FOURTEENTH AMENDMENT LIMITATIONS ON BANNING RACIAL DISCRIMINATION: THE ORIGINAL UNDERSTANDING

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I. CURRENT SIGNIFICANCE

There is at large in the United States today a singular notion. The idea has gained ground that the fourteenth amendment is a special foe of racial discrimination, that it forbids racial discrimination where it permits other types of discrimination. This notion has penetrated into some very high places.[1] Its most common habitat is to be found in the proliferating "civil rights" acts of both the federal and state governments, which usually confine their ambit to a stock formula of race, creed, color, and national origin, with occasional references thrown in to age or sex.[2] The first section of the fourteenth amendment mentions neither race nor religion. It guarantees the privileges and immunities of national citizenship to all citizens, and equal protection to all persons. Statutes singling out racial and religious discrimination for special condemnation, except in respect to voting, cannot justify themselves on the letter of the fourteenth amendment. Discrimination may be based on political grounds, on unpopularity of viewpoint, on occupation, on financial status, on looks, and on many other factors. The letter of the fourteenth amendment does not condemn one form of discrimination any more than any other. There is nothing about reasonableness of classification in its text. If one form of discrimination is a denial of privileges or equal protection all forms must be a similar denial. The terms of the amendment require that all discrimination be banned, or none. To protect one group and not another is not equal protection, but its converse.

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[1] See Harper v. Virginia State Board of Elections, 86 Sup. Ct. 1079, 1089, note 3 (1966). (Harlan J., dissenting).

[2] See Civil Rights Act of 1964, 78 Stat. 241; Avins, *Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Antidiscrimination Legislation*, 49 CORNELL L.Q. 226 (1964) and the statutes cited therein.

It has been suggested that racial discrimination forms a special class to be particularly condemned.[3] Since nothing in the text of the amendment supports this theory, if it has any validity it must be found in the historical origins of the amendment. This study will examine those origins to test the validity of the foregoing theory.

II. The Hoar Incident

If a single incident can be found which impelled the North to conclude that the constitutional rights of American citizens were not safe in the protection of southern officials, and that federal intervention was needed before the Civil War, it was the Hoar incident. Indeed, the need to enforce the privileges and immunities of citizens, and the requirement of equal protection, stemmed from this incident.

The background may be briefly stated. South Carolina along with Louisiana, had a statute which provided that any free Negro found on a vessel which came into a port in the state would be arrested and jailed until the vessel was ready to sail, and the ship captain would have to pay the expenses of detention, in default of which the colored seaman would be sold into slavery and the ship captain fined and imprisoned. The purpose of the statute was to keep free Negroes out of the state, since it was believed that they would stir up slave revolts. This statute was highly detrimental to Massachusetts shipowners, who employed a number of free Negroes, chiefly as cooks and stewards in coastwise trade. It was also believed that the statute was violative of article four, section two, the clause of the Constitution giving citizens of each state the privileges and immunities of citizens in the several states, since Massachusetts Negroes were deemed to have state citizenship.[4]

In November, 1844, former Representative Samuel Hoar, a leading lawyer in Massachusetts, was sent by that state's officials to South Carolina to test (in federal court) the constitutionality of the law imprisoning Negro sailors. His visit aroused great excitement, and he was threatened with personal injury.[5] The state authorities refused or expressed the inability to protect him against mob violence, and on December 5, 1844, the South Carolina legislature passed a resolution expelling him from

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[3] See McLaughlin v. Florida, 379 U.S. 184 (1964); Tussman & ten Brock, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341 (1949); Frank and Munro, *The Original Understanding of 'Equal Protection of the Laws,'* 50 Col. L. Rev. 131 (1950).

[4] An extensive discussion of the background will be found in Cong. Globe, 31st Cong. 1st Sess. app. 1654-64, 1674-78 (1850). [Hereinafter, Congressional Globes or Records will be cited by Congress, session, page and year, in chronological order, as follows: 31 (1) Globe app. 1654-64, 1674-78 (1850).] See also *id.* at 2066.

[5] See 34 (1) Globe 1598 (1856).

the city of Charleston. He was thus forced to leave without bringing his suit.[6]

The Hoar incident was a constant subject of reproach by northern members of Congress against the South before the Civil War.[7] For example, Representative Edward Dickinson, a Massachusetts Whig, complained that Hoar "was informed by the authorities of Charleston that he could not be protected, and was advised by them to leave, because they could not answer for his safety if he remained."[8]

All during the Reconstruction period, too, reference was made to the Hoar incident.[9] Representative John A. Bingham, the Ohio Republican lawyer who drafted the first section of the fourteenth amendment,[10] except for the declaration of citizenship, gave as the reason for introducing his amendment that the old constitutional provision "was utterly disregarded in the past by South Carolina when she drove with indignity and contempt and scorn from her limits the honored representative of Massachusetts, who went thither upon the peaceful mission of asserting in the tribunals of South Carolina the rights of American citizens."[11] Likewise, Senator John Sherman, an Ohio Republican lawyer, declared:

> By this clause of the Constitution, one which has always been a part of our fundamental law, it is provided that —
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> > "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several states."
>
> This clause gives to the citizen of Massachusetts, whatever may be his color, the right of a citizen of South Carolina, to come and go precisely like any other citizen. There never was any doubt about the construction of this clause of the Constitution .... but the trouble was in enforcing this constitutional provision. In the celebrated case of Mr. Hoar, who went to South Carolina, he was driven out, although he went there to exercise a plain constitutional right and although he was a white man of undisputed character. This constitutional provision was in effect a dead letter to him. The reason was that there was no provision in the Constitution, by which Congress could enforce this right.[12]

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[6] 13 Encyclopaedia Britannica 542 (11th ed. 1910); Biographical Directory of the American Congress, 1774-1927, p. 1103 (1928).

[7] See 33 (1) GLOBE 1154-55, 1556, app. 575, app. 1012-13 (1854).

[8] 33 (1) GLOBE 1155 (1854).

[9] 38 (1) GLOBE 2984 (1864) (Rep. Kelley); 38 (2) GLOBE 193 (1865) (Rep. (Kasson); 39 (1) GLOBE 474-5 (1866); (Sen. Trumbull); 39 (1) GLOBE 1263 (1866) (Rep. Broomall); 40 (3) GLOBE 1001 (1869) (Sen. Edmunds); 42 (1) GLOBE 500 (1871) (Sen. Frelinghuysen).

[10] 42 (1) GLOBE app. 256 (1871).

[11] 39 (1) GLOBE 158 (1866).

[12] *Id.* at 41.

Hoar, as noted above, was a respected white lawyer. He was discriminated against and denied equal protection, not because of his race, but because he wanted to try an unpopular lawsuit. Protection of people in his category was the very purpose of the fourteenth amendment. It is plain that confining this amendment to racial discrimination would frustrate an important reason for the amendment's very existence.

III. Protection of White Travelers in the South

Protection of northern white travelers in the South was another prime purpose of the fourteenth amendment. The dominant Republican majority in Congress considered freedom of speech an essential right,[13] and were sharply critical of southern states for menacing anyone traveling therein with outspoken anti-slavery views.[14] Representative Green C. Smith, a Kentucky Unionist, observed:

> The very fact that men from the North could not go to the South and speak their real sentiments induced the people of the North to become bitter toward the institution. Now . . . my judgment is that the principle of the Constitution will not become fully established until the man from Massachusetts can speak out his true opinions in the State of South Carolina, and the man of Mississippi shall be heard without interruption in Pennsylvania.[15]

For example, Representative Ignatious Donnelly, a Minnesota Republican, urged Bingham's amendment because otherwise "the old reign of terror [shall] revive in the South, when no northern man's life was worth an hour's purchase."[16] Representative Hiram Price, an Iowa Republican, declared that a northerner visiting the South who expressed anti-slavery opinions was expelled by violence. He said that the amendment meant that "if a citizen of Iowa or a citizen of Pennsylvania has any business, or if curiosity has induced him to visit the State of South Carolina or Georgia, he shall have the same protection of the laws there that he would have had had he lived there for ten years."[17] Representative Ralph P. Buckland, an Ohio Republican lawyer, demanded that

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[13] 35 (2) Globe 985 (1859) (Rep. Bingham); 38 (1) Globe 2990 (1864) (Rep. Ingersoll); 39 (1) Globe 2765 (1866) (Sen. Howard); 41 (2) Globe 3671 (1870) (amendment); 42 (1) Globe app. 310 (1871) (Rep. Maynard); *id* at app. 85 (Rep. Bingham); *id.* at 382 (Rep. Hawley); *id.* at 414 (Rep. Roberts); *id.* at 486 (Rep. Cook).

[14] 38 (1) Globe 1202 (1864) (Sen. Wilson); 38 (2) Globe 138 (1865) (Rep. Ashley); *id.* at 193 (Rep. Kasson); 39 (1) Globe 157 (1866) (Rep. Bingham); 40 (2) Globe 926 (1860) (Sen. Ferry); 42 (1) Globe 335 (1871) (Rep. Hoar); *id.* at 500 (Sen. Frelinghuysen); *id.* at 579 (Sen. Trumbull).

[15] 38 (2) Globe 237 (1865).

[16] 39 (1) Globe 586 (1866).

[17] *Id.* at 1066. See also *id.* at 2082 (Rep. Perham).

citizens of his state traveling in the South be protected in their rights. He added that northerners "will never again submit to the indignities and outrages which were perpetrated upon northern people in the South previous to the war."[18] The widely circulated Schurz Report declared that if federal troops were withdrawn from the South the lives of northerners there would not be safe.[19] The Report of the Joint Committee on Reconstruction, which recommended the fourteenth amendment, gave this as one of the reasons for the amendment.[20] It was also mentioned during the debates on ratification.[21]

The need to protect northern travelers was also mentioned during Reconstruction.[22] Senator Orris S. Ferry, a Connecticut Republican lawyer, complained that while he was able to campaign in his own state for the Republican ticket in 1856, "I could not have gone to one of these ten States and asked the people to vote for that candidate without endangering my own life."[23] Senator John Conness, a California Republican, asserted that a northerner who emigrated to the South risked his life.[24] A Pennsylvania Republican adverted to the fact that northern investors, businessmen, and officeholders were being driven out of the South by violence.[25] A New York Republican said that citizens of his state being driven out of the South had the right to protection, it being a privilege of national citizenship.[26] Senator Oliver P. Morton, an Indiana Republican, denounced the South for driving out northern emigrants.[27] Senator Frederick T. Frelinghuysen, a New Jersey Republican and a former attorney-general of that state, declared that a northerner has the right to come to the South in spite of all state laws to the contrary, and could demand "protection of the laws" in doing so.[28] The Ku Klux Klan Act of 1871,[29] which was designed to enforce the equal protection clause, was specifically directed, in part, towards protecting northerners in the South.[30]

The travelers going from northern states to the South were just as

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[18] *Id.* at 1627. See also *id.* at app. 293-4 (Rep. Shellabarger).

[19] S. Ex. Doc. No. 2. 39th Cong., 1st Sess. 7-8 (1865).

[20] S. Rep. No. 112, 39th Cong., 1st Sess. 11-12 (1866).

[21] Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 Stan. L. Rev. 5, 75, 96 (1949).

[22] 40 (2) Globe 514 (1868) (Rep. Bingham), 725 (Sen. Morton).

[23] *Id.* at 926.

[24] *Id.* at 2903.

[25] 42 (1) Globe 339 (1871) (Rep. William D. Kelley). See also *id.* at app. 310 (Rep. Maynard).

[26] *Id.* at 413-4 (Rep. Ellis H. Roberts).

[27] *Id.* at 253. See also *id.* at 567 (Sen. Edmunds).

[28] *Id.* at 500. See also *id.* app. 227-8 (Sen. Boreman). *Cf.*, 42 (2) Globe 436 (1872) (Sen. Frelinghuysen).

[29] 17 Stat. 13, Ch. 22.

[30] 42 (1) Globe 567 (1871) (Sen. Edmunds).

much of the Caucasian race as the southerners against whom they requested protection. No element of racial discrimination was involved. Discrimination was based on state origin and differences of opinion on sundry social and political problems. Here again, confining the fourteenth amendment to racial discrimination would remove from its ambit another important type of discrimination which the framers clearly intended to prevent states from making.

IV. Protection of White Loyalists

The problem of protecting white anti-slavery southerners against discrimination because of their opinions occupied the attention of the Republicans even before the Civil War. During the 1860 Republican National Convention, a special resolution moved by former Representative Joshua R. Giddings of Ohio and adopted therein stated:

> Resolved, That we deeply sympathize with those men who have been driven, some from their native States and others from the States of their adoption, and are now exiled from their homes on account of their opinions; and we hold the Democratic Party responsible for the gross violation of the clause of the Constitution which declares that citizens of each State shall be entitled to all privileges and immunities of the citizens of the several States.[31]

Representative John A. Kasson, an Iowa Republican lawyer, also declared:

> Let me say here that it is necessary to carry into effect one clause of the Constitution of the United States which has been disobeyed in nearly every slave State of the Union for some twenty-five or thirty years past. I refer to that clause of the Constitution which declares in section two of the fourth article that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. You cannot go into a State of the North in which you do not find refugees from southern States who have been driven from the States in the South where they had a right to live as citizens, because of the tyranny which this institution exercised over public feeling and public opinion, and even over the laws of those States.
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> In my own State there are numbers of men who have been driven from their farms, not for any offense against any of the laws which usually constitute crime, but because in opinion they did not agree with those who adhere to the institution of slavery.[32]

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[31] Curtis, The Republican Party 357, 361 (1904).

[32] 38 (2) Globe 193 (1865).

At the close of the war, protection of the minority of white loyalists in the South loomed as a large problem in the eyes of the dominant Republicans. The report of Major General Carl Schurz pointed out that known loyalists in the South led a "precarious" existence, and that the withdrawal of federal troops would lead to their expulsion. Schurz recounted instances of the murder of white unionists in the South, and of their arrest by local officials for activities in aid of the Union cause.[33] Representative William D. Kelley, a Pennsylvania Republican, declared that to surrender the "truly loyal white men of the insurrectionary districts" without protection to "the unbridled lust and power of the conquered traitors of the South" in order to obtain peace would be a purchase "by such heartless meanness and so gigantic a barter of principle [as] would be unparalleled in baseness in the history of mankind."[34]

When the Thirty-Ninth Congress commenced the work of reconstruction with the Freedmen's Bureau Bill,[35] it was careful to give as much protection to loyal white southerners, known as "refugees," as it did to the newly liberated Negroes.[36] The House was told that they were to be treated "exactly the same," and that they had "all the rights under this bill that the freedmen have."[37] Likewise, when Senator Garrett Davis, a Kentucky Democrat, complained that the Civil Rights Bill was partial to Negroes, Senator Lyman Trumbull, an Illinois Republican and a former state supreme court justice, who was in charge of the bill as Chairman of the Judiciary Committee, replied that "this bill applies to white men as well as black men," and that its "only object . . .

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[33] S. Ex. Doc. No. 2, 39th Cong., 1st Sess. 9 (26) (1865).

[34] 38 (2) GLOBE 289 (1865).

[35] A discussion of the debates in the first session of the Thirty-Ninth Congress which led to the fourteenth amendment is contained in Tansill, Avins, Crutchfield & Colegrove, *The Fourteenth Amendment and Real Property Rights in Open Occupancy vs. Forced Housing Under the Fourteenth Amendment* 68 (Avins ed. 1963).

[36] The following colloquy occurred between Representative Green C. Smith, a Kentucky Unionist, and Thomas D. Eliot, a Massachusetts Republican who was in charge of the Freedmen's Bureau Bill:

> Mr. SMITH. Then the word "refugee" applies only to whites. I would inquire . . . if, under this law and under the operations of the Freedmen's Bureau, all white men who were not rebels and who were as poor as the Negroes are entitled to the same privileges and the same protection that Negroes are?
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> Mr. ELIOT. The object of this bill is to place the refugees — that is to say the loyal white men who have fled from their homes because of the rebellion — upon the same footing with the freedmen as to the care and protection of the Government . . . .
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> Mr. ELIOT. I will say . . . that there is no distinction made in this bill between the rights of freedmen and of refugees under it. They are treated alike from the first to the last . . . . 39 (1) GLOBE 516 (1866).

[37] *Ibid.* (Rep. Eliot). See also *id.* at 632 (Rep. Moulton); 651 (Rep. Grinnell); 1262 (Rep. Broomall); 1292 (Rep. Bingham).

is to secure equal rights to all the citizens of the country, a bill that protects a white man just as much as a black man."[38] Trumbull also observed that not only did the Freedmen's Bureau Bill provide for white refugees, but that "we have been feeding more white persons than colored persons in some localities. . . ."[39]

The fourteenth amendment was likewise designed to protect southern white loyalists. The following exchange between Representative Robert S. Hale, a Republican former judge from New York, and Representative Bingham, shows this clearly:

> Mr. HALE. It is claimed that this constitutional amendment is aimed simply and purely toward the protection of "American citizens of African descent" in the states lately in rebellion. I understand that to be the whole intended practical effect of the amendment.
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> Mr. BINGHAM. It is due to the committee that I should say that it is proposed as well to protect the thousands and tens of thousands and hundreds of thousands of loyal white citizens of the United States whose property, by State legislation, has been wrested from them under confiscation, and protect them also against banishment.[40]

Shortly thereafter, in respect to South Carolina, Bingham urged the amendment "to protect the few loyal white men there against State statutes of confiscation and statutes of banishment." He observed that as the Constitution stood the federal government was powerless, once the southern states were restored, "to protect the loyal white minority." He added:

> Restore those States with a majority of rebels to political power, and they will cast their ballots to exclude from the protection of the laws every man who bore arms in defense of the Government. The loyal minority of white citizens and the disfranchised colored citizens will be utterly powerless. There is no efficient remedy for it without an amendment to your Constitution.[41]

Congressman Giles W. Hotchkiss, a New York Republican lawyer, in urging that the initial draft of the fourteenth amendment's first section be redrafted, stated that he wanted to protect white persons as well as blacks.[42]

Representative John M. Broomall, a Radical Republican from Penn-

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[38] *Id.* at 599. See also *id.* at 1757.
[39] *Id.* at 746. See also *id.* at 943.
[40] *Id.* at 1065.
[41] *Id.* at 1094. See also Bingham's reference to statutes of banishment and confiscation at pp. 1091 and 1093.
[42] *Id.* at 1095.

sylvania, also advocated protecting loyalists in mountain areas without "distinction of caste or color" who had been banished or imprisoned for standing against secession. Broomall adverted to the fact that the property of white southern loyalists had been seized and confiscated in state courts, and they "are denied remedy in the courts of the reconstructed South . . . ." Representative Thomas T. Davis, a New York Republican, agreed with this object.[43] Representative Samuel W. Moulton of Illinois warned that Union soldiers were being persecuted by rebels in the Kentucky courts, and that if the rebels regained power in the South they would persecute white unionists as well as freedmen, confiscate their property, pass laws discriminating against them, and drive them out of the state or kill them. He added that such a process was already beginning.[44] A Pennsylvania Republican complained that Alabama had passed criminal laws severely punishing both white and black workers.[45] Representative Buckland of Ohio declared "that the Government was bound to protect the rights of the loyal white people and the loyal colored people of the South . . . ."[46] Another Ohio Republican read letters and articles to the House describing how white loyalists in the South were being insulted and driven out.[47]

Representative Sidney Perham, a Maine Republican, declared that the southern "policy is to render it so uncomfortable and hazardous for loyal men to live among them as to compel them to leave." He, too, recounted how the Kentucky courts were prosecuting Union soldiers and imprisoning them for acts done pursuant to military orders. He cited the Schurz report for the proposition that "if the military forces should be removed, it would be impossible for Union men, black or white, to remain there."[48] Representative Ephriam R. Eckley, an Ohio Republican, added:

> The whole North is full of loyal refugees who do not dare return to their former homes . . . . Reject the amendment . . . and you must widen the asylum in the North for those southern people who have sympathy with the Government.[49]

Finally, the Joint Committee on Reconstruction, which reported out the fourteenth amendment, gave as a reason for it:

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[43] *Id.* at 1265.

[44] *Id.* at 1618.

[45] *Id.* at 1621 (Rep. Leonard Myers).

[46] *Id.* at 1627.

[47] *Id.* at 1835 (Rep. William Lawrence).

[48] *Id.* at 2082-3. Representative Thaddeus Stevens of Pennsylvania, leader of the House Radical Republicans, thought that the fourteenth amendment does "not sufficiently protect the loyal men of the rebel States from the vindictive persecutions of their victorious rebel neighbors." *Id.* at 2460.

[49] *Id.* at 2536. See also *id.* at 2537 (Rep. Beaman), 2539 (Rep. Farnsworth).

> [W]ithout the protection of United States troops, Union men, whether of northern or southern origin, would be obliged to abandon their homes . . . . the general feeling and disposition among all classes are yet totally averse to the toleration of any class of people friendly to the Union, be they white or black; . . . Southern men who adhered to the Union are bitterly hated and relentlessly persecuted . . . . All such demonstrations show a state of feeling against which it is unmistakably necessary to guard.[50]

Even after proposing the fourteenth amendment, Congress continued its criticism of southern states for "denying protection to the people who were true and loyal during the war . . . ."[51] Representative Kasson of Iowa said that loyal men were being driven out of the South by violence, and that southern states should not be admitted to representation until "first they . . . take care that all free men, white or black, who adhere to the Government of the United States shall be protected as fully as one of their own class of citizens."[52] Senator Morton of Indiana declared that southern loyalists were murdered with impunity because the state governments "failed to extend protection to the loyal men, either white or black," and as a result the white majority was able to persecute "the loyal men, both white and black, in their midst . . . ."[53] Senator Timothy O. Howe, a Wisconsin Republican and a former state supreme court justice who had voted for the fourteenth amendment, declared that it was adopted because the Joint Committee on Reconstruction, after taking testimony,

> finally came to the conclusion that it would not be safe to commit these two populations, the loyal white men and the freedmen of those communities to the keeping of those governments unless some further restrictions were placed upon the authority of the state governments than were placed by the Constitution as it then stood.[54]

Senator William M. Stewart, a Nevada Republican lawyer, ascribed the Radical plan of reconstruction to the "denial of the rights of the black

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[50] S. REP. No. 112, 39th Cong. 1st Sess. 11-12 (1866). For discussion of this point during the debates on ratification, see Fairman, *op. cit. supra* note 21, at 90.

[51] 39 (2) GLOBE 128 (1866) (Sen. Sherman).

[52] *Id.* at 346. See also discussion of hostility to loyal whites and their protection in H.R. REP. No. 21, 40th Cong., 2nd Sess. 2 (1868); H.R. REP. No. 30, 40th Cong., 2nd Sess. 5, 26 (1868).

[53] 40 (2) GLOBE 725 (1868).

[54] *Id.* at 883. See also *id.* at app. 113 (Sen. Sumner and Morrill of Maine). Representative Burton C. Cook, an Illinois Republican lawyer, likewise asserted: "It is also manifest the white Union men of the southern States who risked so much and suffered so much for their devotion to the country would be left in the power of their enemies, receiving no measure of protection . . . ." *Id.* at 2402.

man and of the white Union man of the South" by the Johnson governments.[55] An Oregon Republican declared that if the southern rebels had been left to themselves "they would have imposed upon the loyal white people of the South political burdens and disabilities for the purpose of gratifying their revengeful feelings . . . ."[56]

It is obvious that the southern, white unionists or loyalists were not being discriminated against based on race, color, or previous condition of servitude. Discrimination against them was based on adherence to the national government, or political viewpoint. If the first section had been confined to racial discrimination, one of the major objects of congressional solicitude in submitting the fourteenth amendment would have been left out. It is therefore clear once again that if racial discrimination were deemed to have a special condemnation, under the fourteenth amendment, an important group, of equal concern with Negroes to the framers could not benefit from it. This is strong evidence that no such primacy was given to racial discrimination.

V. PROTECTION OF SOUTHERN REPUBLICANS

One of the three statutes passed during the Reconstruction period to enforce the fourteenth amendment, and especially the equal protection clause, was the Ku Klux Klan Act of 1871.[57] This statute was designed, not to bar racial discrimination, but to protect southern Republicans against politically inspired violence.[58] White Republicans were as much covered as were black Republicans. Thus, Representative Horace Maynard, a Tennessee Republican, gave as the reason for the bill that "this Congress will be recreant to its duty if it stops short of making it just as safe anywhere in the country to vote the Republican ticket as it is to vote the Democratic ticket."[59] Senator Morton of Indiana declared:

> [T]he white people in many parts of the South who are Republicans, who are the friends of the Government, have no security for life or property in the State courts, and that the colored people, . . . because they, too, are Republicans, have no protection for life and property. I plead for the security and protection of these people, not because they are Republicans, but because they are human beings; because they are men and women entitled to the protection of the laws; and I call upon all men, without regard to party, . . . to give to the citizens of the

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[55] *Id.* at 2898.

[56] 40 (3) GLOBE 900 (1869) (Sen. George H. Williams).

[57] 17 Stat. 13, Ch. 22.

[58] 42 (1) GLOBE app. 412-4 (1871) (Rep. Ellis H. Roberts, N.Y.).

[59] *Id.* at app. 310.

United States, whatever may be their political views, the equal protection of the laws.

> We are not at liberty to doubt that the purpose is by these innumerable and nameless crimes to drive those who are supporting the Republican party to abandon their political faith or flee from the State. A single murder of a leading Republican will terrify a whole neighborhood or county.[60]

Senator Daniel D. Pratt, an Indiana Republican lawyer, made a lengthy argument to demonstrate that the equal protection clause gave as much protection to white persons discriminated against on account of their politics as it did to Negroes discriminated against because of race. He observed that southern courts were virtually closed "when a man of known Union sentiments, white or black, invokes their aid."[61] He added that the first section of the fourteenth amendment, " by way of limitation upon the power of the States, applies equally to both races . . . . whether Caucasian, African, or Asiatic in origin." He observed:

> If protection is guaranteed to the African, it is also to the Chinaman if naturalized; and what warrant have we to claim that the whites alone are excluded?[62]

Senator George F. Edmunds, a Vermont Republican lawyer in charge of the bill for the Judiciary Committee, observed that a refusal of a state to protect a man because he was a Democrat, a Catholic, a Methodist, or a native of Vermont, would constitute a denial of equal protection of the laws within the meaning of the fourteenth amendment.[63] Edmunds remarked:

> But when you . . . come to the next [fourteenth] article of the Constitution, which secures the rights of white men as much as of colored men, you touch a tender spot in the party of our friends on the other side. If you wish to employ the powers of the Constitution to preserve the lives and liberties of white people against attacks by white people . . . contrived in order to drive them from the States in which they have been

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[60] *Id.* at app. 251-2. See also *id.* at 702, where Senator George F. Edmunds, a Vermont Republican, observed:

> The disorders in the South are not like the disorders in many other States, where there always are disorders, the results of private malice. The slaying of men there, as a rule . . . is but one step in the progress of a systematic plan and an ulterior purpose, and that is not to leave in any of those States a brave white man who dares to be a Republican or a colored man who dares to be a voter. The one is to be expelled or slain and the other is to be reduced to what they consider to be his normal condition.

[61] *Id.* at 505.

[62] *Id.* at 506.

[63] *Id.* at 567.

> born or have chosen to settle, contrived in order to deprive them of the liberty of having a political opinion . . . then the whole strength of the Democratic party and all its allies is arrayed against . . . such an act.[64]

Senator Lyman Trumbull, an Illinois Republican and chairman of the Senate Judiciary Committee, observed in criticizing one of the drafts of the bill:

> [N]ow there is nothing in the [fourteenth amendment of the] Constitution of the United States in regard to "race, color, or previous condition of servitude" that I am aware of. The Constitution of the United States guarantees to all citizens the equal right of protection wherever they are, and guarantees the equal protection of the laws to all persons, whether they are citizens or not . . . . Now, if you can punish persons for doing an injury to a man because he is white, or because he is black, or because he is yellow, why can you not punish him for an injury done to a man because he is regarded as a mean man, because the community do not like him, because he is an unpopular man?[65]

Representative Charles W. Willard, a Vermont Republican lawyer, likewise declared, in criticizing another section as it was originally drafted:

> But no man is guaranteed by the Constitution, on account of his race, color, or previous condition of servitude, the enjoyment of any more rights than every citizen has by that instrument the guaranty of. The Constitution holds over no man any shield on account of his birth-place, or parentage, or previous condition . . . . That instrument gives him as a citizen no rights which it does not give to me or any other man. It gives him as a citizen no rights which are not given to white and black alike. Alike they are entitled to the equal protection of the laws, . . . The Constitution now calls them all citizens, and gives to all the protection which it gives to any citizen; and it is the most patent inequality and injustice to give Irishmen or Chinamen or colored men a remedy against a county, and in the United States courts, when a white native citizen can only have his remedy against individuals and in the State courts.
>
> It is true that a person may suffer this damage by reason

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[64] *Id.* at 696. See also the somewhat humorous remarks of Senator Allen G. Thurman, an Ohio Democrat, *id.* at app. 219.

[65] *Id.* at 758. Trumbull also observed:

> [I]f you can punish an offense committed against a man because he is white or because he is black, . . . if you can punish a mob for getting up a riot and driving a man off on that account, I want to know if you cannot punish a mob for injuring a person for any cause that may be conceived of, because they want a man's property, because they want him out of the community, because they are "Regulators," as they had in Nevada some time ago . . . . *Id.* at 759.

> of his previous condition of servitude . . . but every offense has something peculiar in its character, and which constitutes the motive for its commission against that particular individual. But the life of a colored person, the house of a colored person are no more under the peculiar protection of the United States than the life and property of citizens of different complexions; and where the guarantee is the same it is clear that the remedy must be the same. When we have just got rid . . . by the amendment to the Constitution, of the inequality, . . . let us not now begin to go over to the other side and give greater rights and more effectual remedies to one man than to another, to one class of men than to another, to one race of men than to another. Of course, I deny that we have any constitutional power to do this; but I . . . confine my remarks mainly to a consideration of the injustice of the legislation . . . . I believe a black man is just as good as a white man . . . . and while I would give to him the same rights and the same protection which I would give to any one, I would not give him any greater rights or any higher remedies than are allowed to other citizens . . . we must [not] make him an exceptional and favored class in the administration of our laws.[66]

It is quite clear that southern, white Republicans, at least, were not being discriminated against on account of race, or color, and if the equal protection clause were limited, in whole or in part, to preventing such discrimination, there would have been no legal basis for protecting them under that clause. But such was not the understanding of the framers of the fourteenth amendment. They were loud in their assertions that discrimination based on race or color was not entitled to be more guarded against than political discrimination or any other form of discrimination. In their eyes, everyone was entitled to the same protection, whether the discrimination was based on race, color, religion, birthplace, politics, personal traits, or any other ground.

VI. Protection of Aliens and Chinese

Discrimination by law against Chinese on the West Coast, which was deemed in legal theory to be based on nativity rather than race,[67] was extensive during the Reconstruction period.[68] The California courts would not permit them to be witnesses,[69] as a result of which they

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[66] *Id.* at 791.

[67] 41 (2) Globe 4275 (1870) (Rep. Sargent), 4278 (Rep. Fitch).

[68] See 39 (1) Globe 628 (1866) (Rep. Marshall); *id.* at 1056 (Rep. Higby); 40 (3) Globe 1033-4 (1869) (Sen. Morton); 41 (2) Globe 3807-8 (1870) (Sen. Stewart); 42 (2) Globe 898 (1872) (Sen. Corbett); 901 (Sen. Trumbull), 912 (Sen. Stevenson), 985 (Sen. Sumner); 43 (2) Globe 1794 (1875) (Sen. Thurman).

[69] 41 (3) Globe 1253 (1871) (Sen. Morton). See People v. Washington, 36 Cal. 658 (1869); Speer v. See Yup Co., 13 Cal. 73 (1859); People v. Hall, 4 Cal. 399 (1854).

received no protection from legal authorities against robbery or other crimes committed on them by white persons.[70]

Discrimination against aliens or travelers in respect to natural or "civil" rights was contrary to Bingham's ideals as they were set forth in some of his earliest speeches. In 1859, even before the Civil War, he declared "that natural or inherent rights" were guaranteed by the fifth amendment's use of "the broad and comprehensive word 'person,' as contra-distinguished from the limited term citizen," so that the "natural rights to all persons, whether citizens or strangers, may not be infringed . . . ."[71] In introducing his first draft of what was later to become the equal protection clause, Bingham declared that "the divinest feature of your Constitution is the recognition of the absolute equality before the law of all persons, whether citizens or strangers . . . ."[72] Indeed Bingham was sharp in his criticism of the Civil Rights Act of 1866[73] for protecting only citizens and not all persons in their civil rights.[74] It can hardly be doubted that the differences between the equal protection clause and the due process clause of the fourteenth amendment, in protecting "persons," and the privileges and immunities clause, in protecting only "citizens," stem from this theory.

The very first statute passed by Congress to enforce the fourteenth amendment[75] contained a provision extending the Civil Rights Act of 1866 to aliens, "so that all persons who are in the United States shall have the equal protection of our laws."[76] Although the bill covered all

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[70] 39 (1) GLOBE 2892 (1866) (Sen. Conness).

[71] 35 (2) GLOBE 983 (1859). See also 42 (1) GLOBE app. 314 (1871), where Representative Horatio C. Burchard, an Illinois Republican lawyer, referred to "those inalienable rights that belong to every human being everywhere, and in the enjoyment of which the stranger as well as the citizen is protected by every free Government."

[72] 39 (1) GLOBE 158 (1866). See also *id.* at 1904.

[73] 14 Stat. 27 (1866).

[74] 39 (1) GLOBE 1292 (1866). Bingham declared:

> [A]re we not committing the terrible enormity of distinguishing here in the laws in respect to life, liberty, and property between the citizen and stranger within your gates? Do we not thereby declare the States may discriminate in the administration of justice for the protection of life against the stranger irrespective of race or color?
>
> Sir, that is forbidden by the Constitution of your country. The great men who made that instrument, . . . inserted . . . the more comprehensive words, "no person"; thereby obeying that higher law given by a voice out of heaven: "Ye shall have the same law for the stranger as for one of your own country" . . . .
>
> This bill, . . . departs from that great law. The alien is not a citizen. You propose to enact this law, you say, in the interests of the freedmen. But do you propose to allow these discriminations to be made in States against the alien and stranger? Can such legislation be sustained by reason or conscience? . . . Is it not as unjust as the unjust State legislation you seek to remedy? Your Constitution says "no person," not "no citizen," "shall be deprived of life, liberty, or property," without due process of law.

[75] Enforcement Act of 1870, ch. 114, 16 Stat. 140.

[76] 41 (2) GLOBE 1536 (1870) (Sen. Stewart).

foreigners, including travelers,[77] it was called the "Chinese bill,"[78] because it was primarily designed for "the protection of the Chinese."[79] Senator Stewart of Nevada, declared:

> Now while I am opposed to Asiatics being brought here, and will join in any reasonable legislation to prevent anybody from bringing them, yet we have got a treaty that allows them to come to this country . . . . While they are here I say it is our duty to protect them. I have incorporated that provision in this bill on the advice of the Judiciary Committee . . . . It is as solemn a duty as can be devolved upon this Congress to see that those people are protected, to see that they have the equal protection of the laws, notwithstanding that they are aliens. They, or any other aliens, who may come here are entitled to that protection. If the State courts do not give them the equal protection of the law, . . . their ordinary civil rights, . . . we will protect Chinese aliens or any other aliens whom we allow to come here, and . . . let them be protected by all the laws and the same laws that other men are . . . . The fourteenth amendment to the Constitution says that no State shall deny to any person the equal protection of the laws.[80]

Bingham approved the Senate bill. He declared that Congress could enforce the equal protection clause in favor of emigrants.[81] Indeed, even the California representatives of both parties advocated protecting the Chinese in their civil rights. Representative James A. Johnson, a California Democrat, remarked that the equal protection clause "puts the Chinaman on an equality with every other unnaturalized foreigner in the land,"[82] and added that "Chinamen will always receive all the protection that just laws may give."[83] Representative Aaron A. Sargent, a California Republican, said that "the Chinaman and anyone else, no matter what his color, is entitled to the equal protection of our laws in life, liberty, and security; but I never have believed that we should go beyond that and make them all citizens."[84] The right of aliens to be

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[77] *Ibid.*

[78] *Id.* at 3702 (Sen. Thurman). See also *id.* at 3703 (Vice President).

[79] *Id.* at 3807 (Sen. Stewart). See also *id.* at 3570, where Senator Sherman referred to the fact "that we must protect the Chinese against the local law of California . . . ."

[80] *Id.* at 3658. After deploring the fact that the Chinese in California were being robbed and murdered with impunity, Stewart added: "Dare he say to the good people of California that while the Chinese are here under our laws, and while we have a Constitution which says that no State shall deny to any person within its jurisdiction the equal protection of the laws, Congress ought not to pass a law to give them protection?" *Id.* at 3808.

[81] *Id.* at 3871. This included discrimination among European immigrants.

[82] *Id.* at 3879.

[83] *Id.* at 3880.

[84] *Id.* at 4275. Representative Thomas Fitch, a Nevada Republican, likewise noted "that I voted for the bill enforcing the fifteenth amendment, the sixteenth section of which protects this people in all their civil rights." *Id.* at 4278. *Cf.*, 42 (1) GLOBE 506 (Sen. Pratt).

protected in their civil rights under the equal protection clause was conceded by other members of Congress as well.[85]

If the equal protection clause were confined to protection against racial discrimination, in whole or in part, it could not protect travelers and aliens discriminated against because of alienage. Once again, such a construction is manifestly inconsistent with the original purposes of the fourteenth amendment.

VII. THE CIVIL RIGHTS ACT OF 1875

The one statute passed during the Reconstruction period which specifically forbids racial discrimination is the Civil Rights Act of 1875.[86] But even this law does not permit an inference that racial discrimination was especially obnoxious to the fourteenth amendment, even assuming the validity of the law.[87] Although this point is not shown on the face of the law, the purpose of the statute was to guard against state statutes or common-law rules which gave everyone the benefit of the facilities therein named but discriminated only against Negroes. Thus, the law assumed that all discrimination except racial discrimination was forbidden, and merely eliminated this exception.[88] Indeed, the debates show that Congress did not intend to given any special privileges to Negroes, thus "falling into the absurdity of discriminating against whites . . . ."[89]

The Democrats harped on the theme that the remedies given by

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[85] 42 (2) GLOBE 901 (1872) (Sen. Trumbull), 43 (2) Record 1863 (1875) (Sen. Carpenter). *Cf., id.* at 1870 (Sen. Edmunds). Senator Thurman observed:

> As I said before, the clause of the amendment which he reads has no relation to citizenship. It covers every human being within the jurisdiction of a State. It was intended to shield the foreigner, to shield the wayfarer, to shield the Indian, the Chinaman, every human being within the jurisdiction of a State from any deprivation of an equal protection of the laws; and the very fact that it embraces aliens, the very fact that it embraces the traveler passing through, shows that it has no relation whatsoever to qualifications for political office . . . .

43 (2) RECORD 1794 (1875), See also *id.* at 1795.

[86] 18 Stat. 335 (1875).

[87] The first section was held unconstitutional in the Civil Rights Cases, 109 U.S. 3 (1883).

[88] Avins, *The Civil Rights Act of* 1875: *Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COL. L. REV. 873 (1966).

[89] 42 (2) GLOBE 435 (1872) (Sen. Frelinghuysen). Senator James K. Kelly, an Oregon Democrat, observed:

> If the United States can, under the fourteenth amendment, punish white people for infringing the rights of colored people, why can they not punish white people for infringing the rights of white people? Certainly, they have a right to protect all classes, and if the right belongs exclusively to the United States to protect colored people, it belongs in an equal degree to the United States to protect the white people also. *Id.* at 895.

See also Kelly's remarks at 43 (1) RECORD 4163 (1874).

Congress were specially designed for the benefit of Negroes.[90] For example, Representative Aylett H. Buckner, a Missouri Democrat, declared:

> Nor can I understand why there should be such discrimination in his favor as between him and the white citizen . . . . If a white citizen is excluded from a public inn or a place of public amusement he must sue in the State courts, and content himself with the actual damages sustained; but if it be a colored man who has a similar cause of action, the unfortunate innkeeper, showman, or teacher of a public school is subjected to a penalty of from one hundred to five thousand dollars, . . . [91]

Moreover, the Democrats also noted that the fourteenth amendment does not protect against racial discrimination alone. Senator William T. Hamilton, a Maryland Democratic lawyer, said:

> I ask you and each Senator present to read again the fourteenth amendment. It has not a reference to race; it has not a reference to color; it applies to all the people alike as citizens or persons only, and not in any other respect.[92]

Senator Allen G. Thurman, an Ohio Democrat and a former chief justice of the state supreme court, likewise observed: "There is not one word in this first section of the fourteenth amendment that has any relation to race, color, or previous condition of servitude . . . ."[93] Senator Thomas F. Bayard, a Delaware Democratic lawyer, remarked:

> [T]he fourteenth amendment is addressed entirely to States and never to people, and there seems to me to have been a very strange confusion in the minds of those who drafted this bill, under the fourteenth amendment, in referring to "nativity, race, color, or persuasion, religious or political," when the fourteenth amendment contains no such language, and no reference to such subjects is to be found in any part of it. The fifteenth amendment relates only to the right to vote, and forbids any State to abridge that right by reason of "race, color, or previous condition," but the fourteenth amendment has no reference whatever to such subjects. There is not a word of sex or of race, of age or of color, of nativity or of religion — not a word in any way, express or implied, in the language of the amendment under which this statute is supposed to find its warrant.[94]

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[90] For example Representative Henry D. McHenry, of Kentucky declared:
> It has never occurred that such extraordinary remedies have been given by Congress for the protection of any white man in his rights. To be a Negro is to belong to the favored class. 42 (2) GLOBE app. 218 (1872).

[91] 43 (1) RECORD 429 (1874).

[92] *Id.* at app. 362. See also 43 (2) RECORD 1794 (1875) (Sen. Hamilton). And note *id.* at app. 114: "'Color' is not in the fourteenth amendment; 'race' is not in the fourteenth amendment."

[93] *Id.* at 1795.

[94] *Id.* at app. 104.

Bayard suggested that a poor man was as much entitled to equal protection of the laws as a rich man, and that discrimination by an owner of a place of public accommodation based on poverty or inability to pay the requisite charge was as much condemned under the fourteenth amendment as was racial discrimination. He therefore concluded:

> I do not know but that an amendment should be offered to this bill, providing not only that this equal enjoyment of hotels should be guaranteed by the United States, but that money should be appropriated to pay for the accommodation, the ticket of the railway, or for entrance to the theater from the Treasury of the United States, . . . for impecuniosity is as much a condition under the fourteenth amendment as race or color, and entitled to the same protection.[95]

Senator Thurman later added: "No man has been able to point out one word in the Constitution which says you shall make no discrimination on account of race but you may discriminate on any other account you see fit."[96]

The dominant Republicans strenuously denied any discrimination in favor of Negroes. Senator Frelinghuysen of New Jersey, reporting the bill for the Judiciary Committee, said that it "properly secures equal rights to the white as well as to the colored race."[97] Senator Pratt of Indiana noted that "this measure is not confined to colored citizens; it embraces all, of whatever color."[98] And the following exchange between Thurman and Senator George S. Boutwell, a Massachusetts Republican who, as a Representative had been a member of the Joint Committee on Reconstruction of the Thirty-Ninth Congress, which reported out the fourteenth amendment, clearly illustrates this point:

> Mr. THURMAN . . . the first section of the fourteenth amendment, on which he relies of course to sustain the bill, has no reference whatsoever to "race, color, or previous condition of servitude." No such words are in the section. No allusion is made to that distinction . . . . there is not one word in the first section of the fourteenth amendment that relates to race, color, or previous condition of servitude.
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> Mr. BOUTWELL. That is all very true. The fourth section of this bill provides for equality in certain particulars where the equality of citizens is assailed, and not elsewhere.

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[95] *Id.* at app. 105.

[96] *Id.* at 1866.

[97] 43 (1) RECORD 3451 (1874).

[98] *Id.* at 4082. Senator Edmunds said that discrimination based on religion or nativity violated the fourteenth amendment equally with that of race. 43 (2) RECORD 1866, 1870 (1875).

> It is assailed or threatened in many of the States of the Union, upon the ground that certain persons are of a particular race or of a particular color or have been subject in times past to the condition of slaves . . . .
>
> . . . Therefore, while we cannot go into the States and say what the rights of citizens of the State in the State shall be, whenever there is a law in a State or a provision of its constitution which secures to citizens generally their rights and discriminates against other citizens, [it is] in our power under the fourteenth amendment to protect them as citizens of the United States, we pass the boundaries of the several States by authority of the Constitution and secure . . . their rights under the laws of the States as citizens of the State . . . .
>
> . . . all that is claimed under the fourth section of this bill is that you shall not, . . . say that a man shall not sit upon a jury because he is a black man or because he is of the German race or because he has been held in slavery, and I might say for other reasons. If for other reasons discriminations were made by the law of any of these States, we might under the fourteenth amendment protect men from such discriminations.[99]

It is interesting to note that Representative Richard H. Cain, a South Carolina Negro Republican, said that he was not asking for special privileges but merely for no discrimination in the laws, and that when the laws made no distinction, "if the Negro is not qualified to hoe his row in this contest of life, then let him go down."[100]

It is clear from the foregoing evidence that Congress, in passing the first section of the 1875 statute, was simply eliminating a discrimination in respect to businesses in which all other discriminations were forbidden by common law. This statute, therefore, lends no support to the notion that racial discrimination is more interdicted under the equal protection clause than any other form of discrimination. The debates show that members of both parties did not believe that racial discrimination was specially banned. Since it was singled out only because other discriminations were already forbidden, this lends no support to the notion that racial discrimination may be banned when other discriminations are allowed.

VIII. The Fifteenth Amendment

The only enactment during the Reconstruction period which singled out race, color, and previous condition of servitude for special interdiction was the fifteenth amendment. The striking difference in phraseology between the fourteenth amendment and the fifteenth amendment is in

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[99] *Id.* at 1792-3. *Cf., id.* at app. 113 (Sen. Hamilton).

[100] *Id.* at 957. See also *id.* at 982.

itself a good indication that the former does not limit itself to the three classifications set forth in the latter. However, it is of interest to review the attitudes of the dominant Republicans towards this limitation as a reflection of their attitudes generally.

The fifteenth amendment was a political compromise, hammered out under great time pressure after attempts were repeatedly made to give every adult male an equal vote, or to ban the major causes of discrimination against white persons, nativity, religion, education, and property. Many of the dominant party members were very unhappy with the result, and were vocal in the belief that this compromise did not assure equal political rights.[101] It was feared that white persons might disenfranchise other whites for political or other reasons.[102]

Senator Edmunds, for example, objected to any constitutional amendment giving only Negroes the right to vote because it did not "stand on any principle," and because "there is nothing republican in that."[103] He did not want to "undertake to take one particular class of people in this country who happen to have been born in one zone of the earth rather than another, and say that they, and they alone, shall be entitled to the political privileges . . . ." Edmunds added:

> I say it undertakes to dispose of him in the fundamental law, when you leave the native of every other country under the sun, the descendant of every other race under the sun, entirely to the mercy of the States . . . . I say, and I shall be excused for the expression, that it is little less than an outrage upon the patriotism and good sense of a country like this, made up of the descendants of all nations, to impose upon them an amendment of that kind.[104]

Senator John Sherman of Ohio attacked the amendment for protecting only against racial discrimination when many whites were disenfranchised for other reasons. He said that the amendment banning only racial discrimination rested "on so narrow a ground that we are constantly apologizing for its weaknesses."[105] Senator Howe remarked that discriminations among white people should be eliminated along with discriminations against Negroes.[106] Senator Joseph S. Fowler, a Tennessee Republican lawyer, exclaimed:

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[101] Avins, *The Fifteenth Amendment and Literacy Tests: The Original Intent*, 18 STAN. L. REV. 808 (1966).

[102] 40 (3) GLOBE 900 (1869) (Sen. Williams).

[103] *Id.* at 1008.

[104] *Id.* at 1009. *Cf., id.* at 1011 (Sen. Doolittle).

[105] *Id.* at 1039.

[106] *Id.* at 1040.

> [T]he propositions before us ignore the rights of all the white men of the country who are now divested of this great right. When this measure is adopted they will remain divested of the right . . . . I contend that any amendment of the Constitution that does ignore the rights of the white men who are disenfranchised throughout the United States is an amendment unworthy of the age and it is an amendment unworthy of a white citizen of the United States or of any citizen of the United States. Carry the proposition to the colored men in the southern country and they will vote today to give this right to the disenfranchised whites. They would spit upon such a proposition as this — a proposition in which their own rights are attempted to be secured, while it tramples down the rights of their own white fellow-citizens . . . . There is not a decent black man in all the southern States who would not scorn such a proposition as this; and yet we are told . . . that nobody's rights are to be guarded except those who are marked by race, color, or previous condition of servitude . . . . For all other reasons a State may divest a man of his right to vote . . . .[107]

Senator Wilson of Massachusetts lamented the loss of his substitute banning discrimination based on factors other than race, or color. He wanted to protect people against discrimination based on other grounds. He declared:

> If the black man in this country is made equal with the white man — and I hope he soon will be — I mean, . . . to make every white man equal to every other white man. I believe in equality among citizens — equality in the broadest and most comprehensive democratic sense. No man should have rights depending on the accidents of life.[108]

Senator Willard Warner, an Alabama Republican, attacked the fifteenth amendment as "a narrow and illogical one, and one that is unworthy of the grand opportunity that is presented to us."[109] Finally, Bingham himself viewed the fifteenth amendment as the very antithesis of the fourteenth amendment, rather than as a logical extension. He considered that by banning only racial discrimination the amendment gave special privileges to Negroes. He declared:

> Why, equality of the law is the very rock of American institutions, and the reason why I desire to amend this proposition of the Senate is that as it stands it sweeps away that rock of defense by providing only against State usurpation in favor of colored citizens, to the neglect of equal protection of white citizens. While colored citizens are equal in rights with every other class

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[107] *Id.* at 1303. See also Fowler's remarks at 1307-8.

[108] *Id.* at 1626. See also Wilson's observations at 1307.

[109] *Id.* at 1641.

> of citizens before the majesty of American law, as that law stands written this day, I am unwilling to set them above every other class of citizens in America by amending the Constitution exclusively in their interest. The import of my amendment is to protect all classes alike . . . ."[110]

Of course, the Democrats were equally in favor of protecting the right of white persons to vote, so there was no difference between the parties in this regard.[111]

Thus, the equalitarian Republicans were unhappy with limitations on the fifteenth amendment. Bingham was himself keenly disappointed. This amendment, therefore, casts no reflected light on the fourteenth amendment.

IX. CONCLUSION

Where is the authority for the proposition that the fourteenth amendment interdicts racial discrimination to any greater extent than any other discrimination? It is true that there is some *obiter dicta* by Mr. Justice Miller in the *Slaughter-House Cases*[112] which points in this direction, but the five-to-four decision, insofar as it rests on any such notions, is opposed to the whole legislative history of the reconstruction period. Moreover, this point was specifically rebutted by Senator Howe of Wisconsin,[113] a Radical Republican and a former state supreme court justice who had taken part in the debates on, and voted for, the fourteenth amendment, and who declined the position of Chief Justice of the United States right after that case was decided.[114] Such *dicta* is therefore hardly authoritative.

Bingham had the broadest view of the scope of the protection given by the fourteenth amendment. He wanted it to be "the keystone of American liberty."[115] What kind of a keystone of liberty would it be that was more solicitous of one racial group than another, or protected against one kind of discrimination more than another? The Republicans themselves supplied the answer during the debates on the fifteenth amendment which prohibited only racial discrimination, just as "civil

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[110] *Id.* at 1427. Of course, Bingham was always sensitive to charges that he was less interested in protecting the rights of white persons than Negroes, and always refuted them. See *e.g.*, 41 (2) GLOBE 3874 (1870) (Rep. Beck), app. 400 (Rep. Cox), 3883 (Rep. Bingham).

[111] See *id.* at 3565 (Sen. Thurman), 3567 (Sen. Stockton), 3569 (Sen. Sherman, Trumbull). See also 40 (2) GLOBE app. 350 (1868) (Sen. Yates).

[112] 83 U.S. (16 Wall.) 36, 71-72 (1873).

[113] 43 (1) RECORD 4148 (1874).

[114] Graham, *The Waite Court and the Fourteenth Amendment*, 17 VAND. L. REV. 525 (1964).

[115] 42 (1) GLOBE app. 84 (1871).

rights" bills do today. Bingham thought that discrimination "sweeps away" equality and "sets [Negroes] above" everyone else, upon a pedestal. Edmunds thought it would be "an outrage upon the patriotism and good sense" of the country which was made up of many groups, while Fowler said that every "decent black man" would "spit upon" such a proposition.

Discrimination in education, housing, and employment may be based on innumerable arbitrary reasons aside from race, color, creed or national origin. People are refused jobs because their political opinions are unpalatable. They are refused housing because their personality is deemed disagreeable. A host of other causes readily come to mind. To refuse to protect them against all arbitrary discrimination, and to protect them only because of racial or religious discrimination, is to deny the same protection to all people who suffer from arbitrary discrimination. Such a partiality is a refusal to protect people equally. Banning racial and religious discrimination alone is therefore a denial of equal protection of the law. It is not only not an enforcement of the fourteenth amendment, but rather a violation of it. Such laws which single out this form of discrimination alone to ban are accordingly unconstitutional on this ground, if on none other.