people knew they deemed the Amendment just and necessary.[65]

The minority of the Committee on Federal relations filed a report setting forth their objections to the Amendment. In this report it was stated that the Amendment would give Congress power to confer suffrage on the negroes and to legislate for the citizens of the several States and that it would surrender certain rights and powers now belonging to the States. This surrender, it was declared, was made by the first section in connection with the fifth. Under the original Constitution, the report continued, the States reserved the right to make laws for the protection of life, liberty, and property of those within their borders, but that the first section of the proposed Amendment would make the Federal Government the arbiter between citizens of the

[62] Minn. Senate Journal, 1867, p. 23.
[63] Minn. Ex. Doc., 1865–66, p. 25.
[64] McPherson, Reconstruction, p. 194.
[65] Wis. House Journal, 1867, p. 33.

same State. Moreover, the Federal Government would have the power to judge state laws and the manner in which the state authority was exercised over its citizens, thereby destroying the harmony between the States and the Federal Government and being a long stride towards consolidation. It was also declared that numerous rights, for example, the enforcement of contracts, the regulation of the intercourse between citizens, the protection of life, liberty, and property, etc., which were enjoyed under the States, would be put under the control of the Central Government.[66] The Amendment, contended the minority in this report, would work a complete subversion of the "fundamental principles upon which the Union was founded," since Congress would have power to appoint Commissioners and provide Courts to determine whether any one was being deprived of his rights without due process of law. "If this was not the object of this section of the Amendments," it was asked, "what other purpose or object was sought by it?" The report also asserted that the "absolute rights of personal security, personal liberty, and the right to acquire and enjoy private property, descended to the people of the government as a part of the common law of England," and that there was no necessity of engrafting into the Constitu-

[66] The report is as follows: "The powers of the Federal Government, respecting the people of the States, are mostly external and are seldom felt by the individual or citizen in social or domestic relations. The powers of the state governments are constantly felt in the regulating of our intercourse with each other; in the making of our municipal laws; in the regulating our estates; in our town, village, city and county organizations; in redressing our wrongs and enforcing our contracts; in protecting us in life, liberty, and the pursuit of happiness as members of society. In all these things the power of the State is supreme. The first section of these Amendments aims a blow at these powers of the States. All these rights which we now enjoy under state authority, by it are made subordinate to federal power.

"The first section, in connection with the fifth, will give the Federal Government the supervision of all social and domestic relations of the citizen in the State and subordinate state governments to federal power." Ibid., p. 96.

tion "nor shall any State deprive any person of life, liberty, and property without due process of law" unless it was intended to confer power upon the Federal Government. Its evident purpose, it was declared, was to be construed to subordinate state authority to the Federal Government, and by it the independence and sovereignty of the state judiciary would be destroyed, and that when this was done, the State would be sovereign in nothing.

In reference to the second section, the report said that it was an insidious distinction, since it allowed the alien non-voters in the North to be counted while the negroes would not, and asked how Wisconsin could insist upon it when the people had decided so adversely to negro suffrage in 1865.[67]

There is no record that these statements of the minority were denied, though the vote shows that the majority either did not believe them, or, accepting them, desired to accomplish the purpose for which the minority said the Amendment was intended.

The Senate ratified the Amendment January 23, 1867, by a vote of 22 to 10;[68] the House, February 7, by a vote of 69 to 18.[69]

Governor Curtin, of Pennsylvania, in his message to the Legislature January 22, 1867, referred to the fact that the people of Pennsylvania had had an opportunity to pass on the Fourteenth Amendment and had shown their approval of it by electing a large majority of those who had openly advocated it.[70] On the same day that the message was received, a resolution was introduced in the Senate for the ratification of the Amendment. This resolution, after considerable debate, was passed January 11, 1867, by a vote of

[67] Ibid., pp. 96–103.
[68] Wis. Senate Journal, 1867, p. 119.
[69] Wis. House Journal, 1867, p. 224.
[70] Penna. Senate Journal, 1867, p. 16.

21 to 11.[71] The House, after a fairly full debate, concurred in the resolution, February 6, by a vote of 62 to 34.[72] The Governor approved the resolution, February 13, 1867.

The debates in the Pennsylvania Legislature were participated in by both parties, and on this account are especially valuable. The debates are given in full, Pennsylvania being the only State which gave a full account of the debates at that time. It was the only State, too, which gave any considerable time to the discussion of the Amendment.

Mr. Connell, speaking in favor of the Amendment, January 4, 1867, quoted the law of Alabama for the year 1866 making it a crime, punishable by a fine of not less than $50.00 or more than $500.00, for any conductor, station agent, officer, or employee of any railroad to allow any freedman, negro or mulatto, except nurses with their mistresses, to ride in first-class passenger cars. After citing this statute, Mr. Connell declared that the adoption of the Amendment was a political necessity on account of the state of things in the South.[73] An opponent of the Amendment asserted that the people had been deceived as to the purpose of it, being told that it made voters the basis of representation.[74]

Mr. Wallace, also an opponent of the Amendment, said that the first and fifth sections taken together declared who

[71] Ibid., p. 125. It may be remarked that the only two instances recorded of petitions laid before the Senate of Pennsylvania in opposition to the Amendment, were made by members of the anti-slavery society and by Mrs. E. Cady Stanton, Lucy Stone and others of the Equal Rights Association. The former's opposition no doubt was due to the fact that the second section recognized the right of the States to regulate suffrage—thus being able to exclude the negro; the opposition of the latter was due to fact that suffrage was not granted to women.

[72] Pa. House Journal, 1867, p. 278.

[73] In reference to this statute he said: "Not much Shakespeare in that. That section gives one a glimpse of the poetry, refinement, and humanity of Mississippi (Alabama) life." Pa. Legislative Record, 1867, vol. II (Appendix), p. 3.

[74] Ibid., p. 5.

were citizens and conferred upon Congress the power to protect that citizenship. He defined privilege as "everything that is desirable" and immunity as "a privileged freedom from anything painful," and asserted that, under the power conferred upon Congress by the second clause of section one, the dearest rights could be bestowed upon negroes. He also maintained that Congress would be authorized to enact laws concerning the regulation and control of liberty and property and to provide for the equal protection of the laws. "If this be the power granted," he added, "what further need have we of the state government?" He contended that, even if concurrent jurisdiction were granted to the States and to the Federal Government, the latter would be superior, since it would have the right to review the state jurisdiction.[75]

An advocate of the Amendment said that the first section guaranteed "state rights to every human being," evidently having reference to the rights which were in the Bill of Rights in the several States. He also said that this section gave sanction or authority to the Civil Rights Bill, though he thought that bill constitutional without this section.[76]

Mr. Davis, an opponent of the Amendment, declared that the people had not decided for it in the last election, since the issue presented to them had been negro suffrage in some instances, while in others it had been the validity of the United States bonds. He said that good Republicans had admitted and claimed that their success was due almost entirely to the immense amount of United States securities held by the people, "and to the adroit manner in which that trump card was played." He also stated it as his belief that thousands of ignorant men were induced to vote the Republican ticket by being told and made to believe that the success of the Democrat party would render the gov-

[75] Ibid., p. 13.
[76] Ibid., p. 16.

ernment bonds worthless, but that this belief was not entertained for a moment by the shrewd men who played the trick. The mass of the people, he asserted, also believed that the Amendment was to base representation on voters—this view having been presented by the speakers in favor of the Amendment. But the issue was, in his opinion, whether the ideas of Jefferson or those of John Adams were to prevail; whether we were to continue to have a Federal Union of States or to have a grand central, consolidated Government under which the domestic laws of the States would be decided by Congress. "The issue is, whether the Constitution of the United States or the will of Congress shall be the supreme law of the land." [77]

Another Senator declared that the Amendment struck at the very foundation stone of our republican form of government. The first section was to meet the doctrine enunciated in the Dred Scott decision and to validate the Civil Rights Bill. Under this section, he continued, Congress might declare suffrage to be a privilege, since it was susceptible of that interpretation. He cited the case of Corfield *vs.* Coryell (4 Wash. Cir. Court Repts., p. 389) to show that the Court had considered the franchise a privilege. The fourth section was inserted, he declared, to secure votes. Of the fifth section he said, "If we are to judge the future by the past, I shall never vote to give Congress any such power. All the dangers that threaten republican institutions are centered in the Congress of the United States. . . . I will never vote to enlarge their powers. If I did, I would do it under the conviction that I was voting against the life of the Republic." [78]

In reply to the argument of Democrats that the Amendment was an invasion of State Rights, it was said that the right to define the qualifications of suffrage was not neces-

[77] Ibid., p. 18.
[78] Ibid., pp. 23–26.

sarily one of the reserved rights of the States, and that the argument was invalid anyway, since the Constitution provided that three fourths of the States could alter it.[79] This was an admission on the part of a Republican that Congress would have the right to declare that suffrage was a privilege, and therefore to define its qualifications. This was not generally admitted by them, however, the question either being avoided or the assertion of the minority denied.

An opponent asserted that not only would Congress be empowered to regulate the franchise, but that it would result in the taking of other rights from the States, since the efforts of the Republicans were to centralize the Government.[80] An eminent statesman (Mr. Browning) was quoted as saying that the Amendment would change the entire structure and texture of the Government and sweep away all the guarantees provided by the framers of the Constitution. The speaker then asked whether any rational man could doubt those facts.[81] A Republican went so far as to declare that Congress had the power to change the status of the States if the weal of the country made it necessary or desirable; that the power of the age and the country was in Congress, as representing the millions of men who had saved the Government and that it was both their "prerogative and duty to do anything and everything that the peace and perpetuity of the country require and demand."[82] This was undoubtedly an extreme view—one to which only the veriest Radicals would subscribe, but it showed the spirit of some of the men of the time, and the speaker undoubtedly thought the Amendment was making more sure the powers which he asserted belonged to Congress.

Speaking on another occasion, one of the Senators said

[79] Ibid., p. 32.
[80] Ibid., p. 35.
[81] Ibid., p. 38.
[82] Ibid., p. 37.

that Philadelphia was the only city which did not allow negroes to enter street cars, and that this was contrary to the Republican doctrine that all should be equal before the law.[83]

The debate in the House was of a nature very similar to that in the Senate. It was asserted by an opponent of the measure that it placed the regulation of the civil relations of each State under the control of the Federal Government; that the States were to act only as the agents or instruments to enforce the federal will, and that almost the entire civil and criminal jurisprudence of the States was placed under the control of Congress. He also declared that it was not necessary, in considering the proposition, to examine the question as to what relations the citizens of the States ought to sustain to each other, but that the only question raised by it, was whether it would be better to give the Federal Government the power asked for by the Amendment, or to leave it where it then was, with the States. He thought it should be the object of all to narrow the grounds of controversy between the States, but that just the opposite would be accomplished by the proposed Amendment, since subjecting the affairs of each State to the control of Congress would enlarge the field of controversy. He then cited the second section of the Civil Rights Bill as an illustration of the manner in which Congress would exercise its power to regulate the affairs of the States, and added: "Under this section the executive, the legislative, and judicial officers of a State may be convicted and punished as criminals. All are subjected to the supreme law of the Congressional will, which is exercised alike in determining the construction of state laws as well as in prescribing the punishment of those who execute them."[84] Mr. Kurtz, an opponent of the Amendment, believed that the first clause would give suffrage to negroes, but whether this clause would *ipso facto*

[83] Ibid., p. 84. "Lawful equality must everywhere be freely sanctified throughout this land or we perish. If he (the negro) fills our pulpits, our school-houses, our academies, our colleges, and our Senate Chambers, I bid him God speed."

[84] Ibid., p. 41.

confer that right might be a question, he said, but that it was quite certain that the first section, taken together as a whole, would give Congress the power, by simple statute, to confer it. It was pointed out that nowhere in the Constitution or in the proposed Amendment was there a catalogue or enumeration of the "privileges and immunities" of citizens which the States were prohibited from abridging by the second clause of section one. Mr. Kurtz then asked: "In case of dispute, where exists the authority to define these 'privileges and immunities'?" The answer was to be found in the fifth section, he declared, which undoubtedly conferred the power upon Congress, and that under that section Congress could also "impose penalties upon all who, under the authority of any pretended state law, should deny or abridge these privileges and immunities." A law of Congress, therefore, he asserted, declaring that suffrage was a privilege, would be constitutional. He furthermore opposed the Amendment, because, by it, all the legal barriers theretofore existing between the white and black races would be removed, and that opportunities and inducements would be given for the association and commingling of the races on such terms of equality as would "naturally result in the gradual, but certain, blending of the two races into one mixed race or people." [85]

Mr. Mann, an advocate of the Amendment, said that it would enable the Federal Government to accomplish the object for which the founders of the Republic declared that all governments were established, namely, to protect all its citizens in their rights of life, liberty, and property.[86] Two Democrats thought that it would confer suffrage on the negroes and make them the political and social equals of the whites.[87] A Republican thought that it was necessary to adopt the Amendment to secure peace and freedom, including the freedom of speech.[88] Still another supporter of the

[85] Ibid., p. 52.
[86] Ibid., p. 48.
[87] Ibid., pp. 54, 60.
[88] Ibid., p. 55.

Amendment declared that it was proposed to write the Civil Rights Bill in the Constitution and to put the inalienable rights enunciated in the Declaration of Independence in the organic law.[89]

Mr. Deise, a Democrat, asserted that it was a question of centralization, and that the rights of the first section were already safeguarded in better form by every State of the Union unless it was intended to confer suffrage on the negroes. In reference to the fifth section he said that a similar provision of the Thirteenth Amendment had been made the pretext of unlimited appropriations for bureaus and the passage of the Civil Rights Bill. "Appropriate legislation" was the invention of Sumner, he declared, and covered a vast deal of ground and involved the expenditure of great sums of money. He was, therefore, opposed to any more "appropriate legislation."[90]

Another Democrat, Mr. Chalfant, sanctioned all that had been said in regard to the danger of the first section, though he regarded the fourth section as harmless. This section had, however, he declared, been used to draw attention away from the important sections, and he predicted that the people would later be astonished at what had been accomplished.[91]

Mr. Jones, also an opponent of the Amendment, took the position that it should be considered only as to its effect upon Pennsylvania. This was a somewhat narrow position, but it was evidently the view really taken by most of the States, especially in regard to the second section. Mr. Jones declared that the first two clauses of section one deprived Pennsylvania of all legislative power and conferred it upon Congress, and that consequently there would be little necessity of having a Legislature for the State if it were adopted. By the last clause of that section, he continued, the State would not be allowed to be the judge of its own laws, even in

[89] Ibid., p. 60.
[90] Ibid., p. 68.
[91] Ibid., p. 82.

criminal proceedings, since it gave the Federal Courts the power to determine whether a man was imprisoned unjustly or whether he was deprived of his life, liberty, or property without due process of law. He also contended that the rights and prerogatives of the State would be surrendered to the Federal Government without receiving anything in return for that surrender. Congress would, moreover, have the power to enforce the Amendment by appropriate legislation and itself to determine what was "appropriate legislation." He concluded by saying that Pennsylvania would lose one representative under the second section unless suffrage was given to the negroes.[92]

The speeches of many of the Republicans did not bear upon the Amendment itself, but were confined to declarations that it was a light punishment for traitors and rebels, that the national debt must be made secure, that the rebel debt should not be paid, and that rebels and copperheads must not be permitted to get control of the Government. The debates were sufficient, however, to show that the intention and purpose of the Amendment were understood to confer additional powers upon Congress and to authorize such measures as the Civil Rights Bill.

The Amendment found little opposition in Michigan, being ratified by the Senate January 15, 1867, by the almost unanimous vote of 25 to 1.[93] On the next day, without any reference to a committee, the Senate resolution was agreed to by the House by a vote of 77 to 15.[94]

Several petitions were presented to the General Assembly of Massachusetts against the adoption of the Amendment, but notwithstanding this as well as the fact that the Committee on Federal Relations recommended that it be referred to the next General Assembly, the Amendment was ratified by the House March 15, 1867, the minority report (Republican also) being substituted for that of the majority by a vote of

[92] Ibid., p. 97.
[93] Mich. Senate Journal, 1867, p. 125.
[94] Mich. House Journal, 1867, p. 181.

120 to 22.[95] The Amendment was then adopted by a vote of 120 to 20.[96]

The majority report of the Committee, except so much of it as related to the postponement of the Amendment, was adopted. The reason for the postponement desired by the majority of the Committee was due to the second section, which, it was claimed, conceded the right of the Southern States to disfranchise the negroes, and that Massachusetts would lose by it on account of her educational and tax qualifications for suffrage.[97]

The Committee, in its report, stated that the first section was already in the Constitution and was to be found in the second and fourth sections of Article Four, and in the First, Second, Fifth, Sixth and Seventh Amendments. If these provisions were fairly construed, said the Committee, they would secure everything which the first section attempted to do. After quoting these provisions, the report continues:

"Nearly every one of the Amendments to the Constitution grew out of a jealousy for the rights of the people, and is in the direction, more or less, of a guarantee of human rights.

"It seems difficult to conceive how the provisions above quoted, taken in connection with the whole tenor of the instrument, could have been put into clearer language, and, upon any fair rule of interpretation, these provisions cover the whole ground of section one of the proposed Amendment."

The first clause of the section was considered unnecessary by the Committee in view of the opinion of Attorney General Bates that negroes were already citizens. It was also declared that legal authorities were not agreed as to what constituted state citizenship apart from federal citizenship, and that that part of the Amendment "and of the State wherein they reside" would be of no effect anyway, since

[95] Mass. House Journal, 1867, p. 207.
[96] McPherson, Reconstruction, p. 194.
[97] Ibid., p. 202, and Legislative Documents of the House (Mass.), 1867, Doc. No. 149.

none of the provisions of the Amendment were to apply to persons as *citizens of a State.*

While the last clause of the section was not in the Constitution in the same words, the Committee said that the denial of equal protection of the laws "would be a flagrant perversion of the guarantees of personal rights which we have quoted." In answer to the general argument that such denial had existed notwithstanding those guarantees, the Committee replied that this would be possible under the Amendment. The Committee then concluded that the Amendment was mere surplusage at best, and mischievous in that it was an admission, "either that the same guarantees do not exist in the present Constitution, or that if they are there, they have been disregarded, and, by long usage or acquiescence, this disregard has hardened into constitutional right; and no security can be given that similar guarantees will not be disregarded hereafter." [98]

This report is entirely different from any other that we have found, for it was made by Republicans, and cannot, therefore, be said to be partisan in the sense that the same statements made by Democrats were. It is also valuable from the fact that it shows that the Senate of Massachusetts, in adopting it, accepted the statements made in it that the first section was but a reiteration of the guarantees enumerated in the Amendments. The Senate ratified the Amendment March 20, 1867, the vote being 27 to 6.[99]

Governor Bullock, had on January 4, in his message to the General Assembly, declared that the first section was to secure to all citizens civil equality before the law and to protect them from any state legislation which abridged their privileges or deprived them of life, liberty, or property without due legal process. He also said that it was adopted by Congress to give certain and enduring effect to the Civil Rights Bill, and that whatever reasons there were for the enactment of that bill, were doubly applicable to the incor-

[98] Ibid., Doc. No. 149.
[99] McPherson, Reconstruction, p. 194, Mass. Senate Journal not printed according to card catalogue of Library of Congress.

poration of its provisions into the fundamental law of the country. Its reaffirmation in this form was necessary, he continued, to the end that neither the executive nor judicial power, nor the local authorities, might render inoperative the deliberate verdict of the people, "that no one should be denied of their privileges and immunities."[100]

At the third session of the Legislature of Nebraska, which had but recently become a State, the Amendment was ratified by the House on June 10, 1867, the vote being 26 to 11.[101] The Senate rejected the motion to submit the question to the people, and adopted the resolution by a vote of 8 to 5.[102]

Thus within a year from the time the Amendment was submitted to the States, twenty-two had ratified it, being more than three fourths of the so-called "loyal States." These were not regarded as sufficient, however, by the great majority of the people. There followed quite a long interval before another State gave its sanction to the Amendment, for not until the spring of 1868 did Iowa ratify the Amendment. The lower House of the General Assembly of that State ratified it January 27, 1868, the day on which the resolution proposing it was introduced, by a vote of 68 to 12.[103] The Senate agreed to this resolution, apparently without any debate, on March 9, the vote being 34 to 9.[104]

Nearly two years had gone by since the Amendment had been submitted and the assent of the necessary three fourths was still wanting. Thus far not a single State of the section which would be most affected by the Amendment had given its assent to it, with the exception of Tennessee. And in the case of Tennessee it may be said that it had been ratified against the will of the people of that State. The other States almost unanimously rejected it. Within this time Ohio had withdrawn her assent, thereby giving rise for the first time

[100] Legislative Documents of the Senate (Mass.), 1867, Doc. No. 1, p. 67.
[101] Nebraska House Journal, 1867, p. 148.
[102] Neb. Senate Journal, 1867, pp. 163, 174.
[103] Ia. House Journal, 1868, p. 132.
[104] Ia. Senate Journal, 1868, p. 264.

to the question whether a State could withdraw its ratification of the Amendment before three fourths of the States had ratified it. New Jersey soon followed the example set by Ohio, while Oregon did likewise the following fall. The border States of Maryland, Delaware and Kentucky had also rejected the Amendment.

In the spring of 1868, however, the array of the solid South was broken, Arkansas being the first to ratify. In order to preserve the continuity of the narrative, the rejection of the Amendment by the border and Southern States will be considered after we have given an account of the ratification by those States.

Arkansas was the only State which ratified the Amendment by a unanimous vote in both Houses. The vote in the Senate April 6, 1868, was 23 to 0, while that in the House a week later was 56 to 0.[105]

The Legislature of Florida, which assembled June 8, 1868, lost no time in giving its assent to the Amendment, for both Houses passed resolutions to that effect the next day; in the House by a vote of 23 to 6; [106] in the Senate by a vote of 10 to 3.[107] An extra session of the North Carolina Legislature was called by Governor Holden. The members of the Legislature were elected under an order of General Canby, who had charge of the Military District of North and South Carolina. The North Carolina Assembly acted with the same promptness that was shown in Florida, for it met July 1, 1868, and on the next day both Houses ratified the Amendment. The vote in the Senate was 34 to 2;[108] in the House 82 to 19.[109] Louisiana and South Carolina followed soon after, both ratifying it July 9, 1868. In South Carolina, the vote in the Senate, July 8, 1868, was 23 to 5,[110] while that in the House the next day was 108 to 12.[111] In

[105] McPherson, Reconstruction, p. 353.
[106] Fla. House Journal, 1868, p. 9.
[107] Fla. Senate Journal, 1868, p. 8.
[108] N. C. Senate Journal, 1868, p. 15.
[109] N. C. House Journal, 1868, p. 15.
[110] S. C. Senate Journal, 1868, p. 12.
[111] S. C. House Journal, 1868, p. 50.

the Senate of Louisiana the vote was 22 to 11, July 9.[112] Alabama was added to the list of the ratifying States four days later, while Georgia on the 21st of the same month, was the last State to ratify before the final proclamation of the Secretary of State, announcing that the Amendment had been ratified. Both Houses of the Georgia Assembly ratified the Amendment on the same day, the vote in the House being 89 to 71,[113] while that in the Senate was not given. The States of Virginia, Mississippi and Texas ratified it after it had been declared a part of the Constitution. In Virginia, the vote in the Senate October 7, 1869,[114] was 34 to 4; and in the House next day, 126 to 6.[115] Mississppi ratified it January 17, 1870, by a vote of 23 to 2 in the Senate, and 87 to 6 in the House.[116] Texas ratified it February 18, 1870.[117]

Texas was the first to reject, as well as the last to ratify, the Amendment. The House Committee on Federal Relations reported adversely as to the Amendment, October 13, 1866. In their report, the Committee declared that the first

[112] La. Senate Journal, 1868, p. 21.
[113] Ga. House Journal, 1868, p. 50.
[114] Va. Senate Journal, 1869, p. 27.
[115] Va. House Journal, 1869, p. 37.
[116] Garner, Reconstruction in Miss., p. 271.
[117] Documentary History of the Constitution, vol. II, pp. 779–793. Secretary Seward, in his conditional proclamation of July 20, 1868, after enumerating the States whose Legislatures had ratified the Amendment, stated that it had also "been ratified by newly constituted and newly established bodies avowing themselves to be, and acting as Legislatures respectively of the States of Arkansas, Florida, North Carolina, Louisiana, South Carolina, and Alabama." It was also stated in the proclamation that the Legislatures of Ohio and New Jersay had passed resolutions withdrawing their consent, but that if the resolutions of these States "ratifying the aforesaid Amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of the Legislatures of those States which purport to withdraw the consent of the said States from such ratification, then the aforesaid Amendment has been ratified in the manner hereinbefore mentioned and so has become valid to all intents and purposes as a part of the Constitution of the United States."

On the next day Congress passed a resolution declaring that the Amendment had been ratified. Secretary Seward then issued the final categorical proclamation, July 28, 1868, declaring the Amendment a part of the Constitution.

section would take away from the States a right which they had possessed since 1776,—the right to determine what should constitute their own citizenship. The object of this, it was asserted, was to confer citizenship upon the negroes who would thereby be entitled to all the "privileges and immunities" of white citizens, among which were suffrage, participation in jury service, bearing arms in militia and others which did not need enumeration. The negroes were excluded from these privileges by law in most of the original free States, said the Committee, and in all of them by immemorial usage. There was scarcely any limitation to the powers sought to be conferred upon the Federal Government by the first section, continued the report, since Congress might declare almost anything, even miscegenation to be a privilege or immunity of a citizen of the United States, which would thereupon immediately attach to every citizen in every State. On the same day that this report was made the House rejected the Amendment by a vote of 70 to 5.[118] The Senate Committee on Federal Relations made a report very similar to that made in the House. The Amendment only received one vote in the Senate, the vote being 27 to 1 against ratification.[119]

Governor Jenkins, of Georgia, an old-line whig, opposed the Amendment in his message. His objection to the first section was that it centralized power in the Legislative Department of the Government by giving Congress the right to settle definitely the question of citizenship in the States. He declared that under the fifth section Congress would contend that it was the proper judge of what constituted "appropriate legislation," so that no vestige of hope would remain for the Southern people "if this Amendment were adopted."[120] The House rejected it by a vote

[118] Texas House Journal, 1866, pp. 578–584.
[119] Texas Senate Journal, 1866, p. 471.
[120] Charleston Courier, November 7, 1866.

of 147 to 2,[121] and the Senate unanimously (38 to 0), on November 9, 1866.[122]

Governor Walker, of Florida, on November 14, 1866, submitted the Amendment to the Legislature with a message advising its rejection. The first and fifth sections, he declared, conferred upon Congress the power of legislating about everything that touched "the citizenship, life, liberty, or property of every individual" in the country, and made the existence of the Government of the States of no further use. "It is in fact," he continued, "a measure of consolidation entirely changing the form of the Government." The Amendment gave to Congress all the powers which had previously been exercised, he said, by the States over the affairs of individuals. He also pointed out that to vote for the Amendment would be to vote for the destruction of the Government of the State, since it would disfranchise the most capable men of the State.[123] The House Committee on Federal Relations took about the same position as that taken by the Governor, for in its report, November 23, it was stated that the first and last sections practically annulled the authority of the States in regard to the rights of citizenship. It was also the opinion of the committee that the elective franchise and the right to serve as jurors would be considered privileges. Congress would also have the power, under the Amendment, said the committee, to annul state laws affecting the life, liberty and property of the people whenever it "should deem them subject to the objections therein specified." Since the Amendment would affect the general interests of all the people of the Union, the committee was unable to see how any State could voluntarily invest Congress with such extraordinary power, the whole tendency of which was to the consolidation of

[121] Georgia House Journal, 1866, p. 68.
[122] Georgia Senate Journal, 1866, p. 72.
[123] Florida Senate Journal, 1866, p. 8.

the Government. Moreover, the sections were objected to as being couched in language that was too "general and questionable."[124] The Amendment was rejected unanimously (49 to 0) by the House, December 1, 1866.[125]

The Senate Committee was equally as emphatic as that of the House, for in its report, December 3, it was declared that the States would cease to exist as bodies politic from the moment the Amendment was engrafted upon the Constitution, since Congress would be endowed by it with all the powers which had belonged to the States prior to that time. A great central power at Washington would thus be created, it was asserted. Under the first section alone Congress could subvert and change the whole economy of the State, said the report, whether the people of that State approved it or not, for it was appalling to think what power might be seized and exercised under the head of "appropriate legislation." The Committee was also unwilling to surrender the right of the State to determine who should exercise the right of franchise within its limits.[126] The Senate unanimously (20 to 0) concurred in the House resolution the same day that its Committee made this report.[127]

The message of Governor Patton, of Alabama, November 2, 1866, was very similar in substance to that of Governor Walker. In this message he advised against the ratification of the Amendment on the ground that the first section was of vast, if not dangerous, import, for by it the judicial powers of the General Government would be greatly enhanced, overshadowing and weakening the authority and influence of the state courts. It might also be possible, he said, to reduce the latter to a nullity, since the Federal Courts would be given complete and unlimited jurisdiction over

[124] Florida House Journal, 1866, p. 76.
[125] Ibid., p. 150.
[126] Florida Senate Journal, 1866, p. 102.
[127] Ibid., p. 111.

every conceivable case that might arise, civil or criminal, however important or trivial.[128]

On December 6, however, he sent another message advising the ratification of the Amendment as a matter of necessity and expediency. He stated that it was evident that the majority in Congress was determined "to enforce at all hazards its own terms of restoration," though he added that his views as to the merits of the Amendment had not changed in the least. He also stated that the views given in his first message were based on principle, but that they should look at their true condition and ratify the Amendment in order to be restored to the Union.[129] This message created considerable excitement and there were chances of favorable action, it was stated, until the receipt of ex-Governor Parson's telegram the next morning. This is somewhat doubtful, since it was said that the press of the State was almost a unit against Governor Patton's last position.[130] It was stated in the telegram that President Johnson was still the friend of the South and on no account should the Amendment be ratified. December 7, the day after the receipt of the message, the Amendment was rejected by an almost unanimous vote, 66 to 8 in the House, and 28 to 3 in the Senate. An effort was made in the House to have the question submitted to the people, but this was defeated by a vote of 49 to 24.[131]

Efforts were made in January to reconsider the vote on the Amendment. Mr. Parsons wired the President asking

[128] To quote his language: "It matters not what might be the character of his case. It might be civil, or criminal. It might be a simple action of debt, or a suit in trover; it might be an indictment for assault and battery, for larceny, for burglary, for arson, or for murder. It would be all the same. Upon a simple complaint that his rights, either of person or property, had been infringed, it would be the bounden duty of the tribunal to which he made his application, to hear and determine his case."—Alabama House Journal, 1866, p. 213.

[129] Annual Cyclopædia, 1866, p. 12.

[130] McPherson, Scrap-book, "Fourteenth Amendment," pp. 55–60.

[131] Ala. House Journal, 1866, pp. 210, 213, and Senate Journal, p. 183.

what to do. The President replied that there could be no good in doing this, and the matter was dropped.[132]

Governor Worth, of North Carolina, on November 20, 1866, submitted the Amendment to the General Assembly with a strong message against its ratification. He held that it had not been proposed by a Congress composed as provided by the Constitution, and that on that account alone, no State could, with dignity, ratify it. He also pointed out the heterogeneous character of the Amendment, declaring that it was the first attempt to use omnibus legislation in changing the fundamental law. It was also stated in the message that if the fifth section was but a reaffirmation of what was already in the Constitution, as was claimed by some, it was mere surplusage; but if it was intended to enlarge and amplify the various powers "which would be reasonably implied from the sections which precede it, and to give to Congress a peculiar authority over the subjects" embraced in those sections, then it was "mischievous and dangerous." The great value of the American system of government was due to the fact, said the Governor, that a municipal code was provided under the jurisdiction of each State for trial, by a jury of the county or neighborhood where the parties resided, of all controversies as to life, liberty, or property with the exception of the very limited field of federal jurisdiction. This was to be done anyway, he continued, by the Amendment, since Congress would become the protector of those rights and the "guarantor of equal protection of the laws." Moreover, Congress would be empowered to provide, by appropriate legislation, a system of rights and remedies which could only be administered in the Federal Courts, thereby transferring to the few points in the State where such Courts are held the most common and familiar offices of justice, and to judges and other officers who hold their commissions, not from the people themselves, but from the President and Senate of the United States. "The States, as by so much," he added, "are to cease to be self-governing com-

[132] The Trial of the President, Supplement to the Congressional Globe.

munities, as heretofore, and tresspasses against the person, assault and battery, false imprisonments, and the like, where only our citizens are parties, must be regulated by the Congress of the Nation and adjudged only in its Courts." He was unable to believe, he said, that the deliberate judgment of the people of any State would approve of the innovation to be wrought by the Amendment, and as anxious as he was to see the Union restored, there was nothing in the Amendment calculated to perpetuate that Union, but that its tendency was rather to perpetuate sectional alienation and estrangement.[133]

On November 22, a joint Committee was proposed, to which the Amendment was referred. Four days later Mr. Logan, of Rutherford County, offered a resolution in the House for the ratification of the Amendment, but it was referred to the joint committee on that subject by a vote of 92 to 16,[134] thus showing the fate which awaited the Amendment itself.

The Committee had the Amendment under consideration for two weeks, making their report, which was a very strong one, on December 6, 1866. The Committee agreed with the Governor as to the unwisdom of embracing so many Amendments in one.

In reference to the question whether the Amendment had been proposed constitutionally, it was pointed out that North Carolina and her sister States had been repeatedly recognized *"as States in the Union"* by all the Departments of the Government, both during and since the war. Several instances were cited to show this. They were also recognized as States, said the Committee, by the submission of the Amendment to them for ratification.

The Committee then proceeded to show that if the assent of those States was necessary to make the ratification valid, it was equally necessary to render the proposal of it valid.

The Amendment was objected to on the ground that it contained provisions of temporary interests merely, and that only provisions made for all times should be incorporated into the

[133] N. C. House Journal, 1866–67, pp. 24–30.
[134] Ibid., p. 81.

Constitution. The privileges and immunities which the States were prohibited from abridging or denying were left in doubt, declared the Committee, since it was not stated whether they consisted only of those which were then supposed to exist or whether they included all others which the Federal Government might thereafter declare to belong to citizens. The latter construction was the more natural, continued the report, and was the one which Congress could insist upon as being both correct and consistent with the language used. With this construction, what limit was there, it was asked, to the power of the Federal Government to interfere with the internal affairs of the States. "And what becomes of the right of a State to regulate its domestic concerns in its own way? Whatever restrictions any State might think proper, for the general good, to impose upon any one or all its citizens, upon a declaration by the Federal Government that such restrictions were an abridgment of the privileges and immunities of the citizens of the Union, such state laws would at once be annulled. For instance, the laws of North Carolina forbid the inter-marriage of white persons and negroes. But if this Amendment be ratified, the government of the United States could declare that this law abridged the privileges of citizens, and must not be enforced; and miscegenation would thereupon be legalized in this Commonwealth. Grant that such action on the part of the government would not be probable, still it is possible; and its bare possibility sufficiently exemplifies the boundlessness of the powers which the Amendment would confer on the Federal Government."

Under the original Constitution, says the report, the municipal affairs and the personal and property interests of the citizens were left to the States, but this was all changed by the Amendment, for the Federal Government would be authorized to come between a State and its citizens in almost all conceivable cases. It would be empowered "to supervise and interfere with the ordinary administration of justice in the state courts, and to provide tribunals,—as has to some extent been already done in the Civil Rights Bill, to which

an unsuccessful litigant, or a criminal convicted in the courts of the State, can make complaint that justice and the equal protection of the laws have been denied him, and however groundless may be his complaint, can obtain a rehearing of his cause. The tendency of all this is to break down and bring into contempt the judicial tribunals of the States, and ultimately to transfer the administration of justice both in criminal and civil causes, to Courts of federal jurisdiction, is too manifest to require illustration."

In reference to the third section, the Committee said: "What her [North Carolina] people have done, they have done in obedience to her own behests. Must she now punish them for obeying her own commands? If penalties have been incurred, and punishments must be inflicted, is it magnanimous, is it reasonable, nay, is it honorable, to require us to become our own executioners? Must we, as a State, be regarded as unfit for fraternal association with our fellow citizens of other States, until after we shall have sacrificed our manhood and banished our honor? Surely not. North Carolina feels that she is still one of the daughters of the great family. Wayward and wilful, perhaps, she has been; but honor and virtue still are hers. If her errors have been great, her sufferings have been greater. Like a stricken mother, she now stands leaning in silent grief over the bloody graves of her slain children. The mementos of former glory lie in ruins around her. The majesty of sorrow sits enthroned on her brow. Proud of her sons who have died for her, she cherishes, in her heart of hearts, the loving children who were ready to die for her, and she loves them with a mother's warm affection. Can she be expected to repudiate them? No! it would be the act of an unnatural mother. She can never consent to it. *Never!*"

It was stated in the report that it was impossible to conceive how wide the door was opened by the last section for the interference of Congress "with subjects hitherto regarded beyond its range." One of the most serious evils of the Amendment was declared to consist in the vast addition, made in so many ways, to the power of the General Gov-

ernment. There had already developed, said the Committee, the tendency towards centralization and consolidation, which had been greatly increased by the defeat of the States which had always been the advocates of State Rights; and that even without new constitutional grants of authority, the Federal Government was no longer what it once was, but was now a mighty giant which threatened "to swallow up the States, and to concentrate all power and dignity in itself." This centralizing tendency, continues the report, should be checked rather than fostered, and that the "American people ought not, by new grants of power, to seem to authorize the continual exercise of extraordinary prerogatives, undreamed of in the purer and happier days of the Republic."

It was the opinion of the Committee that the ratification of the Amendment would not facilitate the restoration of the State, and moreover, that no humiliation or degradation could be deeper than yielding to intimidation and ratifying, through fear, a measure which it disapproved.

Only one member of the Committee refused to sign the report, and his reason for doing so was based on the belief that, in view of all the circumstances, it would be to the interest of the State to ratify the Amendment.[135] The Amendment was rejected, December 13, by a vote of 45 to 1 in the Senate, Mr. Harris, of Rutherford, casting the only vote in favor of the Amendment.[136] The House rejected it by a vote of 93 to 10.[137]

The report of the joint Committee of North Carolina is valuable, not only from the fact that it is the longest and most exhaustive made by any Southern State, but also because it gives the principal objections which induced those States to reject the Amendment with such unanimity.

Governor Murphy, of Arkansas, had recommended the ratification of the Amendment, and a resolution to do this in order "to calm the troubled waters of our political atmosphere" was introduced December 10, 1866.[138] This resolu-

[135] N. C. Senate Journal, 1866–67, pp. 91–105.
[136] Ibid., p. 138.
[137] N. C. House Journal, 1866–67, p. 183.
[138] Annual Cyclopædia, 1866, p. 27.

tion was referred to the Committee on Federal Relations. On the same day the Senate Committee reported adversely as to the ratification of the Amendment. The report was based on the following grounds:

1. The Amendment had not been constitutionally proposed, nearly one third of the States being excluded from all participation in it.

2. It had not been submitted to the President for his approval.

3. "The great and enormous power sought to be conferred on Congress, under the Amendment which gives that body authority to enforce by appropriate legislation the provision of the first article of said Amendment, in effect, takes away from the States all control over all the people in their local and their domestic concerns, and virtually abolishes the State."

4. The second section, whether intended so or not, gave the power to bring about negro suffrage, with or without the consent of the States.

5. The third section would disfranchise many of the best and wisest men of the State.

The Committee thought it preferable to bear their "troubles, trials and deprivations, and even wrongs, in dignified silence," rather than to commit an act of disgrace, if not annihilation, such as would result in the adoption of this Amendment by the Legislature.[139]

This report was adopted December 15, by a vote of 24 to 1.[140]

The House Committee reported against ratification December 17, stating as its reasons for doing so, that the first section made negroes citizens and prohibited the States from abridging any of their privileges as citizens of the United States. The report also declared that Congress would be empowered to define what rights they should enjoy, and to elevate them by legislative enactment to a political equality with the whites. "It also transfers to Con-

[139] Ark. Senate Journal, 1866, p. 259.
[140] Ibid., p. 262.

gress," continued the Committee, "jurisdiction of the local and internal affairs of the States, virtually destroying the independence of their courts and centralizing their reserve powers in the Federal Government." The report was adopted the same day by a vote of 68 to 2.[141]

Governor Orr, in his message to the General Assembly of South Carolina, November 27, 1866, recommended the rejection of the Amendment. It, in his opinion, gave Congress the absolute right of determining who should be citizens of the States, who should exercise the elective franchise, and who should enjoy the rights, privileges and immunities of citizenship. By it, he continued, the representatives of Oregon or California, or of any State, would be given the power to declare what should be the measure of citizenship in South Carolina or any other State, and this he declared to be an evil, since the citizens of the States were more likely to exercise this power judiciously and intelligently than non-residents who knew nothing of the people, their necessities, resources, etc. "With this Amendment, incorporated in the Constitution," he declared, "does not the Federal Government cease to be one of 'limited powers' in all of the essential qualities which constitute such a form of government."[142]

About a week before this message was sent, ex-Governor Perry of the same State, in an open letter to the editor of the New York *Herald*[143] asserted that the last section of the Amendment destroyed all the rights of the States and centralized all power in Congress, and that this was done, not openly, but covertly and insidiously.

The Amendment was rejected in the House, December 20, by a vote of 95 to 1. The Senate concurred in the resolution rejecting it, but the vote was not given.[144]

Governor Pierpont, of Virginia, advised the ratification of the Amendment in order to improve the condition of the people, but the Legislature did not follow his advice. The

[141] Ark. House Journal, 1866, pp. 288–91.
[142] S. C. House Journal, 1866, p. 34.
[143] November 22, 1866.
[144] S. C. House Journal, 1866, p. 284, and Senate Journal, p. 230.

Amendment was rejected by both Houses January 9, 1867, the vote in the Senate being 27 to 0; in the House 74 to 1.[145]

Governor Humphreys, of Mississippi, characterized it, in his message, as an insulting outrage to many of their worthiest men, and as "such a gross usurpation of the rights of the States and such a centralization of power in the Federal Government" that the mere reading of it was sufficient to cause its rejection.[146] Ex-Governor Sharkey, who was Senator-elect from the same State, in a letter from Washington, September 17, 1866, to Governor Humphreys, called attention to the fact that the Amendment did not enumerate the privileges and immunities for which Congress might provide by the last section. He also suggested that Congress might confer privileges on one class to the exclusion of another class, or might even assume absolute control over all the people and the domestic concerns of a State, but stated that any State which had so little self-respect as to adopt it deserved no better fate. To him, however, the fifth section was the Trojan horse of mischief, since it could be construed to empower Congress to do whatever it desired to do. He then cited a similar provision attached to the 13th Amendment, under which Congress held that it had power to pass the Freedman's Bureau and Civil Rights Bills. Congress had interpreted the second section of that Amendment, he said, just as he, when Governor of Mississippi, had admonished many members of the Legislature that it would be. He, therefore, thought they should profit by the experience which had been furnished them by the same provision in the Thirteenth Amendment.[147]

The Amendment was unanimously rejected by both Houses, in the House, January 25, 1867, 88 to 0, and in the Senate, January 30, 27 to 0.[148]

In Louisiana, just as in Arkansas and Virginia, the Governor advised the ratification of the Amendment but, as in

[145] Va. House Journal, 1866–67, p. 108, and Senate Journal, p. 101.
[146] Annual Cyclopædia, 1866, p. 521.
[147] Atlanta Intelligencer, October 5, and N. Y. Herald, October 6, 1866.
[148] McPherson, Reconstruction, p. 194.

those two instances, the advice was not heeded. The Governor did not advise its ratification as a matter of expediency, but because he regarded it just and proper, though he thought the States should be required to grant the negroes equal political rights. A joint resolution rejecting the Amendment was almost immediately introduced in the Senate, to which both Houses agreed without a dissenting vote, the Senate February 5, and the House the next day.[149]

Thus, within less than eight months after the Amendment had been submitted by Congress, every one of the so-called disloyal States, except Tennessee, had rejected the Amendment, three of them unanimously, and the others almost so.

Of the three border States which rejected the Amendment, Kentucky comes first. There was apparently no debate in either House, the Amendment being rejected by both on January 8, 1867. The vote in the House was 67 to 27, and in the Senate 24 to 9.[150]

Delaware, one of the three States that never ratified the Thirteenth Amendment, also has the distinction of being one of the three States which rejected and never afterwards ratified the Fourteenth Amendment. In his message to the Legislature, Governor Saulsbury said that the people had spoken so emphatically against ratification he felt sure that it would be rejected.[151] The Committee in the House reported against ratification February 6, 1867, and this report was adopted by a vote of 15 to 6. The Senate concurred next day by a vote of 6 to 3.[152]

Maryland followed Delaware the next month, both Houses rejecting the Amendment, March 23, by a vote of 47 to 10 in the House, and 13 to 4 in the Senate.[153]

The joint Committee on Federal Relations, declared, in their report March 19, that the proposition, which the States were called upon to ratify, would strip the States of powers most vital to their safety and freedom, and even to

[149] Ibid., p. 194, and Annual Cyclopædia, 1866, p. 452.
[150] Ky. House Journal, 1867, p. 60, and Senate Journal, p. 62.
[151] Del. Senate Journal, 1867, p. 26.
[152] Ibid., p. 176, and House Journal, p. 223.
[153] Md. House Journal, 1867, p. 1141, and Senate Journal, p. 808.

their continued existence in any useful way, and would bestow those powers upon the Federal Government. Before giving assent to such a proposition, the Committee thought it should be considered in all its aspects and consequences, Maryland's geographical position, her commercial relations with all parts of the Union, as well as her patriotic desire for the welfare and happiness of the whole country and her desire for the speedy restoration of friendly relations between the States, would, said the Committee induce her to make every possible sacrifice to secure the great objects of the Constitution, namely, "To establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, etc." The Committee, however, was unable to see anything in the proposed Amendment which tended in that direction. In order to understand the nature and the objects of the Amendment, they went into the history of it, and examined the grounds upon which its ratification was urged. The report of the Reconstruction Committee was gone into quite at length, after which the Committee said that the report showed that the avowed purpose was to punish the Southern States and people for the future peace and safety of the country. Two incongruities in the proposition were pointed out: first, that while the demand for conferring additional power upon the Federal Government was presented in the report of the Reconstruction Committee, as if made upon the Confederate States only, it was in fact made upon all the States, since it would be binding on all if ratified; secondly, that while it would greatly diminish the power of the Southern States in the House of Representatives it would at the same time reduce that of Maryland and other States which stood loyally by the Government. The Committee also reached the conclusion that the Amendment had not been properly proposed—eleven States being forcibly excluded from all participation in Congress. It was pointed out that there was no thought of compulsory representation in the Constitution and certainly, continued the report, none of forcible exclusion. The same Congress which excluded the Southern Senators and

Representatives had recognized their state governments as legally accepting the ratification of the Thirteenth Amendment by their Legislatures, while at the same time claiming and exercising the power to pass the Civil Rights Bill and Freedman's Bureau Bill in virtue of that Amendment. The fact that the Amendment had not been properly proposed was of itself an insuperable obstacle to its ratification by Maryland, but the Committee stated that if this fact were otherwise, the State could not voluntarily assent to any of the propositions of the Amendment. Allusion was made to the danger of rashly disturbing the admirable adjustment of the balance of powers between the Federal and state governments, while the passions of men were highly excited, thus rendering them blind to, and reckless of, consequences. The Fathers "guarded against the danger of consolidation. That now is the rock upon which our ship of State is in imminent danger of being totally wrecked" declares the report.

The object and effect of the first clause of section one was to give Congress, it was asserted, instead of the States, the right to determine who should be deemed citizens of the States, and what residence should be necessary to constitute citizenship. All the provisions of the Amendment, it was stated, "must be read in the light of the fifth section, and of the interpretation already given by Congress to the same language in the Thirteenth Amendment." To provide for the protection and regulation of life, liberty and property was declared to be "the sole and exclusive right of every State," and the proposition to invest Congress with the power of supervision, interference and control over state legislation in regard to those questions was virtually to empower Congress to abolish the state governments.

In regard to the second section, the Committee said that it would abridge a right of the States theretofore unquestioned. It was a well known fact, it was stated, that the representation of the South would be constitutionally enlarged by the emancipation of the slaves, but that even then that section would be in such a hopeless minority, that it

would be difficult to imagine a higher compliment or tribute than was paid by the Reconstruction Committee to the moral power and intellectual prowess of Southern Representatives in the expression of the fear and danger that they would control Congress if admitted without diminished power.

The third section was objected to on the ground that it was *ex post facto,* and the fourth, on the ground that it would inspire apprehension rather than confidence, in regard to the public debt, and that compensation should be made for the slaves of Maryland.[154]

Governor Swann, in his message January 4, 1867, said that it could not have escaped notice that the five distinct propositions of the Amendment embodied more than their language would seem to convey. The last clause, he declared, which gave Congress power to enforce the other propositions "by appropriate legislation," might leave the Southern and border States at the mercy of a mere congressional majority, which might become dangerous to the liberties of the people in times of high party excitement and sectional alienation.[155]

California is the only State that neither rejected nor ratified the Amendment. The House Committee on Federal Relations recommended, March 4, 1866, that it be not ratified while the Senate Committee, March 20, reported in favor of ratification,[156] but no vote seems to have been taken by either House. This was no doubt due to the fact that the House was Democratic and the Senate Republican, so that it was useless to vote.

This somewhat extended examination of the action and views of the different States in regard to the Amendment leaves but little doubt as to the views generally held regarding its object and purpose. To be sure, the members of several of the Legislatures were elected prior to the submission of the Amendment and on an entirely different

[154] Laws of Maryland, 1867, pp. 879–911, also Doc. MM., House Journal and Documents, 1867.
[155] Md. House Journal and Documents, 1867, Doc. A., p. 21.
[156] Cal. House Journal, 1867–68, p. 611, and Senate Journal, p. 676.

issue, so that their action may be said not to represent the will of the people, but the command of political leaders. This contention might be well founded in some instances, but when viewed in the light of the elections which were soon to follow, it should have little weight, for the Radicals swept the country in the elections of 1866 in almost every State north of Mason and Dixon's line, often with increased majorities. It may be properly said, however, that if the question of the ratification or rejection of the Amendment had been presented to the people by itself, the result might have been quite different.

The question the people had to decide or to determine in the election was not a simple, but a complicated one. The first section, the most important of all, was largely lost sight of in the general excitement. Furthermore, the people were not in a frame of mind to consider any question calmly and deliberately, and it was certainly a most inopportune time to secure the sober judgment of the people in changing the fundamental law of the country.

It may cause surprise that the people and the States were willing to increase the power of the Central Government to the extent contemplated by the framers of the Amendment, but it does not seem so strange when we consider the circumstances. The people were made to feel and believe that the preservation of the Union was again at stake; that if the Amendment was not adopted, the "Rebels" would soon be in control of the Government at Washington; that the national debt would be repudiated; that the Rebel debt would be assumed; that the slaves would be paid for; that treason would be glorified; and that loyalty would be made odious. Many of the people held government bonds and notes, and, to insure their payment, voted for the Amendment; others thoroughly hated the South, and, to weaken the power of that section, supported it; others still wanted to perpetuate their party and saw the opportunity to do this by incorporating the Amendment in the Constitution; while many no doubt were sincere in their devotion to the Union and were willing to do anything for its preservation,

and, believing the Amendment necessary for this, voted for it. With all these various and heterogeneous elements at work, there is really nothing to cause surprise that the Amendment was overwhelmingly ratified by the popular vote. Moreover, there can hardly be any doubt but that the action of some of the radical, hot-headed men in the South contributed to swell the Radical majority in the North. The Memphis riots, the riot at New Orleans, and the attitude of many in speeches and acts—all tended to increase the flame at the North, while everything was seized upon by the Radical politicians to show that the South was still rebellious and disloyal, that the negroes would be re-enslaved, and that the Union would be destroyed if the Democrats were once permitted to get control of the Government. One has only to read the speeches made during the campaign to see that the effort of most of the political orators was to arouse the passions of the people, to increase their prejudices and hatred, to appeal to selfish motives, and to clothe all these appeals in terms of rights and justice. If there is any surprise it should be that the majority was not larger than it really was.

As in all questions of this kind, the great mass of the people never really comprehended the meaning and purpose of the Amendment, and of those who did, many chose what they considered the lesser of two supposed evils—preferring to have the Government in the hands of the Radicals with the Amendment than in the hands of the Democrats without the Amendment. For the question was so presented as to make it practically impossible to reject the Amendment and still keep the Government in control of the Radicals, since the Legislatures, which were to act on the Amendment, would, in many instances, elect United States Senators as well.

In the concluding chapter we shall give the interpretation given the Amendment by Congress.

CHAPTER V.

Congressional Interpretation of the Fourteenth Amendment.

Having given a historical résumé of the origin and development of the Fourteenth Amendment, its passage by Congress, the attitude of the press and the people towards it, and its final ratification by the States, it now devolves upon us to give the interpretation which Congress gave to it after it had been proclaimed a part of the fundamental law of the land. This interpretation is shown in the debates on the bills which were presented for its enforcement and in the legislation which was actually enacted into law.

Congress, which was in session at that time, adjourned a few days later without making any attempt to pass a law looking to its enforcement.

Mr. Broomall, of Pennsylvania, had introduced a bill, July, 1867, to secure equal political and civil rights to all citizens regardless of race or color. It was not considered, however, until the eighteenth of March, 1868, when it was debated quite at length. Its purpose was not to enforce the Fourteenth Amendment, since it had not yet been declared a part of the Constitution, but to guarantee a republican form of Government to every State. But at the time the debate took place, March 18, 1868, many of the Radicals thought the Amendment had been ratified by all the States necessary to make it a part of the fundamental law. This was the position taken by Mr. Thaddeus Stevens and he stated that until that Amendment had become a part of the Constitution, there was nothing in that instrument to warrant the passage of such a bill by Congress. By that Amendment Congress was given the power, in his opinion, to regulate the suffrage in every State of

the Union.[1] Mr. Stevens was the only one of those who spoke who specifically made the Fourteenth Amendment the authority for passing such a bill, the others finding it in the original Constitution. Two Republicans (Messrs. Spalding and Lawrence) declared that the bill could find no sanction in the Constitution, and that two thirds of their colleagues held the same views. One of them (Mr. Spalding) stated that such a bill, if passed, would be the death knell of their party in the presidential election the following fall.[2] The bill was not brought before the House again, its defeat being evident.

When Congress reassembled, December 7, 1868, a bill was introduced by Mr. Boutwell on that day declaring who might vote for electors for President and Vice-President and Representatives in Congress. This bill was referred to the Committee on the Judiciary, of which Mr. Boutwell was a member, and a substitute was reported for it by the Committee on January 11, 1869. The Committee, at the same time, reported a joint resolution proposing an Amendment to the Constitution, which became, in substance, the Fifteenth Amendment. It may seem strange that the same Committee which reported a bill declaring that "No State shall abridge or deny the right of any citizen of the United States to vote for electors of President and Vice-President of the United States or of Representatives in Congress, or for members of the Legislature of the State in which he may reside, by reason of race, color, or previous condition of slavery; and any provisions in the laws or constitution of any State inconsistent with this section are hereby declared to be null and void," should at the same time bring a resolution for amending the Constitution of the United States to secure practically the same thing. If Congress already had the power to regulate suffrage, what need of an Amendment? This seems a reasonable question and the action of the Committee appears, at first sight, contradictory and inconsistent, but however contradictory, their action was not inconsistent

[1] Globe, 40th Cong., 2d Sess., pp. 1966–67.
[2] Ibid., pp. 1971 and 1973.

with the past history of their party. It has already been shown in the earlier pages of this study that the very men who passed the Civil Rights Bill submitted the Fourteenth Amendment, the first section of which practically incorporates that bill. The Fortieth Congress was thus following the precedent set by its predecessor. The same arguments were used in this instance as in that of the Civil Rights Bill. The second and third sections of the bill were remedial and punitive—their purpose being to enforce the first section which we have given above. The fourth section was to enforce the third section of the Fourteenth Amendment, and was punitive in its nature. By this section any one violating section three of said Amendment was to be imprisoned at hard labor for two years, being subject to indictment within ten years after committing the act. By the fifth and last section of the bill, exclusive jurisdiction of all offences against the act was to be given to the District Courts of the United States.

The first section is the only one which we shall consider, since it is the only section of any importance in connection with the Amendment under consideration. Mr. Boutwell, while discussing the bill, stated that he thought Congress had broader powers than those set forth in the first section, but that it was his belief that the objects desired could be obtained by that section, and so not advisable or desirable to enact legislation not necessary to secure those objects, or the object, he might have said, for negro suffrage was the thing desired. He based the power of Congress to pass this bill either in the second and fourth sections of the first article, or the fourth section of the fourth article of the Constitution. He relied more, however, upon the Fourteenth Amendment, declaring that if there were doubts in the minds of any as to the power of Congress to legislate on this subject, those doubts must disappear, in his opinion, upon an analysis of that Amendment. He contended that the first section of the Fourteenth Amendment inhibited the States from depriving citizens of those rights which were derived directly from the States as well as those derived directly from the United

States. In other words, he maintained that the privileges and immunities which the States were prohibited from depriving any citizen of were not only the privileges which they had as citizens of the United States, but also those which belonged to them by virtue of being citizens of the States. His interpretation of the Amendment was thus opposed to that given by the Supreme Court in the Slaughter House Cases. He declared that the inhibition upon the States in the first section was a comprehensive one—applying to all or to nobody. His theory was not that the States could not extend or limit the rights and privileges of its citizens as such, but that if they did, the provisions should apply to all alike. A State might pass a law that no one of a certain age should go to school, should sell goods, carry weapons, etc., but the law must apply to all alike.

Having developed his theory or interpretation of the Amendment to this point, he next considered the question whether suffrage was one of the privileges of a citizen. He quoted at length from a decision by the Supreme Court of Kentucky to show that no one was a citizen in the true sense of the word unless he enjoyed the highest privileges of citizenship. If one man, contended Mr. Boutwell, had the right to vote for certain officers in any State, then every man having like qualifications of education or property had the same right, since if this were denied to any one, he would be denied the enjoyment of equal privileges to which he was entitled by the Constitution. The power of Congress to pass such legislation as he proposed in the bill was to be found in the fifth section of Article Fourteen. He stated that Congress had unlimited power under that Article to legislate for the purpose of securing to citizens of the United States privileges and immunities of citizens of any one of the States —to see to it that the States did not discriminate against any class of citizens. In answer to the question why it was not stated in the Amendment that States could not discriminate among their own citizens in regard to suffrage, he replied: "It was not necessary. The Article provides, as it stands, that there can be no discrimination by the States

among the citizens of the United States, who are as well citizens of the several States and entitled equally to the privileges of citizens." He denied *in toto* the doctrine that the second section was a concession or admission that the States had the right to abridge or deny to a citizen the right of suffrage. It was but a political penalty for doing what the first section declared no State had the right to do. Congress, when the Fourteenth Amendment was submitted, was acting at a time when many of the States were doing what the first section declared they had no right to do. According to Mr. Boutwell, a penalty was provided to prevent any State from taking advantage of this wrong in case Congress should not exercise the power conferred upon it by the fifth section of the Amendment. Congress was now called upon to exercise that power in order to remedy this evil—this wrong which the States had been committing. He pointed out the anomaly of our Government, if this power to legislate in regard to suffrage be denied Congress, in that there would be citizens eligible for the office of President, etc., and yet were not voters. He denied that a State could lawfully deny or abridge the right to vote, and added: "We knew there were some States in which the wrong existed. It might require time before Congress could exercise its powers under the fifth section, and the country meant to say that while this state of things continued—a state of things unjust and contrary to the Constitution—the States should not have the benefit of their wrong doing."

He gave as one reason for the submission of a constitutional Amendment, at the same time advocating the bill he had introduced, that there was nothing in the Constitution to prevent the United States from denying or abridging the right of citizens to vote, as the Fourteenth Amendment was but a limitation upon the States. The proposed Amendment would place a like limitation upon the United States. He also stated that if the Constitutional Amendment be submitted alone—without the bill, that it would in a certain sense be an admission that the power for which he was then contending was wanting. An argument similar to that used for

incorporating the Civil Rights Bill in the Fourteenth Amendment was that some future Congress could repeal a mere law and that it was better to have it in the Constitution. One of his principal arguments for the passage of the bill was that the colored voters would be a potent factor in securing the adoption of the proposed Amendment. This was a political argument of course, and showed to what extent the political leaders of that time were willing to go to maintain their power. He recited the number which would be added in Pennsylvania, Ohio, Kentucky, Maryland, Delaware, New Jersey, New York and others.[3]

This rather extended analysis of Mr. Boutwell's speech seems warranted from the fact that it was made within six months after the final proclamation of Secretary Seward announcing the ratification of the Fourteenth Amendment. It was also the first exposition or interpretation given in Congress to that Amendment after its ratification. Furthermore, Mr. Boutwell had been a member of that famous Reconstruction Committee which had proposed that Amendment, and speaking so soon afterwards, his statements should be given more weight than the ordinary speeches, for he evidently knew the secret motives which prompted the Committee in submitting the Amendment.

Mr. Knott followed Mr. Boutwell with a speech in which he undertook to demonstrate that the third section of the Amendment, which was to be enforced by the fourth section of the bill under consideration, could only apply to insurrections which might take place in the future. His entire speech was devoted to this topic, and so is not of any great importance to us. His main contention was that no matter what Congress intended, this intention could be of no effect if the language used in the measure was clear and comprehensible, as this was.[4]

Another speech delivered in regard to this bill was that by Mr. Eldridge, of Wisconsin. He declared that the bill and joint resolution were but steps toward centralization

[3] Globe, 40th Cong., 3d Sess., pp. 555–61.
[4] Ibid., pp. 561–66.

and consolidation, evincing a premeditated design to concentrate all power in the Federal Government. He contended that the second section of the Amendment recognized the right of the States to regulate the suffrage and said that was the view taken at the time, and the one strongly set forth by Thaddeus Stevens. "It was understood to be optional with the States to grant this right of suffrage to its negroes or have its representation in Congress proportionately reduced." [5]

Mr. Shanks declared his purpose to support the bill and the proposed Amendment, but without making any argument as to constitutional right to pass such a bill.[6] He was followed by Mr. McKee, who, as a member of the preceding Congress, voted for the Fourteenth Amendment, declared that the right of Congress to legislate on the question of suffrage was unquestionable since the passage of that Amendment.[7] Mr. Beck, of Kentucky, had preceded these last two gentlemen with a rather long speech, the most important part of which was an effort to show that it was never claimed while the Amendment was before Congress that it would give the power now claimed for it, but that it was denied by Trumbull and others that it could do so.

Mr. Cullom thought a State had no right to disfranchise a citizen on account of race or color, but was not sure that the Fourteenth Amendment was clear enough on this point.[8] Mr. Kerr denied the right of Congress to pass the bill, holding that suffrage was not one of the privileges of citizenship.[9]

Mr. Miller, a Republican, held that the Fourteenth Amendment did not authorize the bill and that it was not contemplated to confer such power at the time it was proposed.[10] Mr. Shellabarger, while not specifically saying

[5] Ibid., pp. 642–45.
[6] Ibid., p. 692.
[7] Ibid., pp. 694–96.
[8] Ibid., p. 651.
[9] Ibid., pp. 653–58.
[10] Ibid., Appendix, p. 92.

so, seemed to think that the bill was constitutional.[11] Mr. Broomall was in favor of the bill, evidently thinking it constitutional.[12] Mr. Loughbridge also thought that the States did not possess the power to deny to any class of citizens the suffrage on account of race or color, but admitted that he thought the majority of the people believed such power was in the States.[13] Mr. Higby declared that the language of the first section of the Amendment was so comprehensive that it seemed to include every right pertaining to citizenship, but that the second section implied that States might deny or abridge the right to vote. With the exception of this right, he would hold that all other rights were conferred by the Amendment.[14]

The bill was not discussed after January 29, 1869, the resolution proposing what practically became the Fifteenth Amendment having passed the House January 30. From the fact that the bill was not pressed for definite and final action, one might conclude that it was realized by the leaders that it could not pass, but the effort to pass it, as well as the expressions made in regard to it, together with the fact that the Committee on the Judiciary reported such a bill, are significant.

Mr. Stewart had, prior to this, December 14, 1868, introduced a resolution (S. R. 677) to enforce the third section of the Fourteenth Amendment. A month later, January 14, 1869, Mr. Sumner introduced a bill (S. R. 777) to the same effect. Mr. Buckalew, speaking of the resolution introduced by Mr Stewart, admitted that Congress had the power to pass it under the Amendment, but thought the proper course to enforce the section was through the Civil tribunals.[15] Neither of the above resolutions was debated nor does the Senate appear to have taken any further steps.

No real effort seems to have been made during the first session of the Forty-first Congress, and this was probably

[11] Ibid., p. 98.
[12] Ibid., p. 102.
[13] Ibid., p. 199.
[14] Ibid., p. 294.
[15] Globe, 40th Cong., 3d Sess., p. 1490.

due to the fact that it was a special session and very short. Two bills were introduced in the House, however, for the purpose of enforcing the third section of the Amendment (March 24 and 25, 1869), but neither of these bills was considered. Two bills were also introduced into the Senate to the same effect, but no action was taken.

Several bills were introduced at the next session of Congress which met December, 1869. Mr. Spence introduced a bill (S. R. No. 293), December 7, 1869, to amend the Civil Rights Bill, but this was indefinitely postponed, February 2, 1870, on the recommendation of the Judiciary Committee. Two bills were introduced as supplementary to the Civil Rights Bill—one by Mr. Sawyer (S. R. No. 718), March 28, 1870; the other by Mr. Sumner (S. R. No. 916), May 13, 1870. The one submitted by Mr. Sumner is of considerable importance, being practically the same as the bill which became law in 1875. It was reported adversely at this session, however, and indefinitely postponed July 7, 1870. Mr. Rice submitted a resolution that the Committee on Judiciary inquire into the effect of the Fourteenth Amendment upon the Indians to determine whether they were citizens (March 15, 1870).

There were also bills in the House to similar effect; one being introduced January 17, 1870, to enforce the Amendments and another March 14, following, to amend the Civil Rights Bill of 1866. It was also at this session that the House passed a resolution introduced by Mr. Bingham making it a criminal offence for anyone to attempt to repeal the ratification of an Amendment after three fourths of the States had ratified it. The penalty for a violation of it was a fine of not less than $2,000 nor more than $10,000 and imprisonment of not less than one year nor more than ten years. This bill was passed July 7, 1870, by a vote of 130 to 54,[16] but was pigeon-holed by the Senate Judiciary Committee.

The fact that these resolutions were introduced shows that there existed a feeling not only that Congress should

[16] Globe, 41st Cong., 2d Sess., p. 5357.

enact legislation for the enforcement of the Amendment, but that it had the power to do so. No action was taken on any of the above bills at this session, though we shall now consider one which was debated and finally became law.

Mr. Bingham submitted a resolution (H. R. 1293) February 21, 1870, to enforce the rights of citizens of the United States to vote, probably under the Fifteenth Amendment, though it was not at the time a part of the Constitution. It was reported back from the Committee on the Judiciary, March 9, 1870, with an Amendment in the nature of a substitute. It was not brought before the House for consideration until May 16, following, when it was passed, without debate, under a suspension of the rules by a vote of 131 to 44.[17] As passed by the House, the bill only dealt with the question of suffrage, and so must have been for the purpose of enforcing the Fifteenth Amendment.

On the same day that the above bill was passed by the House, the Senate began the consideration of a bill introduced by Mr. Edmunds in April (S. R. No. 810), and having the same object in view as that of the House bill. The Senate bill was amended by Mr. Stewart for the purpose of enforcing the third section of the Fourteenth Amendment and for securing to all persons the equal protection of the laws. One of the amendments offered by Mr. Stewart was the first section of the Civil Rights Bill of 1866. In fact the Civil Rights Bill of 1866 was to be reënacted.[18]

Mr. Vickers, a senator from Maryland, declared that Congress had no power to legislate under the Fifteenth Amendment until some State had denied or abridged the right after that Amendment had been ratified, and since no State had done so, there was no occasion for Congress to act.[19] Mr. Thurman was also of the same opinion.[20] The Senate bill consisted of twelve sections, and was a bill of pains and penalties, while the amendments offered by Mr.

[17] Ibid., p. 3504.
[18] Ibid., p. 3480.
[19] Ibid., p. 3481.
[20] Ibid., p. 3485.

Stewart added five more sections, not counting the nine sections of the Civil Rights Bill which were not repeated.

Mr. Stockton thought Congress was only given the power to pass laws enforcing the Amendments when it was necessary, *i. e.,* when they were violated.[21] Mr. Sherman declared that both of the Amendments had been violated in several States, and especially the Fourteenth. He said there might be some plausibility in the construction of the Courts of California as to the Fifteenth Amendment, by implying that before it should be enforced in the Courts some legislation should be passed by Congress.[22] If that be true of the Fifteenth, it would also be true of the Fourteenth Amendment.

Mr. Schurz said the express provisions affixed to the Amendments giving Congress power to enforce them were put there because it was known that those Amendments would have to be enforced against the prejudices and habits of the people.[23]

Mr. Pool said that the word "deny" as used in both the Fourteenth and Fifteenth Amendments included acts of omission as well as of commission. A State could not, according to his view, deny by omission, by failure to prevent its own citizens from depriving any of their fellow citizens of the rights secured by those Amendments. If a State failed to carry into effect the provisions of the Civil Rights Bill to secure the citizens in their rights, then the fifth section would be called into operation. No legislation, he continued, could prevent a State from passing a law, but it could reach the individuals of the State for enforcing the law. Laws of Congress act upon citizens, not upon States, he contended, and Congress could enact legislation for the enforcement of the Amendments, but such legislation would be applicable to the individuals who violated or attempted to violate them, for Congress had no power to legislate against

[21] Ibid., p. 3567.
[22] Ibid., p. 3568.
[23] Ibid., p. 3608.

States, it mattered not whether the individuals were acting as officers or not.[24]

Mr. Howard considered the Fourteenth by far the most important Amendment to the Constitution, and declared, May 19, 1870, that he was still of the opinion expressed in the Report of the Reconstruction Committee.[25] He said the intention and purpose of Congress in submitting the Fifteenth Amendment was to secure to the colored man, by proper legislation, the right to vote, and not merely to confine its operation to legislation by way of prohibition upon the United States and the States. If it is to be given that narrow construction, it will be stripped, he declared, almost entirely of that remedial and protective justice which was in the minds of its authors when it was proposed.[26]

Mr. Williams objected to the Senate bill, saying that it was first a bill to enforce the Fifteenth Amendment, upon which Mr. Stewart had filed a bill to enforce the Fourteenth Amendment, and another to protect citizens in the enjoyment of their civil rights. Mr. Stewart seemed to desire the incorporation of the Civil Rights Bill in order to secure protection to the Chinese aliens who were coming to this country, and the power to see that they had the equal protection of the laws conferred by the Fourteenth Amendment.[27]

Mr. Morton said that if the construction put upon the Fifteenth Amendment by some was correct, the second section was a nullity, for their argument was that if a state law violated the Fifteenth Amendment, it was void. He declared that the second section was put there for the purpose of enabling Congress to carry out the Amendment and that it was not to be left to state legislation.

Mr. Thurman said the bill had been amended in so many respects that no one knew what it was, but the Senate refused to commit the bill to the Judiciary Committee or to lay it on the table and have it printed. The bill was characterized

[24] Ibid., pp. 3611–13.
[25] Ibid., p. 3614.
[26] Ibid., p. 3655.
[27] Ibid., p. 3658.

as a "conglomeration of incongruities,"[28] and it must be said that the characterization was not altogether improper, for as finally passed, it consisted of 21 sections, but it also included the Civil Rights Bill of 1866, which would make about thirty-two sections in all. After an all night session, the bill was passed about seven o'clock on the morning of the twenty-first day of May, 1870, by a vote of forty-three to eight.[29]

The House non-concurred in the amendments made by the Senate (the Senate bill had been moved by way of amendment as substitute for House bill) and asked for a conference. The Conference Committee made a few minor changes, and added two sections, making twenty-three sections, which with the Civil Rights Bill, made a total of thirty-four sections.

Mr. Hamilton of Maryland said that, if the doctrines and principles involved in the bill were sound, Congress possessed the power, under the Fourteenth Amendment, to legislate upon all the subjects of life, liberty and property, and that, taken with the other prohibitions of the Constitution, comprehended every right of person or property, thus giving Congress the arbitrament of every right of the citizen and of the State. He denied, however, that the denial of a certain power to a State thereby conferred upon Congress the power over the subject-matter of such denial.[30] He thought the framers of the Fifteenth Amendment intended, by its peculiar phraseology, by implication in its construction, for the Federal Government to take control of elections in the States, but he did not think they accomplished their purpose.

Mr. Fowler held that the remedy under the Fifteenth Amendment was judicial, though he admitted that Congress no doubt intended to confer legislative power upon itself by the second section.[31]

Mr. Swann, of Maryland, stated that he foresaw, when the Fourteenth Amendment was adopted with the fifth sec-

[28] Ibid., p. 3688.
[29] Ibid., p. 3690.
[30] Ibid., Appendix, pp. 353–55.
[31] Ibid., Appendix, p. 421.

tion in it, all that was contained in the bill before the House in regard to the assumed power of Congress to regulate and control suffrage within the States. "This clause," he continued, "was so vague and indefinite that it bore upon its face the evidence of the stupendous usurpation which it was designed to perpetrate." He stated that only one and one half hours were allowed Democrats for discussion.[32]

Mr. Casserly, while discussing this bill, said that he did not think any one regarded the Civil Rights Bill as valid or Constitutional, and that it was already obsolete. He also stated that both Amendments were of the same character, and that if the powers claimed under the Fifteenth Amendment were applied to the Fourteenth Amendment, Congress could take to itself, under pretence of enforcing that Amendment, the entire criminal and civil jurisdiction of the States as regards offences against life, liberty, and property.[33] He, however, denied the power of Congress to do so in both cases.

Mr. Carpenter, of Wisconsin, seemed to think that the Fourteenth Amendment authorized the passage of the Senate bill.[34]

The report of the Conference Committee was agreed to in the Senate, May 25, 1870, by a vote of forty-eight to eleven;[35] in the House, May 27, by a vote of 133 to 58.[36] The bill as passed by the Houses was signed by the President May 31, 1870, and so became a law, and was, therefore, the first law for the enforcement of the Fourteenth and Fifteenth Amendments. While it was more for the enforcement of the Fifteenth Amendment, it is of importance in a consideration of the Fourteenth Amendment since it shows that Congress acted on the theory that the last section of the Amendment conferred upon it the power to enforce the Amendment, and if this was true of the Fifteenth Amendment, it was equally true of the Fourteenth.

[32] Ibid., Appendix, p. 431.
[33] Ibid., Appendix, pp. 470 and 473.
[34] Ibid., Appendix, p. 473.
[35] Ibid., p. 3809.
[36] Ibid., p. 3884.

Section eighteen of the bill declared that the Civil Rights Bill of 1866 was thereby reënacted—no doubt to give validity to it, though it is strange that no reference was made as to this purpose.

At the third session of the forty-first Congress, efforts were made as during the other sessions, to secure legislation looking to the enforcement of the Amendments, and especially of the Fourteenth and Fifteenth. The Judiciary Committee seems to have been hostile to most of the bills introduced, for nearly every one that was reported back, was either adversely reported or indefinitely postponed. The resolution (S. R. No. 715) introduced by Mr. Sawyer at the previous session was so reported and indefinitely postponed early in the session.[37]

A like fate awaited the bill introduced by Mr. Pool (S. R. No. 871), this bill being to enforce the Fourteenth Amendment and to secure the rights, privileges and immunities of citizens of the United States.[38] These bills had been introduced at the previous session but others were submitted at this time. Mr. Sawyer presented a resolution (S. R. No. 1223) January 18, 1871, for the purpose of protecting citizens against violations of their civil and political rights.[39]

Not in the least deterred by the adverse report as to his resolution of the previous session, Mr. Sumner again introduced his supplementary Civil Rights Bill, January 20, 1871. This was reported adversely February 15, 1871, the report being made by Mr. Trumbull.[40]

Bills were also introduced at this session to amend the Act of May 31, 1870, and one of these was passed. It consisted of nineteen sections and was to amend section twenty of the Act of 1870, and related to elections, to securing the right of suffrage, and the purity of the ballot box, as its advocates claimed, though Mr. Lawrence, of Ohio, declared that the second clause of section one, Article Fourteen, authorized

[37] 41st Cong., 3d Sess., p. 219.
[38] Ibid., p. 366.
[39] Ibid., p. 569.
[40] Ibid., pp. 619 and 1263.

the bill.[41] The House passed the bill, February 15, 1871, after a four hour debate by a vote of 144 to 64.[42] The Senate debated it quite at length, passing it February 24, or rather at 1.30 A. M. of the 25th, by a vote of 39 to 10.[43] The President gave his approval February 28, the bill thus becoming a part of the Act of May 31, 1870.

It thus appears that the Fortieth and Forty-first Congresses, while not really enacting much legislation for the enforcement of the Fourteenth Amendment, showed that they held a general belief that they posessed the power. This is shown by the number of bills introduced for that purpose, by the bills which were enacted into laws, and by the declaration of members on the floors of Congress. It is also true that the right of Congress to enact affirmative legislation in these instances were denied, but these declarations came from the minority generally, and so from those who had opposed the Amendments from the beginning.

If there be any doubt as to whether Congress believed it possessed such power, that doubt is removed by the study of the debates of, and laws enacted by, the Forty-second Congress. We are no longer obliged to draw conclusions or inferences as to this from the nature of bills or resolutions introduced, for here we have unmistakable evidence—plain declarations by members of Congress, many of whom had taken part in the enactment of the Fourteenth Amendment. In fact, some of the principal participants in securing the adoption of that Amendment, were members of the Forty-second Congress and were largely instrumental in the enactment of laws for its enforcement.

On the third day of the session, March 9, 1871, Mr. Sumner again brought forward his bill (S. R. No. 99), known as the supplementary Civil Rights Bill, and to avoid another adverse report, it was not referred to any committee.[44] On March 22, following, he moved it as an amendment to Mr.

[41] Ibid., p. 1276.
[42] Ibid., p. 1285.
[43] Ibid., p. 1655.
[44] Cong. Rec., 42d Cong., 1st Sess., p. 21.

Anthony's resolution limiting or restricting the business of the session, but it was rejected.[45] The bill was referred to the Judiciary Committee on the last day of the session, April 20. March 16, Mr. Frelinghuysen introduced a bill more fully to enforce the Fourteenth Amendment. A bill was introduced in the House to protect loyal citizens in the South in their rights, persons, liberty, and property, and one to secure the equal protection of the laws within the several States.

There appears, however, to have been no intention on the part of the House to enact any law for the enforcement of the Amendments, since on five different occasions it voted to adjourn by large majorities. On motion of Mr. Dawes, March 4, 1871, the House voted to adjourn *sine die* by vote of 147 to 23; on the 13th of March, a similar motion by him was passed by a vote of 124 to 67; on the 15th, a similar motion by Mr. Wheeler was adopted by a vote of 118 to 76; on the 20th, a similar motion was carried by vote of 121 to 55; and on the 23d, a like motion by Mr. Farnsworth passed by a vote of 113 to 68.[46]

On the 23d of March, and after the motion of Mr. Farnsworth for final adjournment had passed, a message was received from President Grant which changed the whole aspect of affairs. In this short message he recommended that such legislation be enacted as would effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States. He gave no evidence to show that such legislation was necessary, merely saying that life and property were insecure in some States and that the carrying of the mails and the collection of the revenues were dangerous. He also stated that it might be expedient to provide that such legislation as might be enacted should expire at the end of the next session of Congress. This last statement seems to give some weight to the charges of the opposition that the legislation was to be for political purposes.

The message was referred on the same day to a select

[45] Ibid., p. 225.
[46] Ibid., Appendix, p. 258.

Committee, of which Mr. Shellabarger was appointed chairman. Five days later, March 28, he reported from the Committee a bill to enforce the Fourteenth Amendment. The bill consisted of five sections, the first of which made any person, who, under color of any law, statute, custom, or regulation of any State, should deprive any one of any rights, privileges, or immunities secured by the Constitution of the United States, liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress, such proceeding to be prosecuted in the Federal Courts. The same rights of appeal and remedies provided for in the Civil Rights Bill of 1866 were to be applicable in such cases. The second section provided that if two or more persons conspire or combine together to do any act in violation of the above mentioned rights or privileges, which act, if committed within a place under the sole and exclusive jurisdiction of the United States, would, under the laws of the United States, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process, or resistance of officers in discharge of official duty, arson, or larceny, and if one or more of the parties to the conspiracy or combination do any act to effect the object thereof, all the parties to the conspiracy or combination shall be deemed guilty of a felony, and on conviction, be liable to a penalty of not more than $10,000, or to imprisonment for not more than ten years, or both, at the discretion of the Court; but in case of murder, the penalty to be death. The third section provided that where any portion or class of people were deprived, by insurrection, domestic violence, or combinations, of any of the rights or privileges secured by the bill, and the constituted authorities of the State should fail to protect them in these rights, either by inability, neglect, or refusal, and should fail or neglect to apply to the President for aid, such facts to be deemed a denial by the State of the equal protection of the laws, to which they were entitled under the Fourteenth Amendment.

It was declared to be the duty of the President in such cases to employ the militia or land and naval forces of the United States as he might deem necessary. The fourth section stated what should be considered rebellion, and authorized the President to suspend the writ of *habeas corpus* and to declare and enforce martial law.[47]

It will be seen by the brief digest of the bill given above, that Congress was to enter upon an almost entirely new field of legislation, and this was admitted by Mr. Shellabarger in his opening speech. Mr. Shellabarger said that the first section of the proposed bill was modeled upon the second section of the Civil Rights Bill of 1866, the only difference being that this one provided for civil remedy where the bill of 1866 provided for criminal proceeding. The authority for passing the bill, he asserted, was the same as that for passing the second section of the Civil Rights Bill, but much greater in this case since the first section of the Fourteenth Amendment was more explicit and more complete than the Thirteenth Amendment which was claimed as authority for passing the bill of 1866. He claimed that the Civil Rights Bill was constitutional, having been so decided by the Supreme Courts of at least three States and had also been declared constitutional by Justice Swayne of the United States Supreme Court in a case under review before the United States Circuit Court of the district of Kentucky. His contention was that the Fourteenth Amendment gave Congress power to protect and defend, by direct, affirmative legislation, those privileges and immunities which were in their nature fundamental. Equality of legislation was secured by the second clause of section one of the Amendment, he declared, and that this meant that the law on its face should apply equally to all. The last clause secured equality of protection. The two clauses, placed in juxtaposition, gave Congress the power to see to it that the States should equally protect, under equal laws, all persons within their jurisdiction.[48]

[47] Ibid., p. 317.
[48] Ibid., Appendix, pp. 67–71.

Mr. Kerr, who followed Mr. Shellabarger, denied that the Fourteenth Amendment authorized such bills as the one before the House. He claimed that the privileges and immunities spoken of in that Amendment were those which belonged to citizens of the United States, and not those of citizens of the States. The privileges and immunities of citizens of the United States belonged to all such citizens alike; to man and woman, to adult and infant, to black and white, to sane and insane. The Fifth Amendment was inserted in the Fourteenth Amendment in order to make it apply to the States, and out of abundant caution only. He further held that the first section of the Amendment would be better enforced by its own vigor and by judicial decisions than by Congressional legislation. He thought the bill neither authorized nor expedient.[49] Mr. Stoughton, speaking of the bill the day it was introduced, said that the authority conferred upon Congress by the fifth section of Article Fourteen, was subject to no restrictions or limitations; that it was for Congress in its discretion to determine what was appropriate legislation, and that its decision would be binding upon every other department of the Government.[50]

Mr. Hoar, of Massachusetts, said that it had sometimes been suggested that the Fourteenth Amendment aimed at unlawful acts by the state authorities, but he thought the last clause of the first section was evidence that this was not the case, since it would have been unnecessary if that was all that was intended. He held that a refusal on the part of the officers to extend the protection provided for by the first section, *e. g.,* if the jurors as a rule refused to do justice where the rights of a particular class of citizens were concerned and the State afforded no remedy, it was as much a denial of the equal protection of the law as if the State had enacted a statute that no verdict should be rendered in favor of that class of citizens.[51]

Mr. Beck declared that the bill was brought forward to

[49] Ibid., Appendix, pp. 46–50.
[50] Ibid., p. 322.
[51] Ibid., p. 334.

divert the attention of the people from the charges of corruption, class legislation, extravagance, etc., by the cry of Ku Klux and murder.[52]

Mr. Farnsworth, speaking of the bill, declared that if there was sanction in the Fourteenth Amendment for the United States to punish offences against the persons of citizens of any State, there was equal sanction for Congress to legislate as to their property also. He considered the history of the first section of the Amendment, and denied that the Amendment reported by Mr. Bingham, from the Committee on Reconstruction, February, 1866, was incorporated into that section, as was claimed by Mr. Bingham. He quoted from the speeches of Messrs. Hale, Hotchkiss, Davis and Conkling made at that time against it to show the opposition on the part of Republicans and their view of what its effect would be. He also quoted Senator Stewart as saying incidentally of it, since it was never considered in the Senate, that there was "another proposition of the Committee of Fifteen, which, if passed, will obviate the necessity of passing this, and obviate the necessity of any further Constitutional Amendment, and I think obviate the necessity of any more state Legislatures or conventions." He cited the fact that the Amendment, as proposed by Mr. Bingham in February, was postponed and never afterwards called up. Mr. Bingham here interjected that he himself had made the motion to postpone and that it was not called up from the fact that it was put in another form. Mr. Farnsworth then quoted from the speech of Mr. Stevens, when he reported the Amendment, April 30, 1866, the first section of which, with the exception of the first clause, was exactly the same as now in the Fourteenth Amendment, to show that its purpose was to correct unjust and partial legislation discriminating against the negro. He declared that they all knew, and especially those of them who were members of Congress when the Amendment was proposed, that it was proposed on account of the unjust and discriminating legislation of the Southern

[52] Ibid., p. 355.

States. He gave it as his opinion that no Democrat had charged at the time, as an argument against it, that it would confer such power as was now attempted to be exercised, but Mr. Garfield interrupted him to say that Mr. Shankling, of Kentucky, and Mr. Rogers, of New Jersey, had stated that it would have the effect of breaking down the barriers of state law and state authority. It was stated that Senators Hendricks, Doolittle, Davis, of Kentucky, and others who spoke against the Amendment, never claimed that it would confer upon Congress power to legislate in the manner now proposed. Senator Johnson, of Maryland, had opposed the second clause on the ground that he did not know what would be its effect.

Mr. Farnsworth admitted that he had voted for the Civil Rights Bill of 1866, but stated that many things had been done by Congress which could not be defended if done in peace, and added: "We passed laws, Mr. Speaker, and the country knows it, which we did not like to let go to the Supreme Court for adjudication. And I am telling no tales out of school. Since the adoption of this [Fourteenth] Amendment, because of scruples in regard to the constitutionality of the Civil Rights Bill we have reënacted it." He thought, however, there was no need for overstepping constitutional bounds at this time. He also denied that the fifth section of that Amendment gave authority for the bill, since he regarded the first section a "law unto itself," which could be executed by the Courts. The only legislation, in his opinion, that Congress could do was to enforce the provisions of the Constitution upon the laws of the States. He thought the question presented by the bill was whether the States should be obliterated and all power concentrated in the Central Government.[53]

Mr. Bingham, who drafted the first section of the Fourteenth Amendment with the exception of the first clause, followed Mr. Farnsworth with a very able speech. Probably more weight should be given the utterances of Mr. Bingham as to the interpretation of that section than to

[53] Ibid., Appendix, pp. 114–17.

those of any other, and we shall, therefore, give considerable attention to what he said on this occasion. It was his belief that the last three Amendments conferred powers upon Congress never before granted and that, under them, Congress could enact laws for the protection of the rights of citizens both as against the States and the individuals in the States.

Referring to the question of Mr. Farnsworth as to why he had changed the form of the Amendment which he reported in February to that of the first section of the Fourteenth Amendment, he replied that he would answer it and answer it truthfully. He stated that he had framed the Article as reported in February, and the first section of Article Fourteen, letter for letter and syllable for syllable. save the clause defining citizenship. He said that the section as it now stood in the Fourteenth Amendment was more comprehensive than it was in the form first presented in February, 1866; that it embraced all and more than did the first proposition. The fifth section gave the grant of power, and it was full and complete.

He then gave in full the Amendment as reported in February, 1866, and referred to the fact that the motion to lay it on the table, which was a test vote on its merits, failed—the motion being lost by a vote of 110 to 41; that he had consented to and voted for the motion to postpone its further consideration until the second Tuesday of April; that afterwards, in the joint Committee on Reconstruction, he had introduced the section as it now stood in the Constitution. The last clause of that section meant, he declared, that no State should deny to any one the equal protection of the Constitution of the United States, or any of the rights which it guaranteed to all men, nor should it (the State) deny to anyone any right secured to him by the laws and treaties of the United States or of such State. The first section was declared to be as comprehensive as "We will sell to no man, will not deny or delay to any man right or justice" of the Magna Charta. Mr. Bingham also quoted from a speech of Mr. Farnsworth in advocacy of

the Amendment when it was before Congress to show that the latter must have thought that it could be enforced.

He then proceeded to explain why he had changed the form of the Amendment as first introduced in February. He had taken counsel of Marshall in the hope that "the Amendment might be so framed that in all the hereafter it might be accepted by the historian of the American Constitution and her Magna Charta 'as the keystone of American liberty.'" The decision of Marshall in Barron *vs.* the Mayor and City Council of Baltimore (7 *Peters,* p. 250) induced him, he declared, to attempt to impose new limitations upon the power of the States by a constitutional Amendment. In this case the City had taken private property for public use, without compensation, and there was no redress for the wrong in the Supreme Court of the United States, since this Court held that the first eight Amendments were not limitations upon the power of the United States. Somewhat later, the same Court ruled that the Amendments did not extend to the States. This was in the Lessee of Livingstone *vs.* Moore et al. (7 *Peters,* p. 552). He (Bingham) said that Jefferson had properly described the first eight Amendments as the American Bill of Rights. He then mentioned the principal rights secured to the people by those Amendments, but only secured as against the United States and not against the States.

Mr. Bingham then stated that, while reëxamining the case of Barron, after his struggle with Congress in February, he had noted and apprehended as never before, certain words used by Marshall in that decision. He quoted the following words used by Marshall in reference to the first eight Amendments: "Had the framers of these Amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original Constitution, and have expressed that intention." He said he acted upon that suggestion and imitated the framers of the original Constitution. Just as they had said "No State shall emit bills of credit, pass any bill of attainder, *ex post facto* law, or law impairing the obliga-

tions of contracts," so had he said, in the first section of the Fourteenth Amendment that "No State shall make or enforce any law," etc., imitating them to the letter. He then added: "I hope the gentleman (Mr. Farnsworth) now knows why I changed the form of the Amendment of February, 1866."

He said that the privileges and immunities of citizens of the United States, as contradistinguished from citizens of the States, were chiefly defined in the first eight Amendments, and in order to show the scope and meaning of the first section of the Fourteenth Amendment, he gave these Amendments in full. The principal rights secured to the citizens by the first eight Amendments were these: freedom of religion, of speech, and of the press; the right peaceably to assemble, and to petition for redress of grievances; the right to keep and bear arms; the inviolability of their homes in times of peace, in that no soldier should be quartered in any house without the consent of the owner; their persons, houses, papers, and effects secured against unreasonable searches and seizures; not to be deprived of life, liberty, or property without due process of law; to have trial by jury; to be informed of the nature and cause of the accusations that might be made against them, and to be confronted with the witnesses against them; excessive bail not to be required, nor cruel and unusual punishments inflicted.

After giving the Amendments in full, Mr. Bingham said: "These eight Articles I have shown never were limitations upon the power of the States, until made so by the Fourteenth Amendment. The words of that Amendment, 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' are an express prohibition upon every State of the Union, which may be enforced under existing laws of Congress, and such other laws for their better enforcement as Congress may make."

He then referred to Mr. Shellabarger's reference to the

decision in the case of Corfield *vs.* Coryell (4 Wash. Cir. Ct. Rep'ts, p. 380), but said other and different privileges and immunities than these were secured by the Fourteenth Amendment, since this Amendment declared that no State should abridge the privileges and immunities of citizens of the United States, and that these privileges and immunities were defined in the first eight Amendments. Before the ratification of the Fourteenth Amendment, it was in the power of the States to deny to any citizens the right of trial by jury, and that it was done, he declared. Before that the States could and did, he asserted, abridge the freedom of the press. But since the ratification of that Amendment the States could not do these things nor could they send men to the penitentiary for teaching an Indian to read the Bible, as had been done in Georgia.

Under the amended Constitution Congress had the power, he asserted, to provide against the denial of rights by the States, whether the denial was in the form of acts of omission or of commission. He said that citizens had been denied trial by jury, had been deprived of property without compensation, had been restricted in the freedom of the press and of speech, and in the rights of conscience, and they had no remedy, but that Congress could, under the Fourteenth Amendment, provide by law against such abuses and such denials as these whether committed by individuals or by States. He said the Thirteenth, Fourteenth and Fifteenth Amendments were all negative, but that nevertheless new limitations were imposed upon the States by them, while, with each of them, there was coupled the grant of power to enforce them. He referred to the Enforcement Act of May preceding to show that Congress believed it had the power to enforce those Amendments, since an Act to enforce one of them made it possible to pass an Act to enforce the others. He declared that, by virtue of these Amendments, Congress could provide by law that no man should be tried for a criminal offence in any state court without a fair and impartial trial by jury, but said Congress did not possess that power before these Amendments be-

came a part of the Constitution. Congress could also provide that no one should be deprived of his property without compensation. This was also true with regard to the freedom of speech, the freedom of the press, the right peaceably to assemble, etc., since they were of the rights of citizens of the United States defined in the Constitution and guaranteed by the Fourteenth Amendment, which Congress was empowered to enforce. If Congress should enact penal laws for the protection of these rights, those violating them would have to answer for the crime, and not the States, he asserted, since the United States punished men, not States, for a violation of its laws.[54]

The most important and valuable part of his speech, we take it, was that giving the reason for his changing the form of the Amendment as reported in February to that of the first section of the Fourteenth Amendment—making it negative instead of affirmative. Of course this includes his statement of what he intended to accomplish by that section, what rights and privileges he thought he was putting beyond the power of the States to deny or abridge, and what limitations he intended to put upon the States as well as what powers were being conferred upon Congress by the first section of that Amendment. His statement that the first eight Amendments were made applicable to the States but corroborates that made by Senator Howard when the Amendment was before the Senate in May, 1866, and which statement no one questioned at the time.

Mr. Storm, of Pennsylvania, said that little attention was given to the first section when the Amendment was before the House, because the attention of the country was called to the question of changing the basis of representation. He furthermore declared that if the views now announced by those advocating the bill had been uttered when the Amendment was before Congress, it would never have been ratified, and added: "If the monstrous doctrine now set up as resulting from the provisions of that Fourteenth Amend-

[54] Ibid., Appendix, pp. 83–85.

ment had ever been hinted at that Amendment would have received an emphatic rejection at the hands of the people." He also stated that the first section was but a reënactment of the Civil Rights Bill through superabundant caution.[55] Mr. Storm seems to have stated the question fairly, and no doubt he was right in saying that had the people been informed of what was intended by the Amendment, they would have rejected it. But it is equally true that there were statements made by men in Congress at the time to show something of what was really meant by it, but these statements seem to have been lost sight of on account of the more stirring and exciting political questions of the time.

Mr. Lowe, of Kansas, said if the first section could only serve to abrogate or nullify the acts or legislation of the States, then it was of little practical use, since the laws of the States might be all right, yet the people be deprived of their rights. He maintained that it was the intention, taking the first and fifth sections together, to enable Congress to secure to citizens by Federal legislation the rights guaranteed.[56]

Mr. Rice, of Illinois, held that the first section was only a limitation upon the States, and not a grant of power to Congress. He criticised the bill on the ground that it gave no classification or enumeration of the rights and privileges sought to be protected by it. He stated that it could not be shown that there was a denial of the equal protection of the laws by the Constitution or laws of any State, and if there should be, such laws or provisions of the Constitution would be void, and that the remedy would be found in the courts, not in Congress.[57]

Mr. Biggs, of Delaware, quoted the *New York Evening Post,* a Republican paper, as saying that the bill was unconstitutional, and if enforced, would overthrow our whole system of Government, and create a centralized despotism.[58]

[55] Ibid., Appendix, p. 87.
[56] Ibid., p. 375.
[57] Ibid., p. 396.
[58] Ibid., p. 417.

Messrs. Bright, of Tennessee, and McHenry, of Kentucky, held views similar to those of Mr. Rice.[59]

Mr. Madison, in the forty-fifth number of the *Federalist,* says: "The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." Mr. Bingham quoted this passage from the *Federalist* in the debate on his February Amendment, says Mr. Garfield, and said: "These words of Madison are very significant. The fact is that Congress has never, by official enactment in all the past, attempted to enforce these rights of the people in any State of the Union." (39th Cong., p. 1093.) He is also quoted as saying that Congress did not possess the power at that time to enforce the citizens' right to life, liberty, and property in South Carolina after her state government should be recognized and her constitutional relations restored. Mr. Garfield also quoted Bingham's speech on Civil Rights Bill, March 9, 1866, to the same effect (p. 1291). The speeches of Shellabarger and Delano on this same bill (pp. 1291–94 and appendix, p. 158) were quoted to show that Congress did not possess the power to legislate in regard to life, liberty, and property. This was before the Fourteenth Amendment had become a part of the Constitution, and Mr. Garfield stated that the last three Amendments had enlarged the functions of Congress to some extent.

In discussing the first section of Article Fourteen of the Amendment, Mr. Garfield stated that it should be borne in mind that the debate on the pending bill would become historical, since it would be the earliest legislative construction given to that clause of the Amendment. "Not only the words which we put into law, but what shall be said here in the way of defining and interpreting the meaning of the clause, may go far to settle its interpretation and its value to the country hereafter." Mr Garfield then proceeded to give a brief account of the history of the first section, quot-

[59] Ibid.. pp 420 and 429.

ing from the speeches of Messrs. Higby, Hale, Hotchkiss, Conkling and Bingham on the Amendment proposed by Bingham in February to show the character of the Amendment. Mr. Higby favored it, whereas Messrs. Hale, Hotchkiss and Conkling opposed it. He stated that the first resolution was a plain, unambiguous proposition to empower Congress to legislate directly upon all citizens in regard to life, liberty and property. Mr. Garfield said it became evident, both to the members of the Senate and of the House, after this debate, that it could not command a two thirds vote of Congress, and that it was virtually withdrawn on this account. He also gave a brief account of the first section as introduced April 30, 1866, declaring that the interpretation given to it by Mr. Stevens was followed by almost every Republican who spoke on the measure, and that it was generally with scarcely an exception, spoken of as a limitation of the powers of the States to legislate unequally as to life and property. He said that no Republican had made any objection to this section similar to those made against the former resolution, but that many had expressed their regret that it was not sufficiently strong. He quoted from Bingham's speech to show that the latter thought that the State would have to deny the privileges or immunities of citizens before Congress would have the power to act.

He further asserted that it would not be denied, as a matter of history, that the first section of the Fourteenth Amendment received many Republican votes that the resolution of February could not have received.

He then proceeded to compare the two, placing them in juxtaposition, and declared that the rejected one would have granted the power to Congress to legislate directly for the protection of life, liberty, and property within the States, whereas the one adopted exerted its force directly upon the States, placing limitations upon them, and enabling Congress to enforce those limitations. They gave Congress plenary power over these subjects to the exclusion of the States, whereas the other merely limited, but did not oust, the jurisdiction of the States. Unless both the history and the lan-

guage of the clauses, he continued, be ignored, the force and effect of the rejected clause could not be given to the section as it stands in the Constitution; and Mr. Shellabarger had done this. Mr. Garfield considered the last clause of the first section of the Amendment as the most valuable of the section. He said it did not require the laws of the States to be perfect, but whether unwise or unjust, they must be equal in their provisions.

Speaking of the bill for the enforcement of the Amendment, he declared that its first section was wise and salutary, and clearly within the power of Congress. Furthermore, that if the state laws were just and equal on their face, but were not enforced, either by neglect or refusal, then Congress could, by virtue of the last clause of section one of the Fourteenth Amendment, provide for doing justice to those who were thus denied the equal protection of the laws. His objection was to the second section of the bill, and he stated that if it were so amended as not to assert the power of Congress to take jurisdiction until the equal protection was denied, and not, in any way, to assume the original jurisdiction of the rights of private persons and of property within the States, he would heartily support it. He was not opposed to a proper bill, he declared, but felt bound to enter his protest against a dangerous and unwarranted interpretation of the recent Amendments. Mr. Shellabarger inquired how the Enforcement Act of May, 1870, could be regarded as constitutional under his interpretation of the Amendment, since the Fifteenth Amendment was also a negation upon the power of the States. To this Mr. Garfield replied that the provision in the old Constitution in regard to election of Representatives, together with the Fifteenth Amendment, authorized it.[60] It seems that this reply was hardly sufficient, and one feels that Mr. Shellabarger's veiled suggestion of the illogical position of Mr. Garfield, after having voted for the Enforcement Act of 1870, was perfectly warranted.

Mr. Cox, of New York, took the position that the Amendment had to do only with the actions of the States, and since

[60] Ibid., Appendix, pp. 150–54.

no State had abridged the privileges of citizens, the bill was not a proper one.[61] Mr. Coburn, of Indiana, held that affirmative action or legislation on the part of the State was not necessary to authorize the bill, since the failure of the State to see to it that every one was protected in his rights was just as flagrant as a positive denial of protection.[62]

Mr. Holman, of Indiana, maintained that the fifth section of the Fourteenth Amendment had reference only to the second and third sections of that Amendment, and did not apply at all to the first section. He also contended that if the limitations or denials of the power of the States in the first section were to be construed as conferring legislative power on Congress, then there was no limit to the power of Congress in respect to the domestic affairs of the States. This was also manifest, he said, from the fact that the advocates of the bill did not seem to recognize any such limit and had not attempted to define the limit or boundary between federal and state jurisdiction.[63] Mr. Golladay, of Tennessee, took a position similar to that of Mr. Holman in regard to the effect and application of the fifth section, and declared that, if the powers claimed in debate were once conceded to Congress, there would be no further need of state constitutions, the Central Government becoming supreme in every imaginable case, from the pettiest police regulation to the loftiest questions of state.[64]

Mr. Dawes, of Massachusetts, who was a member of Congress when the Fourteenth Amendment was submitted to the States, said that the rights, privileges, and immunities sought to be protected by the bill were those which were found in the original Constitution, and in the Amendments, including the Thirteenth and Fifteenth Amendments, thus making the first section of Article Fourteen include all these rights and privileges. He enumerated the rights secured by the first eight Amendments and by the last three Amendments, thus leav-

[61] Ibid., p. 455.
[62] Ibid., p. 459.
[63] Ibid., Appendix, pp. 259–60.
[64] Ibid., Appendix, p. 160.

ing no room for doubt as to what he meant. He maintained that Congress had the power to guard, protect and enforce all the rights which he had enumerated, and that this could be done, either by giving any citizen, whose rights or privileges were denied or abridged, a civil remedy in the Federal Court for any damage sustained; or by the indictment and punishment of any offender who should "invade, trench upon, or otherwise impair any right, privilege, or immunity of any citizen."[65]

Mr. Wilson, of Indiana, held almost the same view as that of Mr. Dawes regarding the power of Congress to secure the rights and privileges of citizens, saying that the last clause of the first section of Article Fourteen was equivalent to "no State shall fail or refuse to provide for the equal protection of the laws to all persons within its jurisdiction." He also held that Congress was made the exclusive judge as to the necessity for congressional legislation. The substance of his views are as follows:

1. The last clause of section one meant that equal protection should be provided.

2. The failure to enact proper laws or to enforce them was a denial of such equal protection.

3. Congress possessed the power to enact laws to secure equal protection where such was the case.

4. Congress was the sole judge as to the necessity of legislation as well as to the remedies necessary to be applied.[66]

Mr. Tyner, of Indiana, said that the obligation imposed on Congress to see that equal protection was not denied to any one was all the justification he wanted for supporting the bill.[67] Mr. Lansing, of New York, believed the grants of power given by the recent constitutional Amendment were in vain unless Congress could carry them into effect by appropriate legislation.[68] Mr. Willard, of Vermont, held that the Amendment was intended only to secure an equality of rights

[65] Ibid., pp. 475–77.
[66] Ibid., pp. 481–83.
[67] Ibid., p. 487.
[68] Ibid., p. 487.

and immunities, and that only a denial of that equality could be made punishable by United States laws, though he believed that anything secured to citizens by that Amendment could be enforced by the laws of the United States. He admitted that the difference between himself and some of the others was as to the meaning of the Amendment, and not as to the power which might be used to enforce it. He considered the rights and privileges mentioned in the case of Corfield *vs.* Coryell and those enumerated in the Civil Rights Bill of 1866 to be those of citizens of the United States, and so could be secured by Congress. He did not think the Amendment accomplished very much, however, and stated that the Fourteenth Amendment did not modify or change the previous Constitution in any way.[69]

Mr. Burchard, of Illinois, said he believed the law of May, 1870, secured all the rights and privileges secured by the Constitution, but was willing to vote for a bill to give them greater efficiency if those enactments—the bill of 1870 and Civil Rights Bill of 1866 which was reënacted by section eighteen of the Act of 1870—were not sufficient. He held that the clause of the Amendment defining citizenship did not enlarge the rights and privileges belonging to citizens, but merely increased the number of those who might enjoy them. He stated that some of these privileges and immunities were enumerated in the Civil Rights Bill passed by the same Congress which proposed the Amendment. He did not see how the application of the first eight Amendments to the States could be held to confer upon the Federal Courts the right to punish for murder or other offenses against life and person. He held that the deprivation of any of the rights or the denial of the equal protection of the laws must be by the State through its officers, nor was it ever enjoined on the State, in his opinion, to provide protection, but that it should not discriminate in its protection, either by the legislative, executive, or judicial departments. He said the debates on the Amendment showed that it was not intended to confer on Congress the power

[69] Ibid., Appendix, pp. 188–89.

to pass affirmative legislation to enforce its provision upon private individuals. He thought, however, that the General Government had the power to punish state officers who willfully and wrongfully made or enforced unconstitutional laws of the State or who neglected the duties enforced upon them by the Constitution of the United States. He even thought that the attempts of individuals to prevent such officers from performing their duties could be punished by the United States.[70]

Mr. Poland, of Vermont, who was a member of the Senate when the Amendment was proposed, said he did not believe it gave Congress the power to go into the States and legislate for the punishment of ordinary offences against persons and property, this power being left with the States, and that even if the States should fail to punish a crime committed within its borders, Congress could not provide a law for punishing it. But he held that if a State denied the equal protection of the laws, or if proper laws were not enforced, or if any one attempted to prevent the officers from carrying out the laws, then Congress could provide for the punishment of such an offence. He approved of Mr. Farnsworth's general proposition in regard to the powers of Congress under the Constitution.[71] He, however, as well as Messrs. Farnsworth, Garfield and others, who contended that Congress did not have the power to enact affirmative legislation applicable to individuals, must have thought that the bill did not do this, for they voted for it. In fact Mr. Garfield's objection was not to the first section, but to the second, and, as it was amended in some respects, he supported it.[72]

The bill, after a debate of nine days, on four of which evening sessions were held, passed the House, April 6, 1871, by a strict party vote of one hundred and eighteen to ninety-one, with only eighteen not voting. Of the one

[70] Ibid., Appendix, pp. 313–15.
[71] Ibid., p. 514.
[72] Ibid., p. 518. The Democrats had voted, July 11, 1870, and again at this session, said Mr. Shellabarger, that the Fourteenth Amendment was not a part of the Constitution. Thirty-two had so voted in 1870, and seventy-five in 1871.

hundred and eighteen voting for the bill, fifteen, some of whom were the strongest men in the Republican party, had been members of Congress when the Fourteenth Amendment was proposed, Messrs. Dawes, Bingham, Shellabarger and Garfield being among the number. Mr. Blaine was speaker, and so did not vote, though no doubt he was in favor of the bill. Two others who were members of the Thirty-ninth Congress were absent, but were probably in favor of the bill.[73]

The Senate had been debating a resolution introduced by Mr. Sherman, directing the Committee on the Judiciary to report a bill for the suppression of violence in the South, and in an indirect way the question of the power of Congress to enact such legislation was involved. Speaking on this topic, April 3, 1871, Senator Blair, of Maryland, said that the Fourteenth Amendment as claimed by its advocates at the time it was proposed did not confer citizenship, but merely defined it as it had existed from the beginning. He cited the debates which took place on it to show that the purpose of the first section was to prevent the repeal of the Civil Rights Bill of 1866, and that both the Civil Rights Bill and the Fourteenth Amendment were directed against discriminating state laws. He maintained that the claim of those who advocated the proposed action was in effect that the Amendment had abolished the state governments, permitting them to subsist by sufferance only.[74]

Mr. Morton, of Indiana, speaking the next day on the same subject, declared that the last clause of the first section made a failure to secure the equal protection of the laws equivalent to a denial, whether this failure was willful or merely the result of inability, and was, in fact, the same as if it read: "Every person in the United States shall be entitled to the equal protection of the laws." It was thus an affirmative provision by its nature, and not simply a negative on the power of the States. He said that the Government could act only upon individuals, and not upon

[73] Ibid., p. 522.
[74] Ibid., Appendix, p. 117.

States, so that any legislation that Congress might enact must operate upon individuals. This principle was recognized by Congress, he continued, in the act passed the year previous for the enforcement of the Fifteenth Amendment, and since the Fourteenth Amendment was in form similar to the Fifteenth, the same principle applied here.[75]

Mr. Frelinghuysen, of New Jersey, declared that the change wrought in the fundamental law by the Fourteenth Amendment was a most important one, and that there was danger, if its words were followed, that the change would be carried too far for the real interests of the country. He declared that it secured much more than "equality" between whites and blacks, and quoted from the decision of the Circuit Court of the United States for the district of Louisiana, June, 1870 (1 Abbott, p. 338, Slaughter House Cases) to show that the Court held that the privileges and immunities of all citizens should be absolutely unabridged and unimpaired. The Court said that the main object may have been to remedy one particular phase of social and political wrong, but that it bore a broader meaning and reached social evils never before prohibited by constitutional enactment, and that it was to be presumed that people knew what they were doing when they gave their *imprimatur* to it, and meant to decree what had, in fact, been decreed. Mr. Frelinghuysen regarded the "pursuit of happiness" as the most comprehensive privilege of the citizen. He said the privileges and immunities of American citizens were to be found in the Declaration of Independence, and that they were further defined in Corfield *vs.* Coryell. He, like Mr. Morton, said that the United States could deal only with individuals and not with States, and so could deal only with offenders who violated these privileges, and not with the States or their officials, to compel proper legislation or enforcement. He did not think it expedient to carry the enforcement of the Amendment to the extent of making the criminal code of the United States include all offenses that affect life, liberty and property,

[75] Ibid., Appendix, p. 251.

since this would make it too comprehensive, though he thought that it would be constitutional to do so, but not expedient or proper at that time.[76]

Mr. Pratt, of Indiana, regarded the Bill of 1866 as a proper one under the Thirteenth Amendment, and held that the means employed to effect the deprivation of the rights secured by the bill, might in law be an assault and battery, or mere misdemeanors ordinarily punishable exclusively in the state courts, but they became offenses against the United States if they related to the class of persons referred to in the Amendment and whose rights were intended to be secured by the Civil Rights Bill. He held also that the provisions of the Fourteenth Amendment were more than limitations upon the States, but that they were positive guarantees by the United States that the privileges and immunities referred to therein as well as the equal protection of the laws should be enjoyed. He said that any legislation that was necessary to secure the enjoyment of the civil and political rights secured by the Fourteenth and Fifteenth Amendments, without let, hindrance, or molestation, was constitutional and that the specific power to legislate was granted. He declared that the negroes could not only contract, hold property, sue, give evidence, sit upon juries, but were eligible to every office, judicial, legislative, or executive, subject to no disability except such as crime imposes. He held views similar to those expressed by Messrs. Morton and Frelinghuysen as to whom the legislation of Congress should apply. He cited the act of May, 1870, as a precedent.[77]

The bill as passed by the House was referred to the Judiciary Committee of the Senate, Friday, April 7, 1871, and reported back the Monday following, but not considered until the next day, April 11. Mr. Stockton, of New Jersey, took the position that the Enforcement Bill was unconstitutional in that Congress could not authorize the President or any one to deprive a person of life, liberty,

[76] Ibid., pp. 499–501.
[77] Ibid., pp. 504–6.

or property without due process of law, or put him twice in jeopardy for the same offense. The Fourteenth Amendment did not authorize the violation of the absolute and express restrictions contained in the Constitution, he declared, because it prohibited the States from doing what Congress had always been prohibited from doing. The construction of the Amendment necessary to make the Enforcement Bill constitutional, he continued, would be that because no State could deny any of the privileges of citizens, Congress might; "or, in other words, the denial of the power to a State confers it on Congress." The general statements made in his speech are sufficient, it seems, to warrant the statement that he thought the Amendment had made the first eight Amendments applicable to the States—or at least the Fifth Amendment. In referring to the latter, he said: "It is manifestly absurd to call this a grant of power to the States. This was a prohibition to the United States, as the Fourteenth Amendment is to the States, and the power to enforce was a matter of course." In closing, he said: "Mr. President, I lay my hands on this Bill of Rights, and, in the name of my constituents, I 'do claim, demand, and insist upon all and singular the premises as their undoubted rights and liberties'; the true, ancient and indubitable rights of the people of this country." [78]

Mr. Trumbull, discussing the bill, maintained that the Amendment had not extended the rights and privileges of citizenship one iota, and that the National Government was not founded for the purpose of protecting the individual in his rights of person and property. At this point, Mr. Carpenter, of Wisconsin, interjected that he understood that the Fourteenth Amendment had wrought that very change, and that it was "now put in that aspect and does protect them." To this Mr. Trumbull replied: "Then it would be an annihilation entirely of the States. Such is not the Fourteenth Amendment. The States were, and are now, the depositories of the rights of the individual

[78] Ibid., pp. 572-74.

against encroachment." He had no objection, he declared, to a law which would protect a person against "any laws that deprive him of life, liberty, or property, except by the judgment of his peers or the law of the land." [79]

The bill passed the Senate, with amendments, on April 14, 1871, by a vote of forty-five to nineteen,[80] Trumbull and Schurz voting with the Democrats. The final vote in the House, April 19, was ninety-three to seventy-four, with sixty-three absentees,[81] while in the Senate it was thirty-six to thirteen with twenty-one absentees.[82]

The action of the special session of the Forty-second Congress on the above measure is very important as to the interpretation of the Fourteenth Amendment by the legislative department, and special weight must be given to the declarations of those who were members of Congress when that Amendment was proposed. Mr. Garfield's statement that the interpretation put upon that Amendment by Congress would become historical and of great importance in determining its future interpretation and value to the country has not been accepted by the Courts, but he was correct so far as the historical and political student is concerned, for the debates on this bill furnish the best evidence and material, except the debates on the Amendment itself, as to what was really intended by the Amendment. While this bill did not go to the extent to which Mr. Sumner and others would have liked, nevertheless it involved the important and fundamental fact that Congress thought and declared, both by the debates and by the bill itself, that it was given affirmative power of legislation by the Fourteenth Amendment. Without this principle, the later Civil Rights Bill would never have been passed, and although the latter went further in declaring some of the specific rights and immunities, the principle was the same, and so far as constitutional power is concerned, there was no difference.

This was the status of affairs when Congress assembled

[79] Ibid., pp. 576–79.
[80] Ibid., p. 709.
[81] Ibid., p. 808.
[82] Ibid., p. 831.

for its regular session in December, 1871. Mr. Sumner had been waiting for an opportunity to get his Civil Rights Bill before the Senate, and when the Amnesty Bill, which passed the House, was before the Senate, he moved it as an amendment to that bill December 20, 1871. This was the same bill which had been adversely reported in 1870 and 1871. He maintained that hotels, public conveyances and schools were legal institutions, and should be opened equally to all. The first section of his amendment to the Amnesty Bill provided that all, without distinction of race, color, or previous condition of servitude, should be entitled to an equal and impartial enjoyment of any accommodation or privilege furnished by common carriers, innkeepers, owners, managers, or lessees of theaters or the places of public amusement, public school officials (the schools being either supported or authorized by law), trustees and officers of churches, cemetery associations, and benevolent institutions, incorporated by national or state authority. The next section provided penalties for the violation of the above section, the one aggrieved to receive $500, and the one offending also to be subject to a fine of not less than $500 nor more than $1,000, and imprisoned not less than thirty days nor more than one year. The third section made sections three, four, five, seven and ten, of the Civil Rights Bill of April 9, 1866, a part of this bill. The fourth section provided that no one should be disqualified from jury service in any court by reason of race, color, or previous condition of servitude. Any official who should exclude or fail to summon any person for that reason was made subject to a fine of not less than $1,000 nor more than $5,000. The bill also provided that every law, statute, regulation, or custom which was inconsistent with it or which discriminated in any way by the use of the word "white," was thereby repealed and annulled.[83]

Speaking of this amendment of Mr. Sumner's the next day, Mr. Sawyer, one of the Senators from South Carolina, stated that as long as the Constitution remained as it then

[83] Cong. Record, 42d Cong., 2d Sess., p. 244.

was, every citizen was entitled to the same rights and privileges as every other citizen. He did not approve, however, of the bill being tacked on to the Amnesty Bill.[84] He reasserted his position when the measure was again before the Senate after the holidays, on January 22, 1872, stating that Sumner's bill was for securing more thoroughly to the negroes their constitutional rights.[85]

Mr. Thurman, one of the most prominent members of the minority and later Vice-President of the United States, declared that the bill was unconstitutional from the fact that the States had neither made nor enforced any law depriving any one of their privileges, and that Congress could not act until a State had done one or the other.[86] Only a week before this time, January 15, 1872, Mr. Sumner had stated that this bill was on the same footing as the Civil Rights Bill, being but the complement of that bill. Without this complementary bill, the former was imperfect, he declared.[87]

Mr. Morton, in reply to his colleague, Mr. Thurman, took the position that the bill was constitutional. He pointed out, furthermore, that Mr. Thurman had not denied that the privileges enumerated in the bill belonged to citizens of the United States, but only that Congress was powerless to interfere unless a State had attempted by legislation, or by the enforcement of some principle of the common law, to deny to some one the exercise and enjoyment of those privileges. In reply to this, Mr. Thurman contended that the Federal Government could not interfere at all until the denial or abridgment of the privilege had taken place. He said, however, that Congress might pass a law in anticipation of such denial or abridgment, but that it would remain wholly suspended in its operation until the case provided for in the Constitution had happened. Mr. Morton said that by the tacit admission that the privileges stated in the bill were privileges of citizens of the United States as such, Mr.

[84] Ibid., p. 273.
[85] Ibid., p. 488.
[86] Ibid., p. 496.
[87] Ibid., p. 383.

Thurman had given up his whole argument. Continuing his argument he added: "If the Constitution of the United States confers a right, the enforcement or protection of that right belongs to the Government of the United States. Will that position be denied? The Senator (Mr. Thurman) will not deny that wherever there is a right, a privilege, or an immunity that flows from the Constitution of the United States, it is within the province of the Government of the United States to protect the enjoyment of that right. If the things intended to be secured by this bill flow from United States citizenship, if a man has them because he is a citizen of the United States, from that fact and from that principle of law, then it follows that the protection of those privileges belongs to the Government of the United States. The conclusion cannot be resisted for a moment." Mr. Morton furthermore said that Mr. Thurman seemed to be imbued with the idea that the Fourteenth Amendment had given new privileges and immunities to citizens of the United States, which was not the case, for it merely declared who should be citizens, and that no State should abridge or deny the privileges or immunities of citizens which had existed before. Mr. Thurman thought that the proper way was for the case to be brought before the Courts when any one claimed that he was deprived of some privilege or immunity, since the Courts were empowered to declare null and void any law or act which was in violation of the Constitution. If Congress had authority to legislate on any subject that affected the privileges, immunities, life, liberty, or property of citizens, continued Mr. Thurman, then all local self-government was at an end, since the Federal Government would swallow up the state governments, and added: "I protest against any such interpretation."[88]

Mr. Lot M. Morrill, of Maine, who, it will be remembered, was charged with violating his pledge at the time Mr. Stockton, of New Jersey, was unseated in order to secure the passage of the Civil Rights Bill over the President's veto, opposed the bill on the ground that the Federal Government

[88] Ibid., pp. 524–27.

had no right to take cognizance of matters of education, worship, amusement, recreation, etc., which entered so essentially into the private life of the people. "I maintain," he declared, "that the bill of the Senator from Massachusetts clearly and manifestly undertakes to regulate these personal, social, religious, domiciliary rights of the people of the States; that it is without warrant in the Constitution." These matters belonged exclusively to the States was his opinion.[89] On the same day, but after Mr. Sumner had replied to his speech, Mr. Morrill said that the Judiciary Committee had reported the bill adversely on constitutional grounds, but modified this when Mr. Edmunds stated that his understanding was that it was because it was deemed unnecessary. No written report was made, and Senators may have voted against it, for different reasons according to the statement of Mr. Edmunds.[90]

Mr. Carpenter, of Wisconsin, one of the ablest men in the Senate, declared that he doubted whether Congress could legislate as to churches, being prohibited from doing so by the First Amendment. He was also of the opinion that Congress could not legislate as to jurors in state courts, but that the Federal Courts could not refuse to receive negro jurors on account of race or color. The significant part of his speech, however, is the following declaration: "There is no provision of the Constitution, that I am aware of, except in the Fourteenth Amendment, which prevents a State from passing a law that no colored citizen shall be admitted to practice law, or be allowed to preach the gospel, or to teach in the schools, or to embark in any other honorable vocation or pursuit of life. Up to the adoption of that Amendment, it was in the power of the States, subject only to their own Constitutions to say what persons should participate in the various pursuits of life." He also took the position that negroes could not legally be excluded from the common schools supported by public taxation, and ap-

[89] Ibid., Appendix, pp. 1–5.
[90] Ibid., p. 731.

proved the main purposes of Sumner's bill with the exceptions noted above.[91]

Mr. Davis, of Kentucky, one of the bitterest opponents of the Radicals, and himself an extremist, admitted Mr. Carpenter's statement as to permitting negroes to practice law, etc., but held that the proper remedy was to be found in the Courts. He held of course that Sumner's bill was unconstitutional.[92]

Mr. Norwood, of Georgia, on February 5, 1872, declared that section five of the bill would repeal all laws of the States which discriminated as between the races, and that Sumner, who had been professor of law and in the Senate for twenty years, knew the force and effect of the words in that section. As to the effect of the bill, he said: "It is nothing more nor less than this: that in any and every State where there is a statute or a law, whether it be statute or not, which inhibits marriages between whites and blacks, this section strikes that statute or that law to the ground. Every such statute on those books [of the State], from the time this bill, if constitutional, is passed, will cease to be in force; it will be absolutely void by reason of the predominance of acts of Congress over any state legislation. Can there be any doubt of this? I have read this clause carefully; I have called the attention of several Senators to this provision, and I have met with no one yet who does not agree with me that the effect of passing this law would abolish every state law which inhibits marriage between whites and blacks." [93] Mr. Norwood, however, did not think the bill constitutional, but raised this objection to it anyway. Mr. Sumner at no time contradicted the statement made by Mr. Norwood as to the effect of his bill on the marriage laws of the States.

Mr. Morton, of Indiana, thought that section four of Mr. Sumner's bill, which had been omitted in the substitute offered by Mr. Carpenter, was a proper subject for legislation by Congress. He admitted that the States had the right to

[91] Ibid., pp. 760–63.
[92] Ibid., p. 764.
[93] Ibid., p. 819.

fix the general qualifications for jurors, but denied that they could, under the Fourteenth Amendment, exclude any one from the jury on account of race or color. He placed the right to be a juror on the same ground as that to be a witness. Mr. Carpenter regarded the right to be a juror as a political right, and not an inherent privilege like testifying, for if it were, then women could be jurors since they were allowed to be witnesses. He stated, however, that he would vote for the section although believing it unconstitutional.[94]

Mr. Thurman, to whom reference has already been made, practically said, February 6, 1872, that the privileges and immunities of which citizens of the United States could not be deprived were to be found in the Constitution. He then enumerated those in the original Constitution, such as *habeas corpus,* bill of attainder, etc., after which he quoted the first eight Amendments as recognizing the other rights and privileges which belonged to citizens. He declared that the power of the Government was commensurate with the rights of the citizens of the United States, and that the Government had the power to protect those rights in the mode provided by the Constitution, namely, by the judicial power. He said there was no provision in the Constitution which gave any one a right to sit on a jury in a state court, nor was there any power there to compel all children to attend the same school, since there could be separate schools for the races or sexes.[95] The significant thing in his speech was, what was the virtual statement that the first eight Amendments were made applicable to the States by the Fourteenth Amendment. This was the first direct, or what may be considered a direct, statement of that belief by one of the minority. Mr. Sherman, who usually took a very active part and whose influence was great, thought that the rights enumerated in Mr. Sumner's Bill were to be found in the common law and in the Constitution. He took issue with Mr. Morrill, who had declared that the Fourteenth Amend-

[94] Ibid., pp. 820–26.
[95] Ibid., Appendix, pp. 25–7.

ment had not enlarged the scope of the old Constitution. Even the first Amendments to the Constitution did not contain all the rights of citizens, declared Mr. Sherman, for the common law was the great reservoir of those rights. All those rights, found in the Constitution and in the common law, were guaranteed by the Fourteenth Amendment, was his contention. To prevent any one from going to common schools, from visiting an inn, from enjoying the rights of a common carrier, etc., was in his opinion, an abridgment of his rights as secured by section one of Article Fourteen.

He answered the statement of Mr. Morrill that the Fourteenth Amendment was but a reiteration of section two of Article Four of the Constitution by saying that the old provision could not be enforced, while section five of Article Fourteen expressly gave the power to enforce it. Mr. Sherman also held that the right of trial by jury was a right which could not be taken away, since the adoption of that Amendment.[96] In other words, he thought that the first eight Amendments were made binding on the States by the adoption of the Fourteenth Amendment. It may be remarked here that Mr. Sherman had taken an active part when that Amendment was before Congress.

Mr. Morton stated, shortly after Mr. Thurman's speech, that "protection," as used in the last clause of the first section of Article Fourteen, meant or was equivalent to the equal "benefit of the law," and that it was intended to promote equality in the States and referred to the laws of the States. The object of the Amendment was, he declared, "to strike at all class legislation—to provide that laws must be general in their effects."[97]

[96] Ibid., pp. 843-45. Mr. Carpenter reminded Mr. Sherman that the right to trial by jury as guaranteed by the Fifth Amendment applied only to Federal Courts, but Mr. Sherman replied: "Yes, sir; the right to be tried by an impartial jury is one of the privileges included in the Fourteenth Amendment; and no State can deprive any one by a state law of this impartial trial by jury. . . . Whatever distinctions were drawn before the adoption of the recent Amendments, here is this last voice of the public will which we are bound to obey, which declares that every man shall have the protection of this immunity and privilege."

[97] Ibid., p. 847.

Mr. Ferry, of Connecticut, opposed the bill because he thought it would be fatal to the Amnesty Bill, to which it had been offered as an amendment, and which he was very anxious to have passed. He seemed to doubt its constitutionality, however, and was opposed to it for other reasons, for, in his judgment, it struck "down the very bulwarks of civil rights throughout the whole country. It t kes away the foundation principle upon which our Federal system rests by striking at the principle of local self-government the most vital blow that it has received since the foundation of the Government."[98]

Mr. Norwood, of Georgia, called Mr. Sumner's attention to the effect of his bill on laws which inhibited the marriage of persons of different races. Mr. Sumner admitted that it would annul those laws and all laws which discriminated on account of color, such laws being offshoots of slavery, and not proper to remain.[99]

Mr. Ferry reiterated his objections to the bill, February 8, declaring that it was "fatal to the rights of the people of the States as citizens of the States," and that it tended "directly to consolidate all authority in this nation into one imperial government." Upon the theory that it was necessary to give all citizens the equal protection of the laws and to secure them in the right of life, liberty and property, he declared that Congress could "go into every city, town, borough and hamlet in the United States and enact ordinary police laws, and put a Federal officer to keep guard over the streets."[100]

Mr. Edmunds, of Vermont, who had entered the Senate as the successor of Mr. Foote, in time to hear the debate on the Fourteenth Amendment, and to vote for it, took the position that the Amendment had been adopted for a purpose, and that this purpose was to broaden in some way the national rights of citizens. He asked those who opposed the inter-

[98] Ibid., p. 870.
[99] Ibid., p. 872.
[100] Ibid., pp. 892–93.

pretation of the Amendment as given by advocates of the bill to tell why it had been adopted.[101]

The vote on Mr. Sumner's bill, as an amendment to the Amnesty Bill, was twenty-eight to twenty-eight, February 9. The Vice-President voted for it, thus attaching the amendment to the bill. The Amnesty Bill as thus amended did not secure the requisite two thirds, the vote being thirty-three to nineteen.[102]

When another Amnesty Bill was before the Senate in the May following, Mr. Sumner came forward with his bill as an amendment. Mr. Sherman, speaking on the subject, May 8, 1872, stated that the amendment offered by Mr. Sumner did not assert or affirm a right which the negroes did not already possess, but that it merely gave additional remedy. The rights were given by the Constitution, and especially by the Fourteenth Amendment, but were denied in many localities,

[101] Ibid., pp. 899–900. Among other things he said: "Why, sir, if the Fourteenth Amendment to the Constitution was adopted for a purpose, and our friends on the other side have always asserted that it was, and they thought a very improper purpose, one which would almost, if not quite, justify a resort to arms to repel it certainly contained in it something that made an advance upon the old Constitution as it respects the equality of the rights of citizens. It was not mere waste-paper; it was not even 'the sounding and glittering generality' that the Declaration of Independence is said to be; but it was a charter of rights, which was to secure to citizens that equality of protection under the law, that equality of right and privilege which belongs to citizenship in its truest and highest sense." After referring to the Civil Rights Bill of 1866, he asked: "What have we done since? Will any one rise in his place and say that in the place of that, we have taken the pains by a solemn act of three fourths of the States to adopt the Fourteenth Amendment without any reason for it, without any occasion for it, without its being in fact as it was intentionally designed, calculated and effective to accomplish a change in the National Constitution, and to broaden in some degree and in some way the national rights of citizens, and to protect to some extent and under some power the rights which citizens ought to be protected in? No man can deny it. What, then, is it that we have done? If we have not by the Fourteenth Amendment accomplished something in declaring that the privileges and immunities of citizens shall be sacred everywhere, and the national power shall protect them, what have we done? If it is not a privilege and immunity of a citizen, being otherwise equal and otherwise qualified, to stand on an equality irrespective of color, what is a privilege and immunity of citizenship upon which you can stand?"

[102] Ibid., pp. 919–29.

he declared. He referred to the decision of the Supreme Court of Ohio, which had been made a day or two before in which the law of Ohio providing for separate schools was held to be constitutional. He thought the Court was right, but he did not say that negroes could be kept out of the schools for the whites, since, he said, separate schools might be had in the South as a matter of convenience and assented to by both races.[103]

Mr. Boreman, of West Virginia, opposed the Amendment of Mr. Sumner on grounds of expediency, and not because it was unconstitutional, declaring that he thought it inexpedient to incorporate such propositions into the Federal law.[104]

Mr. Blair, of Missouri, an opponent of Mr. Sumner's entire bill offered an amendment to permit each city, county, or State to decide, at an election to be held for that purpose, whether it should have mixed or separate schools. This proposition was defeated by a vote of thirty to twenty-three.[105]

Mr. Howe, while denying the contention of Mr. Blair, that the Federal Government was a centralized oligarchy, stated that legislative power, which Congress had not exercised before, had been conferred upon Congress by the last three Amendments, and that one of them (the Fourteenth) gave the authority to pass the Sumner or Civil Rights Bill.[106]

Although the Civil Rights Bill was tacked on to the Amnesty Bill by the casting vote of the President of the Senate, we have already noted that it then received thirty-three affirmative to nineteen negative votes, clearly demonstrating that a great majority thought that it was constitutional. Among those who voted for, or advocated the bill, were the following, who had participated in the submission of the Fourteenth Amendment by Congress: Messrs. Anthony, Conkling, Ferry of Michigan, Morrill of Vermont,

[103] Ibid., pp. 3192–93.
[104] Ibid., p. 3195.
[105] Ibid., pp. 3258–62.
[106] Ibid., p. 3259.

Pomeroy, Sherman, Sumner, Windom, Wilson, Edmunds, Howe, Nye, Sprague, Stewart and Chandler. It is to be remembered, however, that three of those who were active in the passage of the Amendment opposed the Bill of Sumner, viz., Messrs. Trumbull, Carpenter and Morrill, though Mr. Carpenter's only constitutional objection was to that part of the bill relating to the church and jurors.

Although the bill was not considered in the House, there was introduced a resolution by Mr. Hereford, of West Virginia, March 11, 1872, to test the sentiment of the House. The resolution declared that it would be contrary to the Constitution and a usurpation of power for Congress to force mixed schools upon the States or to pass any law interfering with churches, public carriers, or innkeepers, such subjects of legislation belonging exclusively to the States. The resolution was defeated by a vote of sixty-one to eighty-four. Among those voting against the resolution were Messrs. Bingham, Dawes, Garfield, Hoar and Poland.[107]

Although the legislation attempted by the Forty-second Congress, and the debates thereon, furnish very important and valuable evidence as to the construction put upon the Fourteenth Amendment by Congress, and especially by those members who had taken part in its enactment, that of the Forty-third Congress is equally, if not more, important.

Soon after the assembling of the Forty-third Congress, Mr. Benjamin Butler, of Massachusetts, reported from the House Judiciary Committee, of which he was chairman, the so-called Civil Rights Bill known as H. R. No. 796. This bill provided that no person or corporation should make any distinction as to the admission or accommodation of any citizen of the United States on account of race, color, or previous condition of servitude, to any public inn, place of amusement, or entertainment for which a license was required, stage-coach, railroad, or other public carrier, cemetery, benevolent institution, or public school wholly or

[107] Ibid., p. 1582.

partly supported by taxation or by endowment for public use.[108] Speaking of this bill the next day, December 19, 1873, Mr. Butler declared that it gave no rights which did not already exist, and that the laws of the States which attempted to deprive any one of these rights were unconstitutional.[109]

Mr. Beck, of Kentucky, on the same day quoted the first ten Amendments in full, and added: "These are the rights of a citizen of the United States which the Fourteenth Amendment declares no State shall abridge. The Supreme Court recognizes them, and goes on to enumerate a few others of the same general character in the case I quoted from. They are now secured to white and black alike; they were not, under the Dred Scott decision, till the Fourteenth Amendment became a part of the Constitution."[110] This is a clear statement as to the effect of the Fourteenth Amendment.

Mr. Roger Q. Mills, of Texas, who later represented his State in the Senate, practically agreed with Mr. Beck, of Kentucky, for in a speech, January 5, 1874, he took the position that the Fourteenth Amendment protected the citizens only in the rights and privileges which were conferred by the Constitution. These rights, he declared, were fundamental, fixed and absolute, among which were those found in the first Amendments to the Constitution. Those rights and privileges which were conferrred by the State, and without which they would not exist, were not fundamental, he declared, and were not, therefore, included among the rights guaranteed by the Fourteenth Amendment. The right to go to school was not fundamental, for schools could be closed entirely without abridging the rights of any citizen of the United States, which could not be done if it were a right conferred by the Constitution.[111]

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[108] Forty-third Congress, 1st Sess., p. 318.
[109] Ibid., p. 340.
[110] Ibid., p. 343.
[111] Ibid., pp. 384-85. It seems worth while to quote a part of Mr. Mills' speech. It is as follows: "From the authority of adjudged cases it is clear that the privileges and immunities mentioned in

The following day Mr. Lawrence, of Ohio, also made a very significant speech on the bill. After stating that it was supplemental to the Civil Rights Bill of 1866, he quoted the first section of the Fourteenth Amendment with the following comment: "The object of this provision is to make all men equal before the law. If a State permits inequality in rights to be created or meted out by citizens or corporations enjoying its protection, it denies the equal protection of the laws." His interpretation of the "equal protection" which was to be secured to every citizen was thus contrary to the restricted meaning which was given to it by those who opposed Federal action as well as to the construction which was later put upon it by the Supreme Court of the United States. His position cannot be better stated than by his own words when he declared: "What the State permits by its sanction, having the power to prohibit, it does in effect itself." Whatever objection may be made to the legal soundness of this dictum or to its expediency, it cannot be denied that it is a cogent, forceful, and reasonable argument. He contended, and with considerable show of reason, it would seem, that the word "deny" included omission as well as commission. The State was just as reprehensible, in his opinion, in failing to enforce

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the Fourteenth Amendment are only such as are conferred by the Constitution itself as the supreme law over all; that they are fundamental, such as lie beneath the very foundation of Government; that they are fixed and absolute; and any rights, privileges and immunities conferred by the State, and without whose grant they could not be enjoyed, are not fundamental, and upon which its structure is built, neither are they uniform, but their differences are as great as the numbers of the States and as changeable as the laws of the State. The privileges of the Constitution are fixed as the Constitution, which is organic law established to secure fundamental principles. These privileges are, among others, the right to the enjoyment of life, liberty, property, and the pursuit of happiness; the right of peaceable assemblage for all purposes not criminal; freedom of speech, of the press, and of religion; immunity of one's person, home, and papers against unlawful seizure and search; trial by jury when held to answer for crime; to be informed of the accusation, and confronted with the accusers; immunity from excessive bail, excessive fines, and cruel and unusual punishments, and many others, all of which are recognized and guaranteed in the Constitution."

or secure equal rights, as in itself denying those rights, for the failure to secure was in itself a denial.

He referred to the debates on the Civil Rights Bill of 1866 with frequent quotations, to show the doubt felt as to the constitutionality of that bill, both among Democrats and Republicans, and the evident purpose of the Fourteenth Amendment to confer power upon Congress to pass such a bill. He also quoted from the speeches made on that Amendment, among them being Messrs. Stevens, Finck, Broomall, Shanklin, Raymond, Bingham, Poland, Hendricks and others.[112] After quoting from the speeches made in Congress at the time the Amendment was under consideration, Mr. Lawrence said: "The debates show that these distinct assertions of the powers to be conferred in Congress by the Fourteenth Amendment were not controverted. No one ventured to deny them. The debates on the Thirteenth and Fifteenth Amendments are explicit in corroborating this purpose." He also held that it was incredible to think that Congress, in submitting the Amendment, or the people in adopting it, did not clearly and unmistakably intend to confer upon Congress the power now claimed and to provide an effective remedy for the evils (or supposed evils) which had been so fully and frequently denounced. The fact that Congress had, on April 20, 1871, reënacted the Civil Rights Bill of 1866, had passed the "Enforcement Bills" of 1870 and 1871, and the Ku Klux Act of 1871, many of those voting for some or all of these bills having voted to submit the Amendment, was cited. All this contemporaneous construction of the Amendment, he argued, carried more than persuasive force as to its meaning. He also contended that the bills, to which reference has been made, proceeded upon the idea that if a State omitted or neglected to secure the enforcement of equal rights, it denied the equal protection of the law as used in the Fourteenth Amendment.[113]

On the same day Mr. Herndon, of Texas, in speaking

[112] See chapter II above for a consideration of these speeches.
[113] Ibid., pp. 412–14.

of those rights which belong to citizens of the United States as such, enumerated those which are stated in the original Constitution and in the first Amendments to it, and said: "All of these and others not enumerated may be now asserted by a citizen of the United States, and be secured in them by the whole power of the Government, though such person be not a citizen of any State." [114] Since he must have been familiar with the decisions of the Courts, it follows that he was of the opinion that one of the effects of the Fourteenth Amendment had been to make the Amendments binding on the States. Mr. Atkins, of Tennessee, expressed the same opinion the next day.[115]

No action in regard to the bill was taken during this session of Congress.

As an illustration of what the negroes thought of the bill, Mr. Read, of Kentucky, on May 29, 1874, read from the resolutions of a negro meeting in Tennessee approving it, while at the same time denouncing the laws of that State which made it a criminal offense for negroes and whites to intermarry and pledging themselves to raise funds to bring the case of a negro convicted under that law before the Supreme Court of the United States to vindicate the rights of the colored citizens of Tennessee to the civil rights of marriage with whomsoever they may contract and choose." [116]

Mr. Sumner was on hand when the Forty-third Congress assembled and succeeded in presenting the first bill, which was his cherished Civil Rights Bill supplementary to the one passed in 1866. This was December 1, 1873, and on the next day he moved that the Senate proceed to its consideration, stating that it was so well known that debate would not be necessary.[117] Objection was raised to this, and the bill was referred to the Committee on the Judiciary. The bill was in the hands of the Committee

[114] Ibid., p. 420.
[115] Ibid., p. 453.
[116] Ibid., Appendix, p. 343.
[117] Ibid., pp. 2 and 10.

until April 29, 1874, when Mr. Frelinghuysen, of New Jersey, reported it back to the Senate. He asked for a calm, impartial, and non-partisan consideration of the bill. In reference to the bill itself, he declared that if Congress did not have the power to pass it, the people had perpetrated a blunder amounting to a grim burlesque over which the world might laugh, were it not so serious a blunder. There was but one idea in the bill, he asserted, and that was the "equality of races before the law." In considering the inquiry whether it was a denial of equal rights to have separate schools, Mr. Frelinghuysen cited a case which had been decided by the Court of Iowa. That question was directly considered in this case (24 Iowa Reports, p. 263), he said, and the Court had declared that the school directors could not deny a child admission to any particular school on account of race or color, nor could colored children be required to attend separate schools provided for them. He also cited the case which had been decided in Ohio (21 Ohio Reports, p. 198) in which an adverse decision had been given. It was pointed out that the Constitutions and laws of the two States were unlike, thus accounting for dissimilar decisions, but that these decisions afforded no precedent for the construction of this bill. He based the authority of Congress to pass the bill on the War Amendments, but primarily and specifically on the Fourteenth. Reference was made to the Slaughter House Cases, to show that the Supreme Court thought the object of that Amendment was to prevent the curtailment of the rights of the negroes. Mr. Frelinghuysen admitted, however, that it was not one of the privileges of citizens of the United States to have an education, visit inns, etc., but that it was one of his privileges as such not to be discriminated against on account of his race or color by the law of a State relating to those subjects. He said he did not know whether a citizen had the right to be a juror, but that he could not be discriminated against, and that it was not equal protection of the law to exclude a class as such.[118]

[118] Ibid., pp. 3451–55.

Mr. Norwood, of Georgia, followed Mr. Frelinghuysen with a very able speech the next day. He enumerated the privileges which had been created by the original Constitution, after which he gave what he regarded as the privileges and immunities of citizens of the United States. Among the latter were those named in the original Constitution, such as immunity from *ex post facto* laws, but the great majority of them were taken from the Bill of Rights or the early Amendments and the War Amendments. After enumerating all these, he said: "I do not assert that these are the privileges and immunities of a citizen of the United States as distinguished from his rights as a citizen of a State, but I do say that any others, whether few or many, will be found enumerated in the Constitution of the United States. Before the Fourteenth Amendment the first class of privileges and immunities enumerated above belonged to citizens of the State by operation of the Federal Constitution." Then followed quotations from the minority opinions in the Slaughter House Cases and the report of the Judiciary Committee of the Senate on the petition of Susan B. Anthony and others for the right of suffrage. Mr. Norwood maintained that no new privileges were conferred by the Fourteenth Amendment, but that additional guarantees were. Before the adoption of that Amendment, a State might have established a particular religion, he declared, restricted the freedom of speech, or deprived its citizens of any or all of the privileges enumerated in the first eight Amendments, but the Federal Government could not. All this was changed, he continued, for the same inhibition which those Amendments had placed upon the Federal Government had been laid upon the States by the adoption of the Fourteenth Amendment. In other words, he held that the privileges and immunities enumerated in the first eight Amendments had, by the Fourteenth Amendment, been secured to every citizen against denial or abridgment on the part of any State. To quote him again: "And as the first eight Amendments were a prohibition on the General Government as to the privileges and immunities of the

citizens of the States named in those Amendments, so the Fourteenth Amendment was and is a prohibition on the States, forbidding them to abridge the same privileges and immunities." He thought, however, that these privileges could and should be protected and enforced just as obligations of contracts—no punishment on the States, but by appeal to the Federal Courts.[119]

Mr. Pratt, of Indiana, made the assertion that if the negroes did not possess all the civil and political rights to an equal degree with the whites, the people had failed to accomplish what they intended by the last three Amendments.[120]

Mr. Morton, of the same State, maintained that the Amendment secured the general proposition that all men were placed upon the same level of equality as to the enjoyment of civil rights, and that the States still retained the power to fix the limitations in regard to suffrage, travel, etc., with the single limitation that these rights must not be made to depend upon a question of race or color. In reply to the suggestion of Senator Saulsbury, of Delaware, he admitted that theoretically, remedy could be had in the Supreme Court of the United States for a violation of this principle. The Court would merely hold the state law unconstitutional, he declared, and there would be no damages nor would there be any penalty for the one who had deprived another of a right or privilege. The framers of the Amendment, continued Mr. Morton, and he added that he knew whereof he spoke, did not intend to leave the victim to the roundabout costly, and therefore frequently impossible remedy of appeal, but they intended that a violation of the Amendment should be made a personal and criminal offense.[121] In a word, his position was that the rights and privileges enumerated in the bill were secured by the Fourteenth Amendment, but that the bill was necessary to give real effect to that Amendment.

Mr. Boutwell, who had been a member of the Reconstruc-

[119] Ibid., Appendix, pp. 241–44.
[120] Congressional Record, Forty-third Congress, 1st Sess., p. 4183.
[121] Ibid., Appendix, pp. 359–61.

tion Committee, and, therefore, in a position to speak authoritatively, said that the first clause of the first section, in connection with the fifth section of the Amendment, was sufficient to warrant the bill under discussion. The substance of his argument was that the first clause created both federal and state citizenship even against the will of the States, and that in doing so, it practically fixed the rights and privileges of citizens of the States as such as well as that of citizens of the United States as such. The States, he contended, could not make distinctions among their own citizens, all the rights and privileges of one citizen belonging to all citizens of that State, irrespective of race or color. At this point he said that the Supreme Court had erred in the Slaughter House Cases in deciding that there were two classes of rights—national and state.[122]

Mr. Stockton, of New Jersey, admitted that all citizens were entitled to equal rights and accommodations, but he objected to the bill on the ground that the construction as given by Mr. Sumner, its author, made it mean the "same" rights and accommodations, and not "equal." He thought the negroes entitled to equal rights and privileges, but that this did not necessarily mean that they should be admitted to the same cars or the same schools.[123]

Mr. Howe, of Wisconsin, spoke at some length in advocacy of the bill. His principle contention was that increased powers had been conferred upon the Federal Government by the War Amendments, one of these being the transfer of the control of citizens from the States to the United States. If this had not been accomplished, he declared, it was because the draughtsman who framed the Fourteenth Amendment did not know how to construct a clause which would do it. Referring to the Slaughter House Cases, Mr. Howe stated that he did not believe the decision in that case denied the authority of Congress to pass this bill. As to that part of the decision which states that there are cer-

[122] Ibid., p. 4116.
[123] Ibid., p. 4144.

tain privileges which belong to citizens of the United States as such and that certain others belong to them as citizens of the States, he stated that he felt authorized to say that this was not the decision of the Court. It was only a part of the argument by which Justice Miller undertook to defend the judgment of the Court, declared Mr. Howe. Even if it were the decision of the Court, he continued, he believed that the American people would say, as they had said about the Dred Scott decision, that it was not law and could not be law. If the Fourteenth Amendment secured the protection only of such privileges and immunities as pertained to them as citizens of the United States, then it was the idlest piece of verbiage that could possibly be constructed, declared the Wisconsin Senator, for that had ever been the case. It was useless, he contended, to say that this was a privilege, and that was not, in arguing the question of power, for it had nothing whatever to do with it. It was all right to discuss whether it was expedient or inexpedient to clothe this man with this or that privilege, but when the legislative tribunal had spoken, its discretion guided the judgment of every one, and from its decision there was no appeal but to the people.[124]

Mr. Stewart, of Nevada, thought the bill inexpedient as tending to retard rather than aid the education of the negroes, though he stated that he believed Congress had the constitutional power to pass it.[125] Notwithstanding the inexpediency of the bill to his mind, Mr. Stewart voted for it.

Mr. Sargent, of California, moved an amendment to the first section of the bill providing that any State or school district might be allowed to have separate schools if equal facilities and opportunities were given. This was defeated by a vote of 26 to 21.[126]

Mr. Carpenter stated that he would vote against the bill on the ground that the Federal Government did not have the

[124] Ibid., pp. 4147–51.
[125] Ibid., p. 4167.
[126] Ibid., p. 4167.

power to organize or regulate the juries of the States.[127] The other provisions of the bill he evidently approved.

Mr. Sargent also offered an amendment to the effect that all should be entitled to the advantages of the common school system, instead of "the common schools." The purpose of this was to permit the States to have separate schools, as was pointed out by Mr. Edmunds and stated by Mr. Sargent. Mr. Sargent declared that the purpose of the proposed bill was political—to retain the negro vote. His statement should be given more weight when it is remembered that he was a Republican and voted for the bill on its final passage. His amendment was rejected by a vote of 28 to 16.[128]

Mr. Edmunds, of Vermont, spoke briefly just before the final vote was taken, his remarks being called forth by the amendment offered by Mr. Sargent. He took the position that the Fourteenth Amendment secured absolute equality, and not half-equality. If Mr. Sargent's amendment was accepted, he contended, the effect of the bill would be practically nothing, since the States already had separate schools, cars, etc. The Fourteenth Amendment was general and sweeping, he continued, and leveled all distinctions on account of race or color.[129] It will be remembered that Mr. Edmunds became a member of the Senate just four days before the enactment of the Civil Rights Bill over the President's veto April 9, 1866. He was present when the Fourteenth Amendment was before the Senate and voted for its submission to the States.

The bill passed the Senate at 7 o'clock on the morning of May 23, 1874, after an all night session, the Senate being in continuous session for twenty hours. The vote was 29 to 16 in its favor, Boreman and Carpenter being the only Republicans voting against it.[130] Of those voting for the bill, the following had taken part in the enactment of the Fourteenth Amendment: Messrs. Allison, Boutwell, Conkling,

[127] Ibid., p. 4166.
[128] Ibid., pp. 4171–72.
[129] Ibid., pp. 4171–75.
[130] Ibid., p. 4176.

Edmunds, Howe, Morrill of Vermont, Stewart, Washburne and Windom. Messrs. Sherman, Morrill of Maine, Anthony and Chandler were absent. Of these Mr. Morrill was opposed to the bill. Two of these, Messrs. Boutwell and Conkling, were members of the Reconstruction Committee, and the fact that those who voted for the Fourteenth Amendment, with the exception of Messrs. Carpenter, who opposed the bill in regard to one point only, and Morrill, of Maine, supported the bill, must be given due weight. It should also be remembered in this connection that Mr. Conkling, who had at first opposed the first section of the Amendment when offered by Mr. Bingham, February 28, 1866, now supported this bill, thereby showing that he accepted Mr. Bingham's idea as to the purpose and effect of that section.

After this somewhat detailed account of the persevering efforts of Mr. Sumner in behalf of his Civil Rights Bill, of his repeated rebuffs, and its final enactment by Congress, though not until after his death, there seems to be but one conclusion possible. That conclusion is that all the debates on it, all the opinions expressed for and against it, and especially by those who had been members of the 39th Congress, strengthen the conclusion which had been reached in the preceding chapters as to the effect and purpose of the Amendment. Of all the evidence, only a very minor part of it is against this conclusion, and any one who will go through all these debates will be impressed with this fact. Eliminating the fact, for fact it is, that the prime motive of a majority of those who voted for the bill was political, it remains nevertheless that they fully believed they had the power to pass it. The main purpose of the Fourteenth Amendment, must not be lost sight of. Underneath the motive, and of greater importance for the purpose contemplated in this study, lies the question of power. Had there been no partisanship, the bill would of course not have been passed. It is equally true that it would not have been enacted had not a majority of Congress thought that the

Fourteenth Amendment authorized it, and this is the important question.

The second session of the 43d Congress met December 7, 1874. On the 16th of the same month Mr. Butler, of Massachusetts, reported back, with amendments, the Civil Rights Bill which had been debated to some extent at the first session. This bill was almost identical with the one passed by the Senate at the first session. When it was under consideration February 3, 1875, Mr. Hunton, of Virginia, in opposing it, said the privileges and immunities of citizens of the United States were to be found in the Constitution. As illustrating these, he quoted the Fourth Amendment which secures persons against unreasonable searches, etc.[131] Mr. Smith, of the same State, though a Republican, opposed the bill, declaring it unconstitutional and inexpedient. The reasoning and decision of Judge Griswold, of the Ohio Supreme Court, were quoted by Mr. Smith. One Gardiner, a negro, had, on the 11th of February, 1873, purchased a ticket to the dress circle of a theater, but was refused his seat by the ushers with the understanding that his money would be returned. Thereupon the negro brought suit against the manager of the theater under the Civil Rights Bill of 1866, but Judge Griswold held that this bill had no application to the case. Gardiner could bring suit, he held, for a breach of contract just as if he were a white man, but every one could use his property as he saw fit so long as he wronged no one nor committed a nuisance. He further declared that the manager could make a rule excluding negroes from the dress circle.[132]

Mr. Finck, of Ohio, in reply to a query from Mr. Hale, of New York, stated that he gave no effect whatever to the fifth section of the Fourteenth Amendment, holding that Congress would have just as much power if it had been omitted. His position in regard to the Amendment was that it was merely a prohibition upon the States, and that it conferred no affirmative power upon Congress to go into the

[131] Cong. Rec., 43d Cong., 2d Sess., Appendix, p. 119.
[132] Ibid., Appendix, p. 157.

States and regulate the intercourse of their citizens. He quoted from the decision of the Ohio Supreme Court in 1871 (21 Ohio State Reports), in which the Court held that the State had the right to regulate its schools regardless of the Fourteenth Amendment. If the bill before Congress was Constitutional, he asserted, then there was no limit to the power of the Federal Government.[133] In this last statement Mr. Storm, of Pennsylvania, concurred. The latter also referred to the fact that the Judiciary Committee of the Senate had twice reported adversely upon this bill.[134] It must be remarked, however, that no reasons were given for these adverse reports, and that the statement was made in the Senate to this effect, some members of the Committee saying that it was not reported adversely on constitutional grounds.

Mr. Hale, of New York, spoke very forcibly and convincingly the next day, February 4, in regard to the bill and alluded to the fact that he and Mr. Finck had been members of the Congress which proposed the Fourteenth Amendment. "I remember," he stated, "if the gentleman from Ohio [Mr. Finck] has forgotten it, as he probably may, that it was my fortune, standing alone in my party, to oppose the Fourteenth Amendment by my vote and by my voice, upon the ground, which seemed to me to be one I could not forsake, that it *did* change the constitutional power of Congress, that it changed the theory of our Government, and introduced a range of legislation utterly lacking in the old Constitution or in any previous Amendments to it except the Thirteenth. I voted against the Fourteenth Amendment on that ground alone, fully conceding the propriety of the provisions of the Article, except the last section, claiming that that section was to a certain extent a revolution of our form of Government in giving Congress a control of matters which had hitherto been confined exclusively to state control. In the position I then took I certainly understood in the Thirty-ninth Congress that my

[133] Ibid., pp. 947–49.
[134] Ibid., p. 951.

friend from Ohio, whose opinion on legal and constitutional questions I value highly, fully concurred. I understood that the entire body of his political associates on the other side of the House in that Congress concurred with me." Mr. Hale does not seem to have exaggerated in the least, for the facts bear out his statements. The first ten Amendments, in his opinion, merely constituted a Bill of Rights, but there was no provision in the Constitution or in those Amendments which empowered Congress to legislate in regard to prohibitions, restrictions, or rights, and the legislative power was limited to the carrying out of the powers granted. It seems that the clause in regard to the obligation of contracts would be a good illustration of this point. He then cited the fifth section of the Fourteenth Amendment as giving an absolute and unlimited power to enforce the provisions of that Amendment by appropriate legislation. If the doctrine laid down by Chief Justice Marshall in McCulloh *vs.* Maryland be followed, continued Mr. Hale, there could be no question as to the power of Congress under that Amendment to enact legislation to remedy the great evil against which it proposes to guard. The doctrine of the cases referred to is that within the grant of power Congress could use its own discretion, and Mr. Hale held that, according to this decision, the question of the fitness or desirability of such legislation was for Congress alone and not for the Courts.[135]

Mr. Chittenden, of New York, though a Republican and admitting that the bill was in conformity with the Amendments, opposed it because he thought it inexpedient, asserting that the North would oppose it if it had the same proportion of negroes as the South.[136]

Mr. Garfield, of Ohio, advocated the bill in a short speech,[137] though he had opposed a similar bill at an earlier date. Mr. Cessna, of Pennsylvania, moved the bill which had passed the Senate at the previous session as a substi-

[135] Ibid., pp. 979–80.
[136] Ibid., p. 982.
[137] Ibid., p. 1005.

tute for the House bill, but this was defeated by a vote of 114 to 148.[138] The Senate bill was more radical. Mr. White, of Alabama, offered a substitute to the effect that separate schools, separate accommodations on railroads, at hotels, etc., might be provided if they were equal in equipment and kind for both races. The substitute also provided that no one could be excluded from the jury box on account of color or race. This was rejected by a vote of 91 to 114.[139] The amendment of Mr. Kellogg, striking out all reference to common schools was agreed to, however, by a vote of 128 to 48.[140] The bill then passed, February 4, 1875, by a vote of 162 to 99, 28 not voting.[141] Among those in favor of the bill, the following were also members of the Thirty-ninth Congress: Messrs. Dawes, Garfield, Hale (of New York), Kelley, Lawrence, Poland and Wilson (of Iowa).

Mr. Thurman, when the bill was before the Senate on February 26, moved to amend section four by striking out "or of any State." He held that Congress had no power to declare who should sit on the jury in state courts, this not being a right of a citizen of the United States as such. He declared that if Congress could do this, there was no limit to Federal power and that the States were nothing more than counties. Mr. Thurman also noted the fact that the reverence for States Rights had been fading out of the minds of Senators since he had taken a seat in that body.[142] His amendment was defeated later by a vote of 40 to 36.[143]

Mr. Boutwell stated that he doubted whether Mr. Thurman was correct in saying that States Rights had been fading out, but admitted that the power of the States was not what it once was. On this particular point he made the following unmistakable declaration: "The Thirteenth,

[138] Ibid., p. 1011.
[139] Ibid., p. 1010.
[140] Ibid., p. 1010.
[141] Ibid., p. 1011.
[142] Ibid., pp. 1791–92.
[143] Ibid., p. 1867.

Fourteenth and Fifteenth Amendments did limit the power of the States; they did extend the power of the General Government; and the question we are considering almost continually is the extent to which the power of the States has been limited by these Amendments and the extent to which the power of the General Government has been carried by these several Amendments." In regard to the decision in the Slaughter House Cases, he declared that that decision only applied to cases exactly similar to those, and that it was not law for the Senate when considering a question which was different from the one on which the Court had passed. The first privilege of citizens of the United States, he continued, was that they were citizens of the State wherein they resided, and that the chief right of a citizen of a State was that he was the equal before the law of every other citizen of that State. It was this right of being equal before the law which he derived from being a citizen of the United States, and consequently a citizen of the State, which the Federal Government was enabled to see enforced under the Fourteenth Amendment, he declared.[144]

Mr. Edmunds contended that the right to serve on the jury was a civil right on the same basis as the right to be a witness.[145] Mr. Thurman pointed out the inconsistency in the position of the advocates of the bill in saying that the States might make discriminations for everything and anything except about race and color. He asked for the provision which empowered Congress to forbid this discrimination while permitting discrimination on account of ignorance, property, age, etc. If the principle of the bill be accepted, he continued, then Congress could prescribe the qualifications of jurors by a process of elimination and prohibition.[146] Mr. Carpenter thought the section relating to jurors was unconstitutional, and so voted against the bill.[147]

[144] Ibid., pp. 1792–93.
[145] Ibid., p. 1866.
[146] Ibid., pp. 1866–67.
[147] Ibid., pp. 1861 and 1870.

The bill passed the Senate on February 27, 1875, by a vote of 38 to 26. Among those supporting the bill were the following who were also members of the Thirty-ninth Congress: Messrs. Allison, Anthony (of R. I.), Boutwell, Chandler (of Mich.), Conkling, Cragin (N. H.), Edmunds, Howe, Morrill (Vt.), Sherman, Stewart, Washburne (Mass.), Windom (Minn.), Ramsey (Minn.).[148] The President approved the bill on March 1.

The Civil Rights Act of 1875, the principal sections of which were declared unconstitutional by the Supreme Court some years later, marks the culmination of the efforts of Congress to enact laws for the enforcement of the Fourteenth Amendment. The Republicans had been overwhelmingly defeated at the election in the fall of 1874 when the proposed Civil Rights Bill had been one of the main issues, and when that party again had the majority in all branches of the Government, it was evidently regarded as unwise to renew the subject. However futile were the efforts of Congress to give vitality to the Amendment as interpreted by itself and by those who had most to do with its drafting and adoption, the fact remains that nearly all the evidence goes to sustain the position of Congress as far as the question of power and authority is concerned. The evidence given in this chapter but corroborates and strengthens that given in the previous chapters as to the meaning of the Fourteenth Amendment, while all that has gone before sustains the position and contentions of those who advocated the several measures considered in this chapter. This does not mean that those measures were wise or just, and should have been passed, but it merely means that, according to the purpose and intention of the Amendment as disclosed in the debates in Congress and in the several state Legislatures and in other ways, Congress had the constitutional power to enact direct legislation to secure the rights of citizens against violation by individuals as well as by States.

[148] Ibid., p. 1870.

APPENDIX.

The War Amendments.

Article XIII. Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the person shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Article XIV. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of Electors for President and Vice-President of the United States, Representatives in Congress, the executive or judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or Elector of President or Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

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

Article XV. Section 1. The rights of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

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VITA.

Horace Edgar Flack was born at Cuba, Rutherford County, North Carolina, May 14, 1879. He received his elementary education in the public schools of the county and at the Rutherfordton Military Institute. He entered Wake Forest College, North Carolina, in the fall of 1898 and received the degrees of Bachelor of Arts and Master of Arts in 1901. He was Principal of the Piedmont Seminary, Lincolnton, North Carolina, 1901–02. He entered the Johns Hopkins University in the fall of 1903, where he pursued courses in Political Science, History and Political Economy. He was Fellow in Political Science 1905–06.