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Anti-Miscegenation Laws and the Dilemma of Symmetry: The Understanding of Equality in the Civil Rights Act of 1875

STEVEN A. BANK

The Civil Rights Act of 1875,¹ which was introduced by two Republicans from Massachusetts, Charles Sumner in the Senate and Benjamin Butler in the House, sought to overturn many of the bars to interaction between the races after the end of slavery. In its final form, the Act provided that "all persons . . . shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."² No provision of the Act, however, explicitly addressed state anti-miscegenation statutes, or laws that prohibit "intermarriage and all forms of illicit intercourse between the races."³ Proponents of the Act confined their arguments largely to the issue of desegregating public places such as railroad cars, steamships, inns, cemeteries, churches, and public schools.⁴ Continued prejudice, distaste for miscegenation among both races, and a declining post-Civil War rate of miscegenation, combined to persuade supporters of the bill not to address these laws in the push to desegregate public institutions.

This decision, albeit a wise one politically, left Republicans open to attack. Republicans argued that symmetrical equality, where blacks are prohibited

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1. 18 Stat 335. The Act was later struck down in *Civil Rights Cases*, 109 US 3, 25 (1883), on the ground that it was an exercise of power by Congress without basis in the Constitution.

2. 18 Stat at 336.

3. Gilbert T. Stephenson, *Race Distinctions in American Law* ch 6 at 78 (D. Appleton and Co, 1910).

4. Cong Globe, 41st Cong, 2d Sess 3434 (1870); Cong Globe, 42d Cong, 2d Sess 240-41 (1872). Cemeteries, churches, and public schools were not included in the final version of the Civil Rights Act of 1875.

from doing what whites can do, but whites are equally prohibited from doing what blacks can do, was insufficient to satisfy the requirements of the Fourteenth Amendment. They contended that under the Equal Protection Clause, blacks should have the same right as whites to enter any public place. This argument, however, inescapably included anti-miscegenation statutes within the confines of its logic. While such statutes provided symmetrical equality, since they prohibited both blacks and whites from participation in interracial relationships, they denied blacks the same right to marry whites as whites enjoyed. If segregation of public places was unconstitutional, anti-miscegenation statutes must be as well. Opponents of Reconstruction seized upon this logical extension of the Republican principle of equality to suggest that the Civil Rights Act of 1875 would result in increased miscegenation. The charge became intertwined with the claim that Republicans sought to legislate "social" equality between the races. Thus, Republican treatment of miscegenation was watched closely. Accepting symmetrical equality in anti-miscegenation laws would weaken their argument against segregation. Conversely, arguing that anti-miscegenation laws were unconstitutional might arouse opposition to attempts to protect the civil rights of the freedmen.

Modern observers suggest that, where the issue was addressed directly, Republicans resolved the miscegenation question by embracing the principle of symmetrical equality. Relying primarily on evidence from the debates over the Civil Rights Act of 1866, they claim that Republicans used the logic of symmetrical equality throughout Reconstruction to justify the constitutionality of anti-miscegenation statutes.⁵ This interpretation of equality was then reflected in the decisions of the Supreme Court. In *Pace v Alabama*, the Court declared that the purpose of the Equal Protection Clause of the Fourteenth Amendment "was to prevent hostile and discriminating State legislation against any person or class of persons."⁶ Yet, a state statute which punished interracial adultery and fornication more severely than intraracial adultery and fornication was not discriminatory because it "applie[d] the same punishment to both offenders."⁷ *Plessy v Ferguson's*⁸ "equal but separate" doctrine was therefore "predetermined" by the Court's decision thirteen years earlier in *Pace*.⁹ Several scholars conclude that, under this principle of symmetrical

5. See Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 *Loyola LA L Rev* 1207, 1209 (1992); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 *Yale L J* 1385, 1460 n 280 (1992); David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789-1888* ch 11 at 389 (Chicago, 1985). Currie concedes, however, that the statements in Congress in 1866 on miscegenation "fall[] short of a conclusive demonstration that Congress and the ratifying state legislatures affirmatively embraced the same view of the equal protection clause." *Id.*

6. 106 US 583, 584 (1882).

7. *Id.* at 585.

8. 163 US 537 (1896).

9. David P. Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910*, 52 *U Chi L Rev* 324, 369 (1985). See also John P. Roche,

equality, the Fourteenth Amendment as originally understood was not meant to apply to anti-miscegenation statutes or to segregation.¹⁰ With such evidence seemingly well-established, many discount the historical approach and search for different justifications for our modern conception of equality.¹¹

This traditional interpretation of the historical evidence on miscegenation and the understanding of equality, and the subsequent rejection of the enterprise of historical investigation, must be re-evaluated. Republicans embraced a more modern understanding of equality during the debates over the Civil Rights Act of 1875. While supporters of the Civil Rights Act of 1875 were understandably cautious in handling the issue of miscegenation, they were unwavering in their rejection of symmetrical equality. Moreover, when directly confronted with the miscegenation question, several Republicans called for the repeal of anti-miscegenation statutes on the basis of their understanding of equality, and no supporter of the bill sought to avoid the issue by defending the constitutionality of anti-miscegenation laws or by invoking the principle of symmetrical equality. Not only does this suggest revisions in our historical understanding of Congress's treatment of miscegenation, but it questions whether the analysis of the Equal Protection Clause in *Pace* and *Plessy* was consistent with the original understanding.

This Comment examines Congress's treatment of miscegenation and its relationship with the concept of symmetrical equality. Section I discusses the way this issue arose during the debates over the Civil Rights Act of 1875. Section II examines the Republicans' treatment of the miscegenation question in Congress and the courts during Reconstruction. Section III demonstrates how the Republican treatment of the miscegenation question during the debates over the Civil Rights Act of 1875 quietly supported the repeal of anti-miscegenation laws and rejected the doctrine of symmetrical equality.

Civil Liberty in the Age of Enterprise, 31 U Chi L Rev 103, 112 (1963) (“[T]he decision in *Pace v. Alabama* was in *loco parentis* to the ‘separate but equal rule’ of *Plessy*.”).

10. See Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv L Rev 1, 58 (1955); R. Carter Pittman, *The Fourteenth Amendment: Its Intended Effect on Anti-Miscegenation Laws*, 43 NC L Rev 92, 108 (1964); Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 Va L Rev 1224, 1253 (1966).

11. See Walter Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 Va L Rev 1189, 1214 (1966) (“ . . . it must be recognized that the limitations of outlook which men of all historical periods share may preclude them from seeing the implications of the values which they enunciate.”). See also Currie, *The Constitution in the Supreme Court* ch 11 at 389 (cited in note 5) and Bickel, 69 Harv L Rev at 59-65 (cited in note 10) for the suggestion that Congress built into the Fourteenth Amendment the capacity to expand beyond its specific interpretation of equality.

This modern conception of equality is found in the rejection of the “separate but equal” doctrine in *Brown v Board of Education of Topeka*, 347 US 483 (1954) and the eventual overturning of anti-miscegenation laws in *Loving v Virginia*, 388 US 1 (1967).

I. The Political Question of Miscegenation

A. THE OPPONENTS' USE OF THE ISSUE TO ATTACK THE CIVIL RIGHTS BILL

1. A natural alliance between segregation and anti-miscegenation.

During Reconstruction and through *Pace*, supporters of the constitutionality of segregation and anti-miscegenation laws were natural allies. In general, both rested their arguments upon the symmetry of such laws. Such a connection was pointed out as far back as 1867 in the oft-cited Pennsylvania segregation case of *West Chester and Philadelphia RR Co v Miles*:

The natural separation of the races is therefore an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage. But to assert separateness is not to declare inferiority in either; it is not to declare one a slave and the other a freeman—that would be to draw the illogical sequence of inferiority from difference only. It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separated races to intermix. The right of such to be free from social contact is as clear as to be free from intermarriage.¹²

Miles concerned the same type of unequal treatment in common carriers which Sumner's bill prohibited. *Miles* involved a black woman who was thrown off a train because she refused to move to the rear of the car pursuant to the railroad's regulations.¹³ The Pennsylvania Supreme Court upheld the railroad's regulation, pointing out that “[l]aw and custom having sanctioned a separation of races, it is not the province of the judiciary to legislate it away.”¹⁴ Thus, separation was not viewed as a threat to equality in either transportation or marriage. Anyone participating in the debates over the Civil Rights Act of 1875 would recognize these arguments immediately. Opponents of the bill made the same point in supporting segregation. Senator Eli Saulsbury of Delaware contended that “the desire to preserve in its purity the race to which we belong is not prejudice, but it is the implantation of the Divine Author of our being, and wisely intended to preserve the distinctive character of the race to which we belong.”¹⁵ Senator Augustus Merriman of North Carolina echoed this sentiment:

I have meant nothing insulting to the negro race by speaking of them as the

12. 55 Pa 209, 213 (1867). This case was frequently cited by Southerners because, coming from the liberal state of Pennsylvania, it seemed to place arguments in favor of segregation on more neutral and rational grounds.

13. *Miles*, 55 Pa at 211. Obviously, Rosa Parks's refusal to move to the back of the bus was not the first such stand by a black woman.

14. *Id* at 214-15.

15. 2 Cong Rec 4160 (1874).

negro race. . . . That is the proper, lawful designation of his race; and he ought to be, and the true man will be, proud of his race, and sustain its purity and integrity, just as the white man ought to strive to preserve and protect the integrity of his race.¹⁶

Sumner, speaking for the eventually successful majority, sharply rebuked the notion that equivalent or symmetrical treatment is a benign or beneficial goal:

Assuming what is most absurd to assume, and what is contradicted by all experience, that a substitute can be equivalent, it is so in form only and not in reality. Every such attempt is an indignity to the colored race, instinct with the spirit of slavery, and this decides its character. It is Slavery in its last appearance.¹⁷

Support for symmetrical equality, however, re-emerged at the end of Reconstruction. In *Pace*, the Court extended the equal but separate argument to uphold the constitutionality of anti-miscegenation laws. According to the Court in *Pace*, anti-miscegenation laws did not violate the Equal Protection Clause because “[t]he punishment of each offending person, whether white or black, is the same.”¹⁸ In his brief for the State of Alabama in *Pace*, Attorney General Henry Tompkins argued matter-of-factly that “[i]t is not a discrimination against the negro race, because it imposes the same punishment upon the white person that it does upon the negro who violates its provisions.”¹⁹ Moreover, according to Tompkins, “[t]he passage of such laws is a recognition of difference of races, but does not place upon either the badge of inferiority; they are based upon the idea of dissimilarity, which does not necessarily mean legal or civil inequality.”²⁰

Thus, in Congress as well as the courts, the argument against desegregation was aligned with the argument in support of anti-miscegenation laws. Conversely, Sumner's contention that desegregating common carriers was constitutionally mandated logically suggested that anti-miscegenation laws must be repealed as well. This latter argument was forcefully pointed out by opponents of the Civil Rights Act of 1875.

2. Democrats' emphasis on the miscegenation dilemma.

Opponents of the Civil Rights Act of 1875 used the prejudice against miscegenation in two separate ways in their fight against the bill. First, they claimed if the Fourteenth Amendment required desegregation, it also mandated the repeal of anti-miscegenation laws. Second, they argued that the bill attempted to legislate social equality, a code phrase for matters outside the authority of the legislature and, in this context, for attempts to allow miscegenation.

16. 2 Cong Rec App 316 (1874).

17. Cong Globe App, 42d Cong, 2d Sess 383 (1872).

18. *Pace*, 106 US at 585.

19. Brief for Appellee at 3, *Pace v Alabama*, No. 908, 106 US 583 (1882).

20. *Id* at 14.

a) *Miscegenation as the direct or logical result of desegregation.* Democrats argued that the logic of desegregation naturally extended to a right of racial intermarriage. Thus, North Carolina Democrat James Harper stated in the House:

If Congress has the power to pass this bill and make it a law it has the power to enact laws to regulate the minutest social observances of domestic or fashionable life. If it has the right to say to my neighbor, 'You must ride in the same car, eat at the same table, and lodge in the same room with a negro,' it can also say that you must not interpose an objection on account of his color to any advances he may make toward your children or family.²¹

Beyond merely asserting that the bill implied a *power* to ban anti-miscegenation laws, the Democrats were quick to observe that the removal of all distinctions between the races would necessarily *require* the removal of anti-miscegenation laws. Opponents attacked this vulnerability most directly during a debate over § 5 of Sumner's original bill, submitted to the Senate as an amendment to the Amnesty Bill. This section provided the following:

That every law, statute, ordinance, regulation, or custom inconsistent with this act, or making any discriminations against any person on account of color, by use of the word "white," is hereby repealed and annulled.²²

While § 5 merely declared Sumner's general goal of "color-blind"²³ laws and statutes, Senator Thomas Norwood, a Georgia Democrat who was particularly fixated on the miscegenation question, called "the special attention of Senators" to its effect.²⁴ According to Norwood, "I have met with no one yet who does not agree with me that the effect of passing this law would be to abolish every State law which inhibits marriage between whites and blacks."²⁵

This section, according to its opponents, was not just an isolated provision but was the written embodiment of the policy underlying the bill. Norwood contended that the "same familiar association" imposed on the children in the schools and churches "continues from childhood up to manhood, and when they have arrived at manhood you then, by your statute, say that if they see fit to join in matrimony there shall be no impediment to it."²⁶ When the issue was raised in the House version of Sumner's bill, Representative Andrew King, a Missouri Democrat, declared that "[i]t is on this clause [§ 5] that the Senator from

21. Cong Globe App, 42d Cong, 2d Sess 372 (1872) (Rep. Harper).

22. Cong Globe, 42d Cong, 2d Sess 819 (1872).

23. This, of course, was not his term. It was made famous in Justice Harlan's dissent in *Plessy*, 163 US at 559.

24. Cong Globe, 42d Cong, 2d Sess 819 (1872).

25. Id.

26. Id.

Massachusetts [Mr. Sumner] bases his social equality bill, by which . . . a white man shall have the right to marry a negro woman, if the negro is willing."²⁷ Congressman John Rice of Kentucky complained that § 5, "more shamelessly than even the proceeding ones, parades the scheme of social equality" and "is the inauguration of a mixed generation."²⁸ Rice's colleague from Kentucky, Representative Henry McHenry, went so far as to suggest that § 5 was "intended, and will have the effect, to repeal the statutes in force in all the States preventing the intermarriage of whites and blacks. . . . Its scope and intent is to establish perfect equality, legal and social."²⁹

After the debate over § 5, Democrats continued to argue that the underlying policy of desegregation naturally extended to a right of interracial marriage. Senator Norwood argued that it was hypocritical to advocate social contact while opposing miscegenation:

But it is said, "Admit it, then what of it? We do not mean that blacks and whites shall marry." Well if you do not, then be consistent, be logical. Let precept and example be in harmony. If you would not marry them, then coerce no conditions in life among the poor, who cannot protect themselves, by which you increase the danger of such relation. You would not encourage marriage between the two races, but you compel them to associate in every *social* condition.³⁰

Congressman John Atkins of Tennessee posed the converse of this question to illustrate the contradiction. "If, then, the marriage of the races brings decay and death, and must be prohibited by law . . . why have not the States the power to keep the races apart in the schools and elsewhere?"³¹

Sometimes the direct attack was phrased as a metaphor that only slightly blunted its force. Senator Norwood was particularly enamored with this form of argument:

[F]or eight long years [the Republican party] has been coquetting with and affianced to the American branch of the Ethiopian family, commonly known as the "colored people. . . ." His Uncle Sam has lost confidence in his finances, his friends are falling off, creditors are sweeping his estates, and his colored inamorata charges that he has trifled with her affections, and threatens to abandon him, unless he will call in the high priest (Congress) at once, and solemnize the marriage. And now, Mr. President, these "two high contracting parties" are before us for the sixth time to be made one political flesh. . . . Ranged beside [the bride] again stand her ever-faithful bridesmaids clothed in white, symbolic that in this union, as in a ray of light, all color will be absorbed, and this dark bride shall be pure white. Foremost and first among them is one bearing over her serene

27. Cong Globe App, 42d Cong, 2d Sess 383 (1872).

28. Id at 599.

29. Id at 219.

30. 2 Cong Rec App 237 (1874).

31. 2 Cong Rec 453 (1874).

bosom the general motto "Without distinction of race, color, or previous condition of servitude."³²

Democrats often relied less on the bill's logic and more on its practical effect in their attack against the bill. Seizing upon statements that through desegregation, "this prejudice against race and color will be removed and the idea of universal human equality . . . substituted in place of this unnatural and unjust prejudice,"³³ Democrats charged that barriers to miscegenation would also fall. Senator John Stockton, a New Jersey Democrat whose exclusion from the Senate in 1866 gave Republicans the requisite two-thirds majority necessary to pass the Fourteenth Amendment,³⁴ zeroed in on a suggestion by Republican Senator George Boutwell of Massachusetts, a member of the House during the Fourteenth Amendment debates,³⁵ that both races should be educated together so that "this prejudice against race and color will be removed."³⁶ From this statement, Stockton demanded to know whether Boutwell meant "practical amalgamation or not?" or "miscegenation or not?"³⁷

Democratic Senator Saulsbury also played on this theme when he defiantly stated, "[c]all it prejudice if you please; it exists, and I hope and trust it may forever exist. It is the only security which you have against the dire consequences which would result from its abolition; I mean the intermixture and amalgamation of races."³⁸ Representative Robert Vance of North Carolina deduced that "by placing the colored race and the white race continually together, by throwing them into social contact, the result will be more or less that the distinction between them will be broken down, and that miscegenation and an admixture of the races will follow."³⁹ Similarly, Vance's fellow North Carolina Democrat, Senator Merriman, complained that this result was the purpose and "practical effect" of the bill because "[i]t seeks to bring by statutory provision two populous races constantly and perpetually together, under such circumstances as certainly tend to bring the masses of the races and sexes in familiar contact and break down the distinctions set up by nature itself."⁴⁰

Democrats claimed that the bill did not merely weaken prejudice but attempted to subvert the Divine plan for the races. Under this legislation, charged the Democrats, "it is sought to reverse the decrees of the Almighty, to make white people out of black, to take away from people those instincts implanted by the Deity and intended to keep these races apart and prevent their amalgamation

32. 2 Cong Rec App 234 (1874).

33. 2 Cong Rec 4169 (1874) (Senator Boutwell).

34. See Avins, 52 Va L Rev at 1249 (cited in note 10); Cong Globe, 40th Cong, 2d Sess 823 (1868).

35. Congressional Quarterly, *Guide to Congress* 47, 305 (1991).

36. 2 Cong Rec 4169 (1874).

37. *Id.*

38. *Id.* at 4160.

39. *Id.* at 556.

40. 2 Cong Rec App 316 (1874).

and degradation."⁴¹ Senator Merriman warned that any legislative attempt to mix the races "is defying to the Almighty, and any people who shall do so may certainly expect His curse."⁴²

Few seemed to notice the inherent contradiction in the Democrats' argument. At the same time that Democrats were arguing that the bill would weaken prejudice and result in amalgamation, fellow Democrats proclaimed with equal vigor that the bill was "vain legislation" which "cannot execute itself, and can never be executed."⁴³ Several Democrats argued that such prejudice against miscegenation was "inveterate and difficult to eradicate,"⁴⁴ that "[e]ducation does not subdue it [and] Christianity does not abate it,"⁴⁵ and that any legislative attempt to eradicate it will "be a dead letter."⁴⁶

b) Miscegenation in the social rights debate. Miscegenation was intimately connected with the opposition's charge that desegregation sought to provide social, rather than civil or political, rights. Typical of this social equality argument, Senator Francis Blair, a Missouri Democrat, protested that, "[a]fter we have secured to the negroes by previous bills the right of suffrage and all the civil rights which belong to any man, it is now proposed to give them social rights, to impose upon the whites of the community the necessity of a close association in all matters with the negroes."⁴⁷ Social equality was thought to be the ultimate evil: it implied an equality of social standing in complete upheaval of the pre-Civil War class structure. Representative Atkins predicted ominously (or optimistically): "Pass this bill and it will either prove a dead letter upon the statute-book, or, if effectually enforced, then we shall have the *ultima thule* of these modern philanthropists and negrophilists—social equality."⁴⁸ Often the social equality charge was simply a jab inserted at an appropriate place in a speech rather than a full blown argument. Representative Vance asserted that if he belonged to the negro race, "I would not stand here as a beggar asking for these social rights; I would depend on my own merits."⁴⁹ Senator Joshua Hill, a Union Republican from Georgia who opposed the bill, lectured "[i]t is not the fault of the race that, socially, they are not the equals of the white race to-day; nor is it incumbent upon every philanthropist to devote every spare hour to the

41. Cong Globe, 42d Cong, 2d Sess 3252 (1872) (Sen. Blair).

42. 2 Cong Rec App 316 (1874).

43. Cong Globe, 42d Cong, 2d Sess 3252 (1872) (Sen. Blair).

44. 3 Cong Rec App 16 (1875) (Rep. White).

45. 2 Cong Rec App 237 (1874) (Sen. Norwood). Senator Merriman vainly attempted to reconcile this contradiction by saying that this prejudice is "inherent . . . until they are corrupted and brought in close contact with another." This, of course, is an odd use of the word "inherent." He went on to further muddle this response by saying that this prejudice "cannot be broken down or wiped out by the force of a legislative enactment." Id at 317.

46. Cong Globe, 42d Cong, 2d Sess 3252 (1872) (Sen. Blair).

47. Cong Globe, 42d Cong, 2d Sess 3251 (1872).

48. 2 Cong Rec 454 (1874).

49. Id at 556.

elevation of the race.”⁵⁰ Senator Norwood, in criticizing the Republicans' hypocrisy in advocating desegregation without formally repealing anti-miscegenation laws, remarked “[e]very act is a declaration of social equality, and every word is a denial of your acts.”⁵¹

Rather than being a true doctrine of rights that existed independent of civil and political rights, the social equality classification became a code phrase for miscegenation and any other evil Democrats could conjure up to arouse public opposition against the bill. It was sometimes quite bluntly tied to the miscegenation issue. Representative Atkins succinctly stated that “[s]ocial equality means amalgamation.”⁵² Democrats argued that the bill created “compulsory social equality.”⁵³ It was an attempt to “enforce familiarity, association, and companionship between the races.”⁵⁴ The specter of coercion encouraged hyperbole when linked to the miscegenation question. Representative James Beck of Kentucky argued that some individuals on the floor would want to “arrest, imprison, and fine a young woman in any State of the South if she were to refuse to marry a negro man on account of color, race, or previous condition of servitude, in the event of his making her a proposal of marriage, and her refusing on that ground.”⁵⁵ Tennessee Republican Congressman William Crutchfield, in a fit of sarcasm, went so far as to submit an amendment to Butler's bill which made it a crime for a white female to refuse the marriage proposal of a black man on account of race, color, or previous condition of servitude.⁵⁶

Senator Norwood, however, provides perhaps the best example of the Democrats' attempts to portray the Civil Rights Act as a social equality bill. He “arraign[ed] the republican party” for forcing social equality among the lower classes, while not participating in it themselves, for “this is the true issue made by this bill, and they cannot blink it under the flimsy pretext of securing civil rights.”⁵⁷ Norwood illustrated this point with a story about an “ex-champion of social rights” who “from necessity, has sent his daughter to a mixed school.”⁵⁸ A “young gentleman of African descent” calls to ask her hand in marriage, and Norwood asks, “Does any one doubt from which extremity of that ex-champion the instant reply would come—whether from his head or his heel? He would not reply categorically; but with a few vigorous utterances, not strictly canonical, he would impinge on that astonished Adonis with both ends in action like a supple-jack and battering-ram combined.” Yet this would not be the end, according to Norwood, because “[s]he tells that doting father, that civil-rights advocate, that political trader, who in trying to buy the negro vote cheap

50. Cong Globe, 42d Cong, 2d Sess 242 (1871).

51. 2 Cong Rec App 237 (1874).

52. 2 Cong Rec 454 (1874).

53. Cong Globe App, 42d Cong, 2d Sess 217 (1872) (Rep. McHenry).

54. 2 Cong Rec 4158 (1874) (Sen. Saulsbury).

55. *Id* at 343.

56. *Id* at 452.

57. 2 Cong Rec App 236 (1874).

58. *Id*.

has sold his daughter dearly, that the ejected gentleman is her affianced lover; that she has doted on him from her youth up. . . .”⁵⁹ Moreover, “in love’s rhapsody and with Cassandra’s inspiration, she forewarns him that her life, like his political party, must be a failure, and, like Ophelia’s, end in ‘muddy death,’ unless he will bless the bans, and after death lay herself and darling side by side in the same grave-yard beneath a damask rose and a lovely black-jack—*ex quercus nigra*—as emblems of their homogeneous union, and chosen by his poetic soul as the happiest type of civil rights. [Laughter]”⁶⁰ Norwood then proceeded to point out that while this was the bill’s logical result, he doubted that any of the bill’s supporters “would under any circumstances consent to such an alliance by a member of his family. . . .”⁶¹

More frequently, however, miscegenation was latent within the charge of social equality. The notion of private mixing, or the right “to come into my parlor and to be my guest,” carried with it the implication that social mixing would be carried on at a more personal level than on a train or a steamship.⁶² According to Representative William Read of Kentucky, the bill established “perfect social equality” and “the next step will be that [blacks] will demand a law allowing them, without restraint, to visit the parlors and drawing-rooms of the whites, and have free and unrestrained social intercourse with your unmarried sons and daughters.”⁶³

Republican responses to the charge reveal their belief that use of the term “social equality” was little more than a veiled reference to miscegenation.⁶⁴ Representative Robert Elliott, the only attorney among a number of black Republicans from South Carolina,⁶⁵ refused to respond to the “vulgar insinuations” made by certain members of the House.⁶⁶ Representative Joseph Rainey, one of Elliott’s black colleagues from South Carolina, recognized the cries of social equality as “mere subterfuge”⁶⁷ and simply addressed the question of intermarriage.⁶⁸ Since the propriety of discussing miscegenation on the floors of Congress was not self-evident,⁶⁹ Democrats used veiled references to get their meaning across without being accused of “ribaldry.”⁷⁰

Opponents characterized the rights secured by the bill as social rights to demonstrate that they were “without warrant in the Constitution.”⁷¹ Thus, Representative Atkins asked the floor, “[w]here in the Constitution of the United

59. *Id.*

60. *Id.* at 237.

61. *Id.*

62. *Cong Globe*, 42d Cong, 2d Sess 242 (1871) (Sen. Hill).

63. 2 *Cong Rec App* 343 (1874).

64. *Id.* at 382 (Rep. Ransier).

65. Avins, 52 *Va L Rev* at 1246 (cited in note 10).

66. 2 *Cong Rec* 409 (1874).

67. 3 *Cong Rec* 960 (1875).

68. 2 *Cong Rec* 344 (1873).

69. *Cong Globe*, 42d Cong, 2d Sess 878 (1872) (Sen. Harlan).

70. 2 *Cong Rec* 409 (1874) (Rep. Elliott).

71. *Cong Globe App*, 42d Cong, 2d Sess 5 (1872) (Sen. Morrill).

States is it declared that the Anglo-Saxon and the African race may marry?"⁷² The answer is, of course, nowhere. Even the bill's sponsors understood "equal" to be "a political word, used in a political sense, [to mean] equality of political rights."⁷³ The question for Republicans, therefore, was whether a black man could marry a white woman to the same extent as a white man under this conception of equality.

B. THE REPUBLICANS' DILEMMA OVER MISCEGENATION

1. Lack of real interest in miscegenation.

None of the various bills submitted in the House and Senate during the debates over the Civil Rights Act of 1875 explicitly discussed repealing state anti-miscegenation laws. With one notable exception in Sumner's original bill submitted to the Senate,⁷⁴ the bills did not even implicitly provide for the repeal of anti-miscegenation laws. This was not due to Republican conservatism, though, given their willingness to attack segregation in schools and churches.⁷⁵ Instead, the lingering public prejudice combined with the declining incidence of interracial marriage to make anti-miscegenation laws a no-win political issue.

Prejudice against miscegenation continued to simmer during Reconstruction.⁷⁶ Senator Blair revealed some of the extremes of this prejudice:

It was intended that they should be distinct and separate races, and different portions of the earth's surface were intended for their occupancy, and they were not intended to be mingled; and whenever you do mingle them, you make a mongrel race, which becomes demoralized and degraded; like the people of Mexico, incapable of maintaining any sort of Government or any kind of civilization.⁷⁷

Representative Atkins was so confident of the universal nature of this prejudice that he declared that "[a]ll statesmen of all parties—indeed, the public sentiment of the colored people themselves—approve of the ordinance and statutes, now common in many of the States, which forbids intermarriage of the races."⁷⁸

Supporters of the bill recognized that the miscegenation question was raised "for the purpose of arousing public opposition and resentment" against the bill.⁷⁹ Miscegenation, in fact, was a well-sharpened sword used by the opposition. Senator Henry Wilson, Sumner's long-time Republican colleague from

72. 2 Cong Rec 453 (1874).

73. 2 Cong Rec 455 (1874) (Rep. Butler).

74. See text accompanying notes 22-29.

75. See Sumner's original bill submitted to the Senate. Cong Globe, 41st Cong, 2d Sess 3434 (1870).

76. See, for example, Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* 430 (Harper & Row, 1988).

77. Cong Globe, 42d Cong, 2d Sess 3252 (1872).

78. 2 Cong Rec 453 (1874).

79. 3 Cong Rec 960 (1875) (Rep. Rainey).

Massachusetts, who later served as Vice President under Grant,⁸⁰ lamented that the specter of miscegenation was raised “before the war, during the war, and since the war,” whenever the question of equality for blacks was raised.⁸¹ Thus, arguing for the repeal of anti-miscegenation laws, and by implication, for the increase of miscegenation, could only provoke the opposition.

Moreover, this was a battle blacks themselves did not want to fight. Representative Rainey protested that “we do not ask it of you . . . that the two races should intermarry one with the other. God knows we are perfectly content.”⁸² This echoed the sentiments of numerous state constitutional conventions after the Civil War, where “[b]lack delegates expressed little interest in marrying white women.”⁸³ While there were some notable exceptions, the most prominent of which was Frederick Douglass's marriage to a white woman in 1884,⁸⁴ these exceptions were generally not well received in the black community. One observer summed up the reaction in the black press to Douglass's marriage by saying that “[m]ost articulate Negroes . . . seemed to say that while intermarriage ought to be an undisputed right, it was a right better left unexercised.”⁸⁵ For blacks, “the issue was both inflammatory and of little moment.”⁸⁶

The reported declining incidence of miscegenation after the Civil War further pushed state anti-miscegenation laws down the list on the anti-segregationist's agenda. Senator Wilson remarked that “under freedom there is not a tenth part of the improper associations between the races that existed before the war.”⁸⁷ Even Democrats sensed the “lack of substance” in predictions of widespread interracial marriage.⁸⁸ In most of the country, interracial marriages virtually disappeared after the Civil War. One study of black families and their ancestors found that “of 1,152 persons in the antebellum group interracial unions are recorded for 243, while of 1,385 persons in the post-bellum group only three interracial unions are recorded.”⁸⁹ This and other data led Louis Wirth and Herbert Goldhamer to declare that there was “a great decrease in the post-

80. Foner, *Reconstruction* at 468 (cited in note 76).

81. Cong Globe, 42d Cong, 2d Sess 3253 (1872).

82. 2 Cong Rec 344 (1873).

83. Foner, *Reconstruction* at 321 (cited in note 76) (citing *Journal of the Constitutional Convention of the State of North Carolina at Its Session 1868* 473 (Raleigh, 1868); *Journal of the Proceedings of the Constitutional Convention of the People of Georgia* 143 (Augusta, 1868); *Arkansas Convention Debates* 363, 491-99, 501 (Little Rock, 1868)).

84. David H. Fowler, *Northern Attitudes toward Interracial Marriage: Legislation and Public Opinion in the Middle Atlantic and the States of the Old Northwest, 1780-1930* 244 (Garland, 1987).

85. *Id.* at 245-46.

86. *Id.* at 207.

87. Cong Globe, 42d Cong, 2d Sess 3253 (1872).

88. Fowler, *Northern Attitudes toward Interracial Marriage* at 208 (cited in note 84).

89. Louis Wirth and Herbert Goldhamer, *The Hybrid and the Problem of Miscegenation*, in Otto Klineberg, ed, *Characteristics of the American Negro* 248, 274-75 (Harper & Bros, 1944) (citing Caroline Bond Day, *A Study of Some Negro-White Families in the United States*, 10 Harv African Stud 109 (1932)).

bellum period in the amount of interracial mixture.”⁹⁰ The sketchy data concerning interracial marriages in states without anti-miscegenation laws support these contentions. Although “[s]tatistics showing rates of intermarriage are rare in the nineteenth century,”⁹¹ those which exist reveal a relatively small number of interracial marriages. In 1878 in New York City, “there were 12 white-Negro marriages, all involving white women and Negro men. These constituted about six per cent of the 194 marriages involving Negroes and about 0.2 per cent of the total of 7,629 marriages performed in the city.”⁹² In Michigan between the years 1874 and 1893 there were an average of 5.5 black-white marriages a year and in Connecticut and Rhode Island between the years of 1883 and 1893, there were an average of 5.9 and 5.3 a year, respectively. Only in Boston, where there were an average of 18.2 a year from 1855 until 1887, was the number anything close to substantial.⁹³ In fact, if Boston had served as Congress’s guide, the growth in interracial marriages might have seemed alarming to Congress.⁹⁴ However, Boston was by no means representative.⁹⁵

The census records on the percentage of mulattos as a proportion of the overall black population may provide a better way to test the claims of reduced miscegenation.⁹⁶ This is both because many of the interracial relationships went unrecorded and because, at least at some point on the ancestral line, the “mulatto is unequivocal evidence of miscegenation.”⁹⁷

The census data reveal that any increase in miscegenation during the immediate post-Civil War years was negligible. Although the reliability of these figures was subsequently questioned by the Census Bureau,⁹⁸ they did provide Congress

90. *Id.* at 275.

91. Fowler, *Northern Attitudes toward Interracial Marriage* at 241 n 50 (cited in note 84).

92. *Id.* (citing John T. Nagle, M.D., *Summary of Births, Marriages, Still-Births, Deaths, &c in New York City: Compared with 352 American and Foreign Cities for the year 1878: and Also the Mortality for some of the Most Prominent Causes* 6-7 (C. L. Birmingham, 1879)).

93. Wirth and Goldhamer, *The Hybrid and the Problem of Miscegenation* at 277 (cited in note 89) (citing Frederick L. Hoffman, *Race Traits and Tendencies of the American Negro* 198 (Am Econ Assn, 1896)).

94. *Id.* at 279 n 62 (citing Hoffman, *Race Traits* at 200) reported the following rates for Boston:

1862-66 9.0 per year
1867-71 17.6
1873-77 34.4

95. *Id.* at 267.

96. While this may be a more sensible approach, it is by no means a more accurate one. The definitions changed from 1870 to 1890, and in 1850 and in 1860 the terms black and mulatto were not yet defined. Moreover, even when definitions were provided, the classification of “mulatto” relied simply on the judgement of the enumerator. See Department of Commerce, Bureau of the Census, *Negro Population 1790-1915* 207 (GPO, 1918).

97. *Id.* at 268.

98. Even the Census Bureau discounted the accuracy of these figures when it reported them in 1918. See *id.* at 208 (“The very considerable increase in the proportion mulatto

Table 1
 Percentage of the Black Population That Was Called Mulatto, 1850-70

<u>1850</u>	<u>1860</u>	<u>1870</u>
11.2	13.2	12.0

with an important source of information on miscegenation rates, at least during the debates over the Civil Rights Act of 1866. Given that the proportion of mulattos includes the offspring of so-called mulatto-Negro and mulatto-mulatto, as well as Negro-white unions, supporters of the Civil Rights Act of 1875 had powerful data to support their anecdotal evidence of a decrease in miscegenation rates.⁹⁹

2. The rhetorical need to reject symmetrical equality.

The miscegenation question notwithstanding, Republicans needed to reject symmetrical equality in order to argue for the desegregation of public areas. Thus, they emphasized that symmetrical treatment only perpetuated discrimination. Senator Sumner remarked that “[i]t is easy to see that the separate school founded on an odious discrimination and sometimes offered as an equivalent for the common school, is an ill-disguised violation of the principle of Equality. . . .”¹⁰⁰ Any attempt to provide separate facilities as a substitute for equality was “instinct with the spirit of Slavery.”¹⁰¹ This argument was articulated on more general grounds as well. Sumner insisted that any discrimination against “a man on account of his color is an indignity, an insult, and a wrong.”¹⁰² Similarly, Representative Elliott argued that “all discrimination, all denial of equality

for the entire period, 1850-1910, [at 1910, the percentage mulatto was 20.9] makes a decrease for any decade in this period, such as is shown for the decade, 1860-1870, highly improbable, and it is to be noted that this decrease developed in the returns of a census—that of 1870—which was admittedly very defective as regards the Negro population. It may be fairly assumed that the change in the proportion mulatto has not been interrupted or reversed in any decade.”)

99. While no one explicitly referred to such data during the debates over the Civil Rights Act of 1875, census data were used by supporters of the Civil Rights Act of 1866 to show that miscegenation had flourished in the ante-bellum period. Thus, Representative Waitman Willey, a West Virginia Republican, answered the miscegenation charge by saying that “[o]n the question of illegitimate miscegenation I need only refer to the census. . . . There has been brutality in both races. But in proportion as we shall elevate the negro, and increase his self-respect by extending to him the rights of man, these instincts and evidences of lechery and brutality will disappear. In my judgment, one of the most beneficial results of the abolition of slavery will be the decline of miscegenation.” *Cong Globe*, 39th Cong, 1st Sess 3437 (1866).

100. *Cong Globe*, 42d Cong, 2d Sess 384 (1872).

101. *Id* at 383 (Sen. Sumner).

102. *Cong Globe*, 42d Cong, 2d Sess 242 (1871).

before the law, all denial of the equal protection of the laws, whether State or national laws, is forbidden.”¹⁰³ This logic moved Republican Senator Daniel Pratt of Indiana to declare that “free government demands the abolition of all distinctions founded on color and race.”¹⁰⁴ Republicans also refused to accept any distinctions between whites and blacks due to physical differences between the races. Pratt reminded the Senate that “nature has not discriminated against the negro in any of her regulations. On the contrary, he has all the bodily faculties in the fullest perfection.”¹⁰⁵ The intimation of physical and hereditary inferiority implicit in separation, according to Sumner, made symmetrical treatment “the distinctive essence of Caste.”¹⁰⁶

Perhaps most important in the argument against symmetrical restrictions was the contention that such restrictions were unequal despite the fact that they imposed the same punishment on each party. This is illustrated by an exchange between Senators Hill and Sumner:¹⁰⁷

Mr. Hill: On which race, I would inquire, does the inequality to which the Senator refers operate?

Mr. Sumner: On both.

A symmetrical restriction would thus not defeat the unequal nature of an arrangement. Nor, according to Sumner, could there be an exception to this doctrine rebutting symmetrical equality: “Show me, therefore, a legal institution, anything created or regulated by law, and I show you what must be opened equally to all without distinction of color.”¹⁰⁸

II. The Republicans' Treatment of Miscegenation

The natural alliance between segregation and anti-miscegenation laws meant that any retreat on the miscegenation question during the debates over the Civil Rights Act of 1875 would damage the argument against segregation. However, during the debates over the Civil Rights Act of 1866 and the supplemental Freedman's Bureau Bill,¹⁰⁹ no such rhetorical need existed, since the Civil Rights Act of 1866 did not address segregation. A brief discussion of the treatment of miscegenation during the debates over the Civil Rights Act of 1866 may illustrate the importance of this distinction by offering a comparison with the treatment of miscegenation during the debates over the Civil Rights Act of 1875, where the question of miscegenation could not be avoided.

103. 2 Cong Rec 409 (1874).

104. *Id.* at 4083.

105. *Id.*

106. Cong Globe, 42d Cong, 2d Sess 383 (1872); see also *id.* at 3738 (“spirit of caste”).

107. *Id.* at 242.

108. *Id.* (Sen. Sumner).

109. 14 Stat 27 (1866); 14 Stat 173 (1866).

A. THE CIVIL RIGHTS ACT OF 1866

Democrats used the miscegenation issue as a strategic trap for Republicans during 1866. Although neither the Freedman's Bureau Bill nor the Civil Rights Act presented the same logical dilemmas as the Civil Rights Act of 1875, Democrats raised the issue for its anticipated political effect.¹¹⁰ In contrast to the 1875 debates, however, even a Northern Republican, conservative Senator Edgar Cowen from Pennsylvania, broke ranks and objected to the bill on the grounds that it would make anti-miscegenation laws illegal.¹¹¹ Moreover, when President Andrew Johnson vetoed the bill in a message read on the floor of Congress, he specifically discussed the issue of state power to prohibit interracial marriage. While he admitted that the bill did not repeal such state laws, he stated that "I cite this discrimination . . . to inquire whether, if Congress can abrogate all State laws of discrimination between the two races in the matter of real estate, of suits, and of contracts generally, Congress may not also repeal the State laws as to the contract of marriage between the two races?"¹¹²

Supporters of the Civil Rights Act of 1866 immediately sought to allay concerns that the bill would repeal anti-miscegenation statutes. Prominent Republican leaders such as Senators William Pitt Fessenden of Maine and Lyman Trumbull of Illinois reassured the Democrats that anti-miscegenation laws would not be made illegal by the Act.¹¹³ In the House, Representative C. E. Phelps of Maryland echoed these reassurances by arguing that "such a construction is not warranted by the terms employed" in the Freedman's Bureau Bill.¹¹⁴ Moreover, these supporters based their views on the symmetrical equality later discussed in *Pace*. Fessenden argued that anti-miscegenation laws did not discriminate against a black man because "[h]e has the same right to make a contract of marriage with a white woman that a white man has with a black woman."¹¹⁵ Trumbull made the same argument on at least two occasions previous to Fessenden's statement during the debates over the related Freedman's Bureau Bill. In response to the complaints of Senator Thomas Hendricks, an Indiana Democrat, Trumbull asked "[d]oes not the law make it just as much a crime for a white man to marry a black woman as for a black woman to marry a white man, and *vice versa*?"¹¹⁶ Presuming the answer was yes, he concluded that the bill did not interfere with this law.¹¹⁷ When the question was raised again by Senator Garrett Davis, a Democrat from unreconstructed Kentucky, Trumbull responded similarly:

110. See, for example, Cong Globe, 39th Cong, 1st Sess 420 (1866) (Sen. Davis).

111. Id at 604.

112. Id at 1680.

113. See text accompanying notes 115-18.

114. Cong Globe App, 39th Cong, 1st Sess 69 (1866).

115. Cong Globe, 39th Cong, 1st Sess 505 (1866).

116. Id at 322.

117. Id.

The bill provides for dealing out the same punishment to people of every color and every race; and if the law of Kentucky forbids the white man to marry the black woman I presume it equally forbids the black woman to marry the white man, and the punishment is alike upon each. All this bill provides for is that there shall be no discrimination in punishments on account of color; and unless the Senator from Kentucky wants to punish the negro more severely for marrying a white person than a white for marrying a negro, the bill will not interfere with his law.¹¹⁸

Even President Johnson, an opponent of the bill, agreed that anti-miscegenation laws met the test of symmetrical equality: "as the whites are forbidden to intermarry with the blacks, the blacks can only make such contracts as the whites themselves are allowed to make, and therefore cannot, under this bill, enter into the marriage contract with the whites."¹¹⁹ However, the President's reference to miscegenation may have been simply strategic. Trumbull condemned Johnson's discussion of miscegenation "as an *ad captandum* argument to excite prejudice. . . ."¹²⁰

Despite the reassurances, some opponents of the Civil Rights Act of 1866 believed that the bill would repeal anti-miscegenation statutes. Democratic Senator Reverdy Johnson from Maryland argued that symmetrical equality could not explain away the bill's effect on anti-miscegenation laws. Johnson, a respected moderate and former Attorney General of the United States,¹²¹ recognized that the issue was whether a "black man has the same right to enter into a contract of marriage with a white women as a white man has,"¹²² not whether each race has a right to interracial marriage. According to Johnson, under the bill, "[w]hite and black are considered together, put in a mass, and the one is entitled to enter into every contract that the other is entitled to enter into. Of course, therefore, the black man is entitled to enter into the contract of marriage with a white woman. . . ."¹²³ What makes Johnson's statements more credible as a reflection of Congress's understanding of equality is that they were not made in an attempt to defeat the bill. Johnson began his speech by stating that "if this bill is to pass into a law . . . it should be as free from objections as it can be made. What I am about to suggest is not, therefore, for the purpose of defeating the bill . . . but for the purpose of improving the bill, or at least relieving it from objections to which it seems to me to be now subject."¹²⁴ Although the specter of miscegenation was often raised to fuel opposition to the bill,¹²⁵ it seemed that Johnson legitimately felt that anti-miscegenation laws

118. *Id.* at 420.

119. *Id.* at 1680.

120. *Id.* at 1757.

121. Avins, 52 *Va L Rev* at 1233 (cited in note 10).

122. *Cong Globe*, 39th Cong, 1st Sess 505 (1866).

123. *Id.* at 506.

124. *Id.* at 504.

125. Fowler, *Northern Attitudes toward Interracial Marriage* at 208 (cited in note 84).

were a worrisome question which could not be resolved through symmetrical equality.¹²⁶

While some might nevertheless attribute Johnson's arguments to a clever strategic move, rather than a true rejection of symmetrical equality, such an answer would not explain New Jersey Representative Andrew Rogers's use of the same point. Rogers argued that "[a]s a white man is by law authorized to marry a white woman, so does this bill compel the State to grant to the negro the same right of marrying a white woman. . . ."¹²⁷ A minority member of the Joint Committee on Reconstruction, Rogers is not considered a creative thinker.¹²⁸ His conception of equality is thus much more likely to be shaped by the general notions of the time than part of a clever argument. Moreover, he repeated this conception of equality when he was discussing the Equal Protection Clause in the debates over the proposed Fourteenth Amendment: "if this amendment be passed Congress can pass under it a law compelling South Carolina to grant to negroes every right accorded to white people there; and as white men have the right to marry white women, negroes, under this amendment, would be entitled to the same right; and thus miscegenation and mixture of the races could be authorized in any State. . . ."¹²⁹

Notwithstanding the disagreement over which conception of equality applied, one might suspect that Trumbull's view of symmetrical equality carried the day.¹³⁰ Trumbull, as chair of the Senate Judiciary Committee, shepherded the Civil Rights Act of 1866 through Congress. His conception of equality, however, might not be representative when one considers his position on the Civil Rights Act of 1875. Trumbull was one of the few advocates of the Civil Rights Act of 1866 to vote against the Civil Rights Act of 1875. He based his opposition on

126. Cong Globe, 39th Cong, 1st Sess 506 (1866).

127. Id at 1121; see also Cong Globe App, 39th Cong, 1st Sess 134 (1866) (remarks of Representative Rogers on HR 63, proposing the Fourteenth Amendment to the Constitution).

128. Avins, 52 Va L Rev at 1230-31 (cited in note 10).

129. Cong Globe App, 39th Cong, 1st Sess 134 (1866).

130. At least one scholar, however, suggested that Trumbull actually recognized the flaws in the symmetrical equality argument and downplayed his reliance on it. Earl Maltz wrote that Johnson's argument may have persuaded Trumbull to select a different answer to the miscegenation question. Earl M. Maltz, *Civil Rights, the Constitution, and Congress 1863-1869* 76 (Kansas, 1990). Maltz based this conclusion on an exchange between Trumbull and Senator Davis of Kentucky. When Senator Davis pointed out that Trumbull's own state of Illinois still prohibited interracial marriage, Cong Globe, 39th Cong, 1st Sess 598 (1866), Trumbull did not resort to the symmetrical equality argument. Instead, amid jests about Davis's own ability to restrain himself and about the need to protect southern Illinois from migrating Kentuckians, Trumbull argued that "we need no law of the kind where there is no disposition for this amalgamation . . . [and] I do not think there will be any necessity for continuing that act in my State." Id at 600. Maltz's argument seems doubtful considering Trumbull's continued reliance on the position during the debates over the 1875 Act. However, it may be valid to say that Trumbull's conception of equality changed depending upon whether civil rights or what he saw as social or political rights were being discussed.

two issues: social rights and symmetrical equality. He first argued that the 1875 Act provided for social rather than civil rights. The Civil Rights Act of 1866, according to Trumbull, was “confined exclusively to civil rights and nothing else, no political and no social rights,” and under that Act, “we went to the verge of constitutional authority, went as far as we could go.”¹³¹ It was a “misnomer” to call the bill before the Senate in 1872 a “civil rights bill,” argued Trumbull, for it only dealt with “social rights.”¹³² Thus, it was not within Congress’s power to pass. Alternatively, Trumbull argued, even if it did concern civil rights, the bill addressed areas for which no inequality existed under principles of symmetrical equality. He protested that “I know of no right to ride in a car, no right to stop at a hotel, no right to travel possessed by the white man that the colored man has not.”¹³³ On schools, Trumbull matter-of-factly stated that “[i]f the facilities for education are the same nobody has a right to complain.”¹³⁴ Thus, according to Trumbull, “[t]here is perfect equality now.”¹³⁵ When it came to segregation, Trumbull’s views seemed almost in perfect accord with those of the Democratic Party. In contrast to most of his fellow Republicans remaining from the 39th Congress, Trumbull’s conception of equality would not encompass desegregation. It may, therefore, be a mistake to impute Trumbull’s views on symmetrical equality to his fellow Republicans, notwithstanding his influential position.

Thus, Congress did not appear to achieve a settled consensus on the requirements of equality during 1866. Contrary to the opinion of some, the notion of symmetrical equality espoused in *Pace* and *Plessy* was not accepted without question during these debates.¹³⁶ Reverdy Johnson, the only Democrat to vote in favor of any of the Reconstruction measures of 1866-67,¹³⁷ clearly had a different view of equality. Moreover, Trumbull himself seemed to espouse a different conception of equality when the miscegenation question was not before him. He explained that “in respect to all civil rights . . . there is to be hereafter no distinction between the white race and the black race.”¹³⁸ However, as to the question of social rights such as miscegenation, he made no such argument. Many in Congress seemed to feel little need to rebut symmetrical equality or to argue against anti-miscegenation laws, instead choosing to remain silent on the question. The issue of miscegenation and the limits of the equality principle were thus left to be tested at another time. Such a luxury was not afforded, however,

131. Cong Globe, 42d Cong, 2d Sess 901 (1872).

132. Id at 3189.

133. Id.

134. Id at 3190.

135. Id at 3264.

136. See Currie, *The Constitution in the Supreme Court* at 388-89 (cited in note 5). Currie suggests that the failure of Congress to address directly the question of what equality required may be “consistent with a desire to leave it to future Congresses and courts to give consent to their general command of racial equality.” Id at 389.

137. Foner, *Reconstruction* at 276 (cited in note 76).

138. Cong Globe, 39th Cong, 1st Sess 504 (1866).

to the supporters of the Civil Rights Act of 1875.

B. THE CIVIL RIGHTS ACT OF 1875

Republicans could not so easily duck the symmetrical equality issue in the debates over the Civil Rights Act of 1875, because—unlike the Civil Rights Act of 1866—the Civil Rights Act of 1875 forbade segregation. Nonetheless, it is noteworthy that not a single supporter of the 1875 Act sought to rebut the miscegenation charge by invoking the principle of symmetrical equality. The Republican response to the question of what effect the bill would have on anti-miscegenation laws generally fell under one of four broad categories: (1) constitutional and statutory arguments for the repeal of anti-miscegenation laws; (2) refutation of the social equality charge; (3) substantive responses to the predictions of increased miscegenation; and (4) attempts to avoid the issue altogether. Although supporters were cautious in dealing with the miscegenation question, they did not distinguish anti-miscegenation laws from segregation or retreat from their position that symmetrical restrictions do not provide equal protection under the law. On the contrary, when directly challenged on the question of anti-miscegenation laws, they argued for the repeal of such laws.

1. Advocating the repeal of anti-miscegenation statutes.

Proponents of the bill argued throughout the debates that the Equal Protection Clause of the Fourteenth Amendment required more than just symmetrical treatment.¹³⁹ This continued in response to the miscegenation question raised by § 5 of Sumner's original bill. During the § 5 debates, Senator Wilson responded to Senator Norwood's claims that the section would repeal anti-miscegenation laws by declaring that he would vote for Sumner's bill "for the reason that it does, in the clearest and most positive manner, make illegal all distinctions on account of color. . . . The laws of this Christian and democratic Republic should not, must not recognize distinctions among citizens."¹⁴⁰ Senator Samuel Pomeroy, a Radical Republican from Kansas who was in Congress during the framing of the Reconstruction amendments, responded to Norwood by referring to the Fourteenth Amendment's grant of citizenship whereby "we have introduced every human being into the governing class among us." He concluded that under this system "we shall not now argue for a law to restrain men from associating together whom God hath made of one blood. . . . [i]f any one in Georgia is suffering from a law of that kind it ought to be repealed."¹⁴¹ Senator Wilson concluded his response to Norwood by saying that "this talk about superiority of race, about these distinctions in this Christian and democratic land, should pass away and pass away forever."¹⁴² Sumner himself responded to Norwood by stating, "I desire that every word in the laws of this land shall

139. See text accompanying notes 100-08.

140. Cong Globe, 42d Cong, 2d Sess 819 (1872).

141. Id at 821.

142. Id at 820.

be brought in harmony with the Constitution of the United States; and if in that way the [anti-miscegenation] legislation, which the Senator now calls attention to, is repealed or annulled, so much the better."¹⁴³ In explaining the rationale for § 5, Sumner explicitly linked it to the Constitution: "If the word ["white"] is introduced into any law or ordinance, whether of the nation or of a State, it is contrary to the spirit of the national Constitution; it ought to be eliminated; and the object of this section is to do that very work."¹⁴⁴ Specifically, in addition to referring to the general notions of equality in the Fourteenth Amendment and the Declaration of Independence, Sumner relied on the Thirteenth Amendment:

Out of what has the inhibition to which [Norwood] alludes originated? The prejudice of color which was the very basis of slavery. Therefore in abolishing slavery Congress must, would it complete its work, abolish all the offshoots of slavery, all that grows out of slavery. It must do its work thoroughly. It must not allow anything of slavery to remain. But just so long as any legislation inspired by that original prejudice of color shall exist either on the statute books of the nation or the statute-book of a State, slavery to that extent still continues.¹⁴⁵

Thus, Professor Alfred Avins seemed to miss the mark when he wrote that "there is not a shred of evidence that anyone believed that th[e Fourteenth] [A]mendment justified the fifth section of Sumner's bill. Sumner was clearly pursuing his personal notion of the meaning of the Declaration of Independence. . . ."¹⁴⁶ Sumner and some of his Republican colleagues were unambiguously willing to extend the logic of the bill's position against segregation, which was clearly founded upon the Fourteenth Amendment, to the question of miscegenation.¹⁴⁷ More importantly, no one relied on the symmetrical equality argument to avoid the miscegenation question during the debates over § 5.¹⁴⁸

Other sections of the Constitution also received mention in the Republican

143. *Id.* at 872.

144. *Id.*

145. *Id.*

146. Avins, 52 *Va L Rev* at 1254 (cited in note 10).

147. Sumner later withdrew § 5 under pressure from his supporters that it would repeal naturalization laws. *Cong Globe*, 42d Cong, 2d Sess 873 (1872). He recanted his support for the withdrawal, however, later in the debates. *Id.* at 896. After a debate on the section's effects on miscegenation and naturalization laws, the section was kept a part of the amendment by a vote of thirty-four to twenty-five. *Id.* It appears to have died in committee thereafter.

148. Senator Frelinghuysen, a New Jersey Republican and former attorney general of that state, suggested that § 5 could not actually repeal or annul state acts, and thus would leave anti-miscegenation laws intact. *Cong Globe*, 42d Cong, 2d Sess 820 (1872). He did argue, however, that the proper method of reaching such laws was through "affirmative legislation" on "subjects over which it is proper for the national Government to take cognizance," thus not ruling out the possibility that Congress could legislate on the subject of interracial marriage if it was found to be within its control. *Id.*

response to the miscegenation charge. The Privileges or Immunities Clause in the Fourteenth Amendment, although a focal point of much of the opposition to federal action after *Slaughter-House*,¹⁴⁹ was invoked in support of the Civil Rights bill by Representative Rainey.¹⁵⁰ Rainey was responding to taunts from Representative Crutchfield and others that the bill forced interracial marriage.¹⁵¹ He suggested that marrying the person of one's choice was a right protected by the Privileges or Immunities Clause of the Fourteenth Amendment:

Surely there is no constraining power in one class over another to compel or induce that intimate relationship which custom has declared can only be brought about by desirable and mutual agreement. This is not only an acknowledged social right, but one guaranteed by the Constitution, which says, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."¹⁵²

Although it is possible to read Rainey's statement narrowly, so as to recognize the right not to be forced to marry someone else as a privilege or immunity of citizenship, this narrow interpretation does not detract from the force of his statement. His reliance on the Privileges or Immunities Clause after *Slaughter-House* suggests he thought the clause retained some vitality, despite its restricted application to the protection of a person's rights as a U.S. citizen.

Senator Pomeroy also implicitly relied upon the Privileges and Immunities Clause in Article IV, § 2 of the Constitution during the debates over § 5 of the Civil Rights bill. After admitting that he "did not know that they had any such law in [Norwood's home state of] Georgia," he suggested its repeal since "they ought to have the largest liberty in Georgia that they have in any other State. . . ."¹⁵³

2. Response to charges of social equality.

Supporters of the Civil Rights bill made several responses to the charge that the bill attempted to legislate social rather than civil or political equality. The

149. *Slaughter-House Cases*, 83 US (16 Wall) 36 (1872). In *Slaughter-House*, the Court held that the Privileges or Immunities Clause of the Fourteenth Amendment protected only national rights of citizenship, which are very few in number compared to state rights of citizenship. *Id.* at 77. See, for example, 2 Cong Rec 415 (1874) (Rep. Bright).

150. 3 Cong Rec 960 (1875).

151. See text accompanying notes 55-56.

152. 3 Cong Rec 960 (1875).

153. Cong Globe, 42d Cong, 2d Sess 821 (1872). Some speakers, however, doubted Congress had such power to force states to allow interracial marriages to the same extent as was permitted in several other states. Representative John Bright, a Tennessee Democrat, argued that the use of Article IV, § 2 as authority for the bill was contrary to the experience of the nation where "[n]ot only the Southern, but the Northern States exercised the right of making discriminations amongst their own citizens, on the grounds of public policy. Massachusetts prohibited intermarriage between the races. Maine prohibited in the same way intermarriage . . . Ohio, Indiana, Illinois, Michigan, Iowa, denied the ballot and intermarriage between the races. . . ." 2 Cong Rec 415 (1874).

crux of their response was to deny that the bill did or even could legislate social equality. In the context of the miscegenation question, this answer served both to defuse opposition to the bill and to point out the contradiction in the social equality argument as applied to miscegenation. If social rights were indeed a distinct body of rights outside of government control, then anti-miscegenation statutes should be repealed.

The general response to the social equality charge was to deny that this was the aim or effect of the bill. Sumner declared that “[t]his is no question of society; no question of social life; no question of social equality, if anybody knows what this means. The object is simply Equality before the law, a term which explains itself.”¹⁵⁴ To argue that the passage of the bill could affect the social status of the black was called “absurd and ridiculous,”¹⁵⁵ “the sheerest nonsense,”¹⁵⁶ “a simple misrepresentation,”¹⁵⁷ a “howl,”¹⁵⁸ and a “waste of argument.”¹⁵⁹ According to the Republicans, “the negro is not asking social equality,”¹⁶⁰ and “the bill does not touch . . . social equality.”¹⁶¹

Republicans based this denial on their distinction between association in one's private and public lives. According to Sumner, “[e]ach person, whether Senator or citizen, is always free to choose who shall be his friend, his associate, his guest.”¹⁶² However, when a person “walks the streets . . . he is subject to the prevailing law of Equality.”¹⁶³ This distinction pointed out a contradiction in the Democrats' argument, for “if by conferring upon colored people the same rights and privileges that are now exercised and enjoyed by whites indiscriminately will result in bringing about social equality between the races, then the same process of reasoning must necessarily bring us to the conclusion that there are no social distinctions among whites, because all white persons, regardless of their social standing, are permitted to enjoy these rights.”¹⁶⁴ Only if social rights were confined to the private sphere of “taste and choice” could the Democrats avoid conceding social equality for all.

A second response to the social equality charge embraced the notion that “no law is supposed possible to regulate the social customs of any people.”¹⁶⁵ At first glance, this seems to be in accord with the Democrats' argument that social equality is not a proper subject for legislation. For example, Representative McHenry argued that “social prejudice is a social liberty that the law has no

154. Cong Globe, 42d Cong, 2d Sess 382 (1872).

155. 3 Cong Rec 944 (1875) (Rep. Lynch).

156. 2 Cong Rec 382 (1874) (Rep. Ransier).

157. Cong Globe, 42d Cong, 2d Sess 382 (1872) (Sen. Sumner).

158. 2 Cong Rec 344 (1873) (Rep. Rainey).

159. 3 Cong Rec 960 (1875) (Rep. Rainey).

160. 2 Cong Rec 344 (1873) (Rep. Rainey).

161. 3 Cong Rec 1006 (1875) (Rep. Butler).

162. Cong Globe, 42d Cong, 2d Sess 382 (1872).

163. Id; accord 3 Cong Rec 960 (1875) (Rep. Rainey).

164. 3 Cong Rec 944 (1875) (Rep. Lynch).

165. 3 Cong Rec 960 (1875) (Rep. Rainey).

right to disturb."¹⁶⁶ However, the argument was used to bolster the Republican response in two ways. First, it further underlined the distinction between the public and private spheres and made clear that the Republicans could not legislate social equality in the private sphere even if this were their goal. Supporters of the bill could, therefore, agree, as some claimed they did,¹⁶⁷ that social equality could not and should not be enforced by law:

Social equality consists in congeniality of feeling, a reciprocity of sentiment, and mutual, social recognition among men, which is graded according to desire and taste, and not by any known or possible law.¹⁶⁸

Second, the statements were offered in order to throw the miscegenation question back in the Democrats' faces. If social rights are not a proper subject of regulation, then anti-miscegenation laws, and not desegregation measures, should be the target of the bill's opponents. Such an argument was raised as far back as 1869 before the Georgia Supreme Court in *Scott v Georgia*.¹⁶⁹ Article I, § 11 of the 1868 Georgia Constitution provided that "[t]he social status of the citizen shall never be the subject of legislation."¹⁷⁰ According to one commentator, Georgia probably enacted this measure to ensure that the state legislature, in its zeal to wipe out all racial distinctions, did not go "to the extent of legislating as to the social relations of the races."¹⁷¹ *Scott*, which involved the conviction of an interracial couple for illegal cohabitation, served as a test case to challenge the constitutionality of the state's anti-miscegenation laws under Article I, § 11 of the Georgia Constitution.¹⁷² Since other courts had emphatically determined that marriage was a "social status,"¹⁷³ Scott's counsel argued that miscegenation had to be an unconstitutional subject of legislation in Georgia.

The majority rejected this argument, contending that the clause applied only to future legislation and did not affect the ban on interracial marriage already in force:

In so far as the marriage relation is connected with the social status, the very reverse is true. That section of the Constitution forever prohibits legislation of any character, regulating or interfering with the social status. It leaves social rights and status where it finds them. It prohibits the Legislature from repealing any laws in existence which protect persons in

166. Cong Globe App, 42d Cong, 2d Sess 218 (1872).

167. See 2 Cong Rec App 235 (1874) (Senator Norwood claimed that "any profession of a republican that he is not opposed to social equality with the negro race is sheer hypocrisy.").

168. 3 Cong Rec 960 (1875) (Rep. Rainey).

169. 39 Ga 321 (1869).

170. *Scott*, 39 Ga at 324.

171. Stephenson, *Race Distinctions* at 79-80 (cited in note 3).

172. *Id* at 80.

173. See, for example, Joel Prentiss Bishop, 1 *Commentaries on the Law of Marriage and Divorce* § 12 at 36a (Little, Brown, 1864) (collecting cases and declaring that marriage is not a contract but a "status").

the free regulation among themselves of matters properly termed social, and it also prohibits the enactment of any new laws on that subject in [sic] future.¹⁷⁴

Judge McCay, who would later become a federal judge in the Northern District of Georgia, concurred in the judgment only. Rather than relying on the majority's thin analysis that the constitution intended to freeze the wisdom of the legislature on the regulation of social status, McCay argued that marriage was not a social status but rather a civil contract:

Marriage is a civil contract regulated by law, and I see no reason why the prohibition against persons of different color entering into that contract is regulating the social status of the citizen, any more than the law regulating the age of the parties, or the laws fixing the degrees of their relationship, or the law providing that there shall be but one such contract in existence at a time, are laws regulating the social status.¹⁷⁵

Such logic obviously flies in the face of the argument that marriage was a "status" and thus was not covered by the contracts clause of the Civil Rights Act of 1866.

Despite the inconsistency in the concurrence's logic, it was adopted by a federal circuit court when the same issue was raised in *Hobbs*.¹⁷⁶ Rather than swallowing the illogical argument of the majority in *Scott*, the court quoted from the concurrence: "These and such laws have no bearing on the social status of the citizen. They still leave persons to choose their associates, though they provide that they shall not enter into a particular civil contract."¹⁷⁷ The choice to quote this language was quite a devil's bargain for Judge Erskine, because on the very same page he refuted the 1866 Act argument by quoting Bishop, who declared that "when the contract is executed in what the law regards a valid marriage, its nature as a contract is merged in the higher nature of the status."¹⁷⁸

The myriad of confusing and conflicting logic from a state supreme court and a federal circuit court reveals the force of the Republican response to the social equality argument. It is not surprising that the Republicans connected the "oft-repeated" social equality charge¹⁷⁹ with the well-worn miscegenation issue¹⁸⁰ to demonstrate the inherent contradiction in the Democrats' argument. Senator Pomeroy employed the Democrats' own rhetoric on social equality in responding to claims that the Civil Rights bill would repeal state anti-miscegenation laws. He argued that repealing such laws is justified because interracial

174. *Scott*, 39 Ga at 324-25.

175. *Id.*, 39 Ga at 328 (McCay concurring).

176. *In re Hobbs*, 12 F Cases 262 (N D Ga 1871).

177. *Id.* at 263.

178. *Id.* (citing Bishop, 1 *Marriage and Divorce* § 3 at 29 (cited in note 173)).

179. Cong Globe, 42d Cong, 2d Sess 382 (1872) (Sen. Sumner).

180. *Id.* at 3253 (Sen. Wilson).

marriage “is a question of taste and choice which I think should not be regulated by law.”¹⁸¹ Representative Rainey suggested the same implication of this logic:

Men as a rule are always careful never to introduce into the sancity [sic] of their family circles those who would abuse the privilege, or who are not recognized as social equals. This is a right that cannot be disputed, neither can it be invaded by any law or statutory enactment.¹⁸²

Principally, this statement counters the fear that the bill “would signalize the overthrow of opposing barriers, to unrestrained association between the races and thus inaugurate intermarriage of whites and blacks.”¹⁸³ However, its close connection in proximity and language to the social equality argument suggests that Rainey is hinting at the broader contradiction in the Democrats' argument.

Sometimes this connection was made quite explicit by the Republicans. Representative Butler, the Republican chair of the Judiciary Committee who managed the Civil Rights bill in the House, undertook to rid the bill of the social equality issue by detailing exactly who engaged in the practice of social equality:

I am inclined to think that the only equality the blacks ever have in the South is social equality; for I understand the highest exhibition of social equality is communication between the sexes, and I have here a statute of the State of Mississippi, which I propose to have read, which will show the extent to which social equality had place in that State before the war, and how a republican Legislature had to provide for the consequences of that social equality since the war. . . . [the statute is read] . . . Now sir, if there is any greater social equality than that, to have one man become the father of seven children by six different colored women, I do not know what an exhibition of social equality is.¹⁸⁴

Butler claimed his bill was needed to abate this form of “social equality.” He had the clerk read a letter of a black woman from Richmond who complained that “[n]othing can ever make us equal with the white race while our daughters are forced to commit adultery by every white man and boy that chose to treat them as dogs.”¹⁸⁵

3. Denials of the substance of the miscegenation charge.

Republicans did not simply concede that the Civil Rights bill would overturn the social inhibitions against miscegenation. As with their response to the social

181. *Id.* at 821 (1872).

182. 3 Cong Rec 960 (1875).

183. *Id.*

184. *Id.* at 1006.

185. *Id.* This obviously struck a nerve for the Republican representative from Richmond, who immediately “pronounce[d] the statements utterly false” and went on in a later speech to use the letters of a major, a judge, and a police chief to show that such a woman by the name of Betty Huntington did not reside in Richmond. *Id.* (Representative Smith); 3 Cong Rec App 159 (1875).

equality issue, Republicans sought to deny the effects of the argument and defuse its force by pointing out the inherent contradiction in claiming both to be the superior race and to be hopelessly susceptible to the temptation of miscegenation.

Republicans were quick to refute the predictions of a numerical increase in miscegenation. John Roy Lynch, a black Congressman from Mississippi, argued that the reported fears of the Southern public would not be realized:

They will find that democratic predictions have not and will not be realized. They will find that there is no more social equality than before. That whites and blacks do not intermarry any more than they did before the passage of the bill. In short, they will find that there is nothing in the bill but the recognition by law of the equal rights of all citizens before the law.¹⁸⁶

As Senator Wilson pointed out, “[t]here is less, far less mixing of races now than before the war.”¹⁸⁷ This data, according to Wilson, suggested exactly the opposite of the Democrats' predictions. “[J]ust in proportion as you have lifted up the colored race and put them on the plane of equality, just in that proportion you have separated the races and maintained the social virtues.”¹⁸⁸

The Democrats' predictions of calamity¹⁸⁹ in the form of increased miscegenation were also not beyond rebuttal. Several speakers recognized “the futility of such laws”¹⁹⁰ in actually preventing miscegenation. Senator Wilson needed only look as far as the Senate's own galleries, which “were filled by colored men and women, thronging here to hear their rights vindicated,” to notice that “there was hardly a full-blooded black man among them.”¹⁹¹ Senator James Harlan, an Iowa Republican, contended that state anti-miscegenation laws were not only ineffective against amalgamation, but also facilitative of even worse behavior: “These State laws prohibiting the intermarriage of the two races do not prevent amalgamation, but encourage prostitution and abandonment of offspring. They are, therefore, evil, and only evil.”¹⁹² The practical effect of the laws, rather than preventing illicit contact, is to “deprive the mothers and innocent children of the proper protection of the laws of their country, and nothing more.”¹⁹³ Thus, if amalgamation of the races were to occur, it would not be because of the Civil Rights Act of 1875.

Even the Democrats' religion-based arguments for the anti-miscegenation laws¹⁹⁴ were not accepted without question. Senator Harlan posited that if the laws were the only barrier against miscegenation, such that their repeal would

186. 3 Cong Rec 947 (1875).

187. Cong Globe, 42d Cong, 2d Sess 3253 (1872).

188. *Id.*

189. 2 Cong Rec App 316 (1874) (Sen. Merriman).

190. Cong Globe, 42d Cong, 2d Sess 878 (1872) (Sen. Harlan).

191. *Id.* at 820.

192. *Id.* at 878.

193. *Id.* (Sen. Harlan).

194. See text accompanying notes 41-42.

open the floodgates, then miscegenation could not “violate the laws enacted by the Maker of the races of men thus inclined.”¹⁹⁵ Moreover, continued Senator Harlan, “if such alliances are not prohibited by the laws of God, such human enactments will ever prove futile.” Harlan confessed, perhaps surprised by the neatness of his logic, that “I have always thought that there was something more sacred in such alliances than the consideration of merely human enactments. Those whom God joins together cannot be kept asunder by human laws.”¹⁹⁶ While Harlan could not hope by such logic to convert the most prejudiced of the Democrats, it does indicate the Republicans' willingness to defend desegregation and its implications on all fronts. Even a topic as sensitive as the interpretation of Divine law was not out of reach.

The Democrats' claim of “superiority” over blacks “in intelligence, morality, and in all the virtues of true manhood,”¹⁹⁷ was quite easily turned against them on the miscegenation question. Thus, Representative Rainey argued that this alleged superiority should be ample security against miscegenation:

The superiority of the Anglo-Saxon race—which has been flaunted in our faces during the discussion—is enough to lead one to believe that there is no occasion whatever for this dread of indiscriminate association, inasmuch as this much talked of superiority would be of sufficient security and a safeguard of itself to defy all assaults, intrusions, or intrigues.¹⁹⁸

Senator Wilson acknowledged that the distinctions between the races were rapidly eroding, a result he resoundingly approved. “We have heard all through these forty years about these great distinctions between the races, about the superiority of the one race over the other, and yet we have seen everywhere around us evidences that these distinctions were very often forgotten.”¹⁹⁹

4. Responses which attempted to dodge the issue.

Many Republicans tried to avoid the question of miscegenation during the debates. Although the preceding subsections demonstrate that the Republicans had a substantive response to the issue, most of the bill's supporters did not want to become deeply involved in this discussion given the enormous prejudice against miscegenation and the minimal value in advocating the repeal of prohibitions against such action. These supporters sought either to avoid the question altogether or to make light of the subject at the Democrats' expense.

195. Cong Globe, 42d Cong, 2d Sess 878 (1872) (Sen. Harlan).

196. *Id.*

197. Cong Globe App, 42d Cong, 2d Sess 218 (1872) (Rep. McHenry).

198. 3 Cong Rec 960 (1875).

199. Cong Globe, 42d Cong, 2d Sess 820 (1872).

a) *Avoid the issue altogether.* Sometimes hesitance to confront the question of miscegenation prompted supporters of the bill to avoid the issue altogether. Senator Frederick Frelinghuysen, a prominent Republican from New Jersey, attempted to excuse himself from the discussion by saying "I do not wish to enter into a speech just at present, as we have been here all night."²⁰⁰ After being bombarded with a series of questions regarding whether the bill attempted to encourage miscegenation by Senator Stockton, his fellow New Jersey senator on the other side of the floor, Frelinghuysen finally responded, "[n]ot exactly recognizing the right of the Senator from New Jersey to catechise me in that style, still, out of the regard I entertain for him, I will answer him in the negative."²⁰¹ Even Senator Sumner, not known for his reticence, hoped to defer to a previous speaker's answer when the issue was posed by Norwood.²⁰²

b) *Mock and ridicule the Southerners.* Perhaps the Republicans' most interesting response to charges of miscegenation was to mock and ridicule the Southerners who raised the charges. This deflected attention from the issue while making the not-so-subtle point that the Democrats might be even more vulnerable to such allegations. When black members of Congress responded in this way, it was quite often understandably bitter and resentful. Representative Alonzo Ransier, a black congressman from South Carolina, took this tone in admonishing those raising the "bugbear" of social equality:

These negro-haters would not open school-houses, hotels, places of amusement, common conveyances, or the witness or the jury box to the colored people upon equal terms with themselves, because this contact of the races would, forsooth, "result injuriously to both." Yet they have found agreeable associations with them under other circumstances which at once suggest themselves to us; nor has the result of this contact proved injurious to either race so far as I know, except that the moral responsibility rests upon the more refined and cultivated.²⁰³

Ransier's colleague, Representative Rainey, similarly criticized the sincerity of those worried about amalgamation of the races:

If the future may be judged from the results of the past, it will require much effort upon the part of the colored race to preserve the purity of their own households from the intrusions of those who have hitherto violated and are now violating with ruthless impunity those precious and inestimable rights which should be the undisturbed heritage of all good society.²⁰⁴

200. 2 Cong Rec 4169 (1874).

201. Id.

202. Cong Globe, 42d Cong, 2d Sess 872 (1872).

203. 2 Cong Rec 382 (1874).

204. 3 Cong Rec 960 (1875).

Representative Lewis Carpenter, another in a line of black Republicans from South Carolina, echoed Rainey's concerns:

[I]n every nook and corner of the State, in every hamlet and village, may still be found indisputable evidence of the laxity of social laws and the absence of social restraint. The African was fast bleaching into the fair-skinned Saxon, and had the old condition of things continued, the day could not have been far distant when the power to trace genealogy in that State would have been lost forever.²⁰⁵

Representative James T. Rapier, a black congressman from Alabama, supported these claims with specific evidence of the indiscretions committed by Southerners even during Reconstruction:

But how can I have respect for the prejudices that prompt a man to turn up his nose at the males of a certain race, while at the same time he has a fondness for the females of the same race to the extent of cohabitation? Out of four unfortunate colored women who from poverty were forced to go to the lying-in branch of the Freedmen's Hospital here in the District last year three gave birth to children whose fathers were white men, and I venture to say that if they were members of this body, would vote against the civil rights bill.²⁰⁶

Congressman Richard H. Cain, a black Republican from South Carolina, was only slightly less serious when he raised the issue. According to Cain, “[w]e have some objections to social equality ourselves, very grave ones. [Applause] For even now, though freedom has come, it is a hard matter, a very hard matter, to keep sacredly guarded the precincts of our sacred homes. But I will not dwell upon that. The gentleman knows more about that than I do. [Laughter]”²⁰⁷ Cain later refuted the “great bugaboo” of social equality by arguing that “there are men even who have positions upon this floor, and for whom I have respect, but of whom I should be careful how I introduced them into my family. I should be afraid indeed their old habits acquired beyond Mason and Dixon's line might return.”²⁰⁸ Representative Butler chimed in to the black members' refrain by pointing out that “this bill does not touch the most terrible, the most awful question of social equality which grew up under a system where men traded in the results of their lust.”²⁰⁹

More often, however, the Republican retort was quick with wit and sarcasm, punctuated by the reporter's bracketed description of laughter and applause on the floor. For example, Representative Butler pointed out that prejudice could not justify separation of the races in the South, because “your children and your

205. 3 Cong Rec App 108 (1875).

206. 2 Cong Rec 4784 (1874).

207. *Id* at 902.

208. 3 Cong Rec 957 (1875).

209. *Id* at 1006.

servants' children played together; your children sucked the same mother with your servants' children; had the same nurse; and, unless tradition speaks falsely, sometimes had the same father. [Laughter and applause].”²¹⁰ Senator Pomeroy mocked Senator Norwood's earnest concern for the survival of anti-miscegenation laws by saying that “our Democratic friends were always afraid that we should bring about a state of things whereby people of one color would be allowed to marry those of another, and I have known them to go so far as to pass a law restraining themselves from marrying black women. I have never felt the necessity of any such statute, [laughter,] and I think it is a sort of imposition upon a man to place him under any such restraint. In any State or country that I ever lived in men were in the habit of choosing their wives and marrying them.”²¹¹ Senator James Flanagan, a Republican from Texas, was tongue-in-cheek when he described a newspaper account of a twenty-year-old black man described as “gingerbread color” running off with a thirty year old white woman from England to get married:

If there was any running off between the two, which ran off with the other, the white woman with the black boy, or the black boy with the old white woman? [Laughter] Social equality! It is hard to say whether it preponderates upon the side of the woman or the man, the gingerbread man or the white woman. . . . I should say the twenty-year old boy got the worst when that woman took him up and ran off with him. [Laughter]²¹²

Flanagan also teased the Democrats by pointing out that one of their own, Vice President Richard M. Johnson, who was elected in 1837, “lived for many years with a colored woman and sired several mulatto children.”²¹³

Democrats were susceptible to such ridicule and, in protesting, may have increased its frequency. Senator Merriman illustrated the Democrats' great sensitivity to the subject when he argued that “we know that there has been an intermixture of them to a greater or less extent in almost every locality of the Union; and it is not a subject to be laughed at or jeered at by one side or the other, by the black or the white race.”²¹⁴ Perhaps in response to these jokes, some Democrats tried to place the blame for such indiscretions on the slaves rather than their masters. Representative E. K. Wilson of Maryland noted that “[i]n his African home, as you know, the negro cares little for the institution of matrimony.”²¹⁵ Thus, at emancipation, Wilson lamented, the blacks were often found to be “forgetful of the laws of chastity.”²¹⁶ As proof of such accusations, Representative Read offered the resolution of a Tennessee state meeting for

210. 2 Cong Rec 457 (1874).

211. Cong Globe, 42d Cong, 2d Sess 821 (1872).

212. 2 Cong Rec App 374 (1874).

213. Id; Avins, 52 Va L Rev at 1248-49 (cited in note 10).

214. 2 Cong Rec App 316 (1874).

215. Id at 419.

216. Id.

blacks that condemned the sentence passed against a black man, David Galloway, for marrying a white woman, and resolved to “vindicate the rights of the colored citizens of Tennessee to the civil rights of marriage with whomsoever they may contract and choose.”²¹⁷ According to Read, this left no doubt “as to what the negro means by civil rights. It is perfect social equality of the races in all the departments of life.”²¹⁸

C. LITIGATION AGAINST ANTI-MISCEGENATION STATUTES

Some of the same scholars who downplay the strong Republican response to the miscegenation question and ignore the rejection of symmetrical equality during the debates also misunderstand the treatment of anti-miscegenation statutes in the courts. R. Carter Pittman ended his review of the intended effect of the Fourteenth Amendment on anti-miscegenation statutes by asserting that “[a]lmost contemporaneously with the adoption of the amendment, federal and state courts upheld anti-miscegenation statutes against such attacks [based upon the Fourteenth Amendment].”²¹⁹ Pittman then incorrectly concluded that “[a]ll court decisions on the question have upheld the constitutionality of anti-miscegenation statutes. . . .”²²⁰ Such an assessment not only misses several important cases in which anti-miscegenation statutes were held unconstitutional, but ignores the significance of the increasing frequency in which such arguments were raised in the courts during the 1870s.²²¹

At least two state supreme courts agreed that the Civil Rights Act of 1866 and the Fourteenth Amendment abrogated state anti-miscegenation laws. The argument relied on the first section of the Act, which provided that all “citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts . . . as is enjoyed by white citizens.”²²² Since marriage was a contract, opponents of anti-miscegenation laws argued that a State had no right to interfere with a black citizen’s right to

217. 2 Cong Rec App 343 (1874).

218. *Id.*

219. Pittman, 43 NC L Rev at 108 (cited in note 10).

220. *Id.* The only exception cited by Pittman was *Perez v Sharp*, 198 P2d 17 (Cal 1948). Pittman, 43 NC L Rev at n 76 (cited in note 10). However, he failed to cite Reconstruction cases that held anti-miscegenation statutes unconstitutional. See *Burns v State*, 48 Ala 195 (1872) and *Hart v Hoss & Elder*, 26 La Ann 90 (1874) for cases Pittman missed. See also Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 BU L Rev 93, 104 (1993) (“In the 100 years following the ratification of the Fourteenth Amendment only one state court overturned an anti-miscegenation law.”).

221. The cases discussed here are cited by various sources that have studied the laws surrounding miscegenation. See Fowler, *Northern Attitudes toward Miscegenation* at 339 (cited in note 84) (table covering decisions and laws of all states); Stephenson, *Race Distinctions* at 78 (cited in note 3); Comment, *Intermarriage with Negroes: A Survey of State Statutes*, 36 Yale L J 858, 860 (1927).

222. 14 Stat 27 (1866).

make a marriage contract with a white citizen.

The most dramatic case using this argument to hold its state's anti-miscegenation statute unconstitutional was *Burns*, which overruled *Ellis v State*.²²³ *Burns* was a justice of the peace convicted of "solemnizing the rites of matrimony between a white person and a negro, contrary to the provisions of sections 3602, 3603 of the Revised Code."²²⁴ The court took a broad swipe against the doctrine of symmetrical restrictions in establishing marriage as a civil contract covered by the Civil Rights Act of 1866:

The same right to make a contract as is enjoyed by white citizens, means the right to make any contract which a white citizen may make. The law intended to destroy the distinctions of race and color in respect to the rights secured by it. It did not aim to create merely an equality of the races in reference to each other. If so, laws prohibiting the races from suing each other, giving evidence for or against, or dealing with one another, would be permissible.²²⁵

The court in *Burns* also cited the Equal Protection Clause of the Fourteenth Amendment as mandating the repeal of Alabama's anti-miscegenation statute. The U.S. Supreme Court in *Dred Scott*²²⁶ had used anti-miscegenation laws as proof that blacks were not citizens. This use of anti-miscegenation laws to reinforce the inferior status of blacks had to be abandoned when they were accorded full citizenship. According to the Court, a symmetrical restriction could not disguise an obvious discrimination against blacks:

It cannot be supposed that this discrimination [prohibition against miscegenation] was otherwise than against the negro, on account of his servile condition, because no State would be so unwise as to impose disabilities in so important a matter as marriage on its most favored citizens, without consideration of their advantage.²²⁷

223. 42 Ala 525 (1868).

224. *Burns*, 48 Ala at 196. Although it is possible that the ruling of the court might have been less lenient if a black man, and not a minister, were before it, the force of its opinion suggests a more radical intent. Penalties of fines up to one thousand dollars and imprisonment not more than six months for performing such a ceremony only appeared in the Alabama Revised Code of 1867. See Fowler, *Northern Attitudes toward Interracial Marriage* at 340 (cited in note 84). This is more likely a test case for a friendly court hoping to overrule the law during a less controversial case.

225. *Burns*, 48 Ala at 197.

226. *Scott v Sandford*, 60 US (19 How) 393 (1857). "The supreme court of the United States, in the *Dred Scott* case, (19 How. 393), decided that a free negro, of the African race, whose ancestors were brought to this country and sold as slaves, was not a 'citizen' within the meaning of the constitution of the United States. In proof of this, for the constitution did not so declare at the time, Chief Justice Taney, with much stress, referred to the laws of many of the States, prohibiting marriage between such persons and the white population." *Burns*, 48 Ala at 197.

227. *Burns*, 48 Ala at 197.

Under this analysis, a black citizen only “approaches equality with the more favored population in proportion as the proscription is removed.”²²⁸

The second state supreme court to approve of the 1866 Act rationale against anti-miscegenation laws was the Louisiana Supreme Court in *Hart v Hoss & Elder*.²²⁹ Rather than overturning an anti-miscegenation law, however, the court cited the Civil Rights Act of 1866 as a rationale for the validity of an interracial marriage that took place prior to the legislature's own repeal of its anti-miscegenation law in 1870:²³⁰

The effect of the Civil Rights bill was to strike with nullity all State laws discriminating against them [Cornelia Hart and her children, persons of color] on account of race or color, and to confer upon them the rights and privileges which they would have under the State laws if they were white persons. It invested her with the capacity to enter into the contract of marriage with E.C. Hart, a white man, and to legitimate her children by him born before said marriage, just as if she had been a white woman.²³¹

The question in *Hart* was whether an interracial couple that was not permitted to marry could later legitimate its children for purposes of inheritance when the couple was able to marry legally. The court held that “the moment after the law forbidding marriages between white and colored persons was abrogated, it was lawful to legitimate them in every way that white children might be.”²³² Since white children born out of wedlock could be legitimated by the subsequent marriage of their parents,²³³ black or mulatto children must occupy “the same position that white children occupy,”²³⁴ after the Civil Rights Act of 1866 “abrogated” the ban on miscegenation. Although Louisiana's court merely followed the lead of its legislature, its reliance on the Civil Rights Act of 1866 to substantiate its position suggests the force of this argument.

While no other state supreme court followed Alabama and Louisiana's lead in striking down its state's anti-miscegenation statute, the frequent constitutional challenges to such laws suggest that the position was gaining respect and provides context for the explicit and implicit constitutional attacks in Congress. The 1866 Act argument was raised in numerous state cases,²³⁵ as well as in several

228. *Id.* Although *Burns* was later limited by *Ford v State*, 53 Ala 150 (1875) (distinguishing *Burns* on the ground that it dealt with marriage and not adultery) and directly overruled by *Green v State*, 58 Ala 190 (1877), a number of other courts cited it in their decisions. See, for example, *Frasher v State*, 3 Tex App 263, 277 (1877); *State v Jackson*, 80 Mo 175, 178 (1883).

229: 26 La Ann 90 (1874).

230. See La Civil Code, art 94 (1870), in Virginia Dominguez, *White by Definition* ch 3 at 57 (Rutgers, 1986). According to Dominguez, the miscegenation prohibition disappeared from the Civil Code from 1870 until 1894 when it was reintroduced. Dominguez, *White by Definition* at 28 (cited in this note).

231. *Hart*, 26 La Ann at 97.

232. *Id.* at 100.

233. See articles 1948 and 200 of the Civil Code in *id.* at 94.

234. *Id.* at 95.

235. See, for example, *State v Hairston and Williams*, 63 NC 451, 453 (1869); *Lonas*

federal cases.²³⁶

The rationale for rejecting the 1866 Act argument was similar to the Democrats' social equality charge. The majority of the cases maintained that marriage is not a mere civil contract; rather "[i]t is a social and domestic relation,"²³⁷ more akin to a "civil status"²³⁸ or "an institution of public concernment, created and governed by the public will of the state or nation."²³⁹ They rested upon the notion that the Civil Rights Act of 1866 "has no application to social relations," nor was it "intended to enforce social equality, but only civil and political rights."²⁴⁰

A corollary to the 1866 Act argument was that anti-miscegenation laws violated Article I, § 10 of the Constitution, which provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." Thus, according to the petitioner's brief in *Lonas*, "[w]hite and colored persons who have contracted marriage in other States, are protected by this clause."²⁴¹ This was raised in a few cases in which the parties had left the state to be lawfully married and then returned to make their homes.²⁴² This argument, however, was settled by the Supreme Court in *Dartmouth College v Woodward*.²⁴³ According to the Court, contracts concerning property and the like were the only contracts contemplated by this provision.²⁴⁴

Several courts discussed the argument that anti-miscegenation laws violated the Equal Protection Clause by discriminating against blacks.²⁴⁵ Those cases rejecting the equal protection argument sometimes resorted to the symmetrical restrictions rationale later employed by *Pace*. The opinion of Judge Hughes in *Kinney v Commonwealth* was typical:

I do not see any discrimination against either race in a provision of law forbidding any white or colored person from marrying another of the opposite color of skin. If it forbids a colored person from marrying a white, it equally forbids a white person from marrying a colored. In its terms, and, for all I know, in its spirit, the law is a prohibition put upon both races alike and equally.²⁴⁶

v State, 50 Tenn (3 Heiske) 287, 307-08 (1871); *State v Gibson*, 36 Ind 389, 395 (1871); *Green*, 58 Ala at 193; *Frasher*, 3 Tex App at 276; *Dodson v State*, 61 Ark 57, 60 (1895).

236. See, for example, *Hobbs*, 12 F Cases at 263; *Ex parte Kinney*, 14 F Cases 602, 606 (E D Va 1879); *State v Tutty*, 41 F 753, 759 (S D Ga 1890).

237. *Dodson*, 61 Ark at 60.

238. *Lonas*, 50 Tenn at 308.

239. *Hobbs*, 12 F Cases at 263.

240. *Hairston*, 63 NC at 453.

241. *Lonas*, 50 Tenn at 290 (J. Scott Payne, brief for the petitioner).

242. See *State v Bell*, 66 Tenn 9 (1872); *Kinney v Commonwealth*, 71 Va (30 Gratt) 284 (1878); *Hobbs*, 12 F Cases at 263; *Lonas*, 50 Tenn at 290; *Tutty*, 41 F at 757.

243. 17 US (4 Wheat) 518 (1819).

244. *Hobbs*, 12 F Cases at 263.

245. See *Burns*, 48 Ala at 198; *Hobbs*, 12 F Cases at 264; *Kinney*, 14 F Cases at 605; and *Hairston*, 63 NC at 452.

246. *Kinney*, 14 F Cases at 605. See also *Hobbs*, 12 F Cases at 264 ("Nor do I think

Significantly, this formal equality argument was not adhered to in all jurisdictions. In Texas, the Equal Protection Clause argument was rejected even though the state statute was patently unequal: it provided penalties for only the white participant in an interracial relationship.²⁴⁷ The court in *Frasher* reasoned that the Equal Protection Clause was only for the protection of blacks:

This clause [the Equal Protection Clause] was added in the abundance of caution, for it provides in express terms what was the fair, logical, and just implication from what had preceded it; and that was that persons made citizens by the amendment should be protected by the laws in the same manner and to the same extent that white citizens were protected.²⁴⁸

Although this argument had some support from *Slaughter-House*,²⁴⁹ even the circuit court in Texas was uncomfortable with its implications:

That the law in question is unwise and unjust—that it is repugnant to the spirit of the constitution, and of the civil rights bill, both of which contemplate the equality of all persons before the law, and the equal protection of the law to all—I have no doubt. At the same time, I am not satisfied that it violates the letter of either.²⁵⁰

At a minimum, *Frasher's* recognition that the Fourteenth Amendment served primarily to protect blacks impliedly approves of *Burns's* reasoning that antebellum restrictions on blacks were removed by the Amendment. Under this analysis, anti-miscegenation laws were discriminatory no matter who was punished.

State court litigants also argued that anti-miscegenation statutes violated the privileges and immunities clauses contained both in Article IV, § 2 and in the Fourteenth Amendment. Although *Slaughter-House* seemed to take the force out of this argument, it was still considered by several courts.²⁵¹ The argument

that the state law operates unequally: the marriage relation between whites and colored cannot exist under the statutes of this state - it is null and void as to both.”).

247. Article 386 of the Texas Criminal Code (Pasc Dig, art 2016) provided as follows:

If any white person shall, within this state, knowingly marry a negro, or a person of mixed blood descended from negro ancestry to the third generation inclusive, though one ancestor of each generation may have been a white person, or, having so married in or out of the state, shall continue within this state to cohabit with such negro, or such descendent of a negro, he or she shall be punished by confinement in the penitentiary not less than two nor more than five years.

Frasher, 3 Tex App at 265. This act was later changed to punish both parties equally effective September, 1879. See *Ex Parte Francois*, 9 F Cases 699, 700 (W D Tex 1879) (case note).

248. *Frasher*, 3 Tex App at 271.

249. *Id* at 271-72 (quoting *Slaughter-House*, 83 US (16 Wall) at 81 (“We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.”)).

250. *Ex Parte Francois*, 9 F Cases at 700-01.

251. See *Lonas*, 50 Tenn at 307; *Kinney*, 14 F Cases at 605; *Hobbs*, 12 F Cases at

followed the logic of Judge Erskine in *Hobbs*, who noted that “there still lie dormant in the national legislature, under the original constitution and the amendments thereto, vast and various powers which but await such exigencies as are necessary to call them into action.”²⁵² Most courts, however, while declining to enumerate these rights, concluded that “[t]he right of intermarriage among the races is . . . not one of them.”²⁵³ The state's historical regulation of marriage suggested it was a privilege of state rather than national citizenship.²⁵⁴

No case directly cites the Thirteenth Amendment as authority for the argument that anti-miscegenation laws are unconstitutional. However, in several cases, such an argument is implied either by the court or the defendant. In *Frasher*, the appellant argued that “the statute prohibiting such marriages was passed in the interest of slavery, before that institution was abolished.”²⁵⁵ The court, however, rejected the argument that this law constituted an implied repeal of the state's anti-miscegenation statute.²⁵⁶ This argument was also rejected in *Dodson*.²⁵⁷ Even in *Hart*, which held that the prohibition against miscegenation was abrogated by the Civil Rights Act of 1866, the court noted that the Louisiana constitution freed the slaves in 1864, but they were not able to contract freely into marriage with white citizens until April, 1866.²⁵⁸

The litigation concerning anti-miscegenation laws reveals that the concept of symmetrical equality was by no means universally held during this period. In fact, some courts expressly rejected the concept. Two cases in the late 1860s resorted to the symmetrical equality position.²⁵⁹ One was subsequently overturned by *Burns*.²⁶⁰ The second case, while finding an anti-miscegenation statute to be symmetrically equal, distinguished “a discrimination between the races in civil rights,” such as the right to testify, and “a matter affecting the social and domestic relations,” such as interracial marriage, concluding that the Civil Rights Act of 1866 was intended to provide equality for the former and not the latter.²⁶¹ The vast majority of courts, instead of justifying the laws on principles of symmetrical equality, attempted to exclude miscegenation from the definition of a contract or to define it as a social matter outside the bounds of the law.²⁶² The courts sought to avoid the question of miscegenation regardless of the

264.

252. *Hobbs*, 12 F Cases at 264.

253. *Lonas*, 50 Tenn at 307.

254. See *Kinney*, 14 F Cases at 605; *Hobbs*, 12 F Cases at 264.

255. *Frasher*, 3 Tex App at 265.

256. *Id* at 277.

257. *Dodson*, 61 Ark at 58.

258. *Hart*, 26 La Ann at 93.

259. A third case employed this rationale along with many other rationales in 1871. See *Hobbs*, 12 F Cases at 264. Other cases applied this argument, but too many years after the 1866 Act to provide any insight. See *Green*, 58 Ala at 192; *Jackson*, 80 Mo at 177; *Tutty*, 41 F at 757.

260. *Ellis v State*, 42 Ala 525, 526 (1868).

261. *Hairston*, 63 NC at 452.

262. See text accompanying notes 237-40.

underlying principle employed.

III. Conclusion

Supporters of the Civil Rights Act of 1875, despite powerful incentives to avoid the issue altogether, argued for the repeal of anti-miscegenation laws on both constitutional and policy grounds. When squarely confronted with the issue in the debates over § 5 of Sumner's original bill, four senators argued for repeal because anti-miscegenation laws were contrary to their understanding of equality.²⁶³ According to Avins, these statements represented only the "personal opposition" of a "few Radicals" to anti-miscegenation laws, hardly embodying the views of Congress as a whole.²⁶⁴ Admittedly, many Congressmen were probably afraid to speak out in favor of overturning anti-miscegenation laws. Even Sumner was subject to such conservatism at times. In 1867, Senator Pomeroy criticized Sumner's attempt to allow blacks to hold office and serve on juries in the District of Columbia because the bill did not remove the restriction that "a man of my complexion, or about like mine, is prohibited from contracting matrimony with a person of darker complexion."²⁶⁵ According to Pomeroy, "[a]ll such restrictions ought to be stricken from the code of the capital of this nation. There ought to be no such distinction on our statutes."²⁶⁶ Sumner responded by saying that, while he agreed with Pomeroy "precisely in all his aims," he "thought on the present occasion it was not expedient to raise any further question."²⁶⁷ However, during the debates over the Civil Rights Act of 1875, some Republicans publicly argued that anti-miscegenation laws were unconstitutional. Indeed, with few exceptions,²⁶⁸ no Republican defended anti-miscegenation laws.²⁶⁹ Moreover, calls to remove § 5 were defeated by a vote

263. Senators Sumner, Wilson, Pomeroy, and Harlan. See text accompanying notes 139-53.

264. Avins, 52 Va L Rev at 1253 (cited in note 10).

265. Cong Globe, 40th Cong, 2d Sess 39 (1867).

266. Id.

267. Id.

268. A few Southern Republican opponents of the bill raised the miscegenation question. See Cong Globe, 42d Cong, 2d Sess 242 (1871) (Sen. Hill); 2 Cong Rec 452 (1874) (Sen. Crutchfield); id at 4593 (Sen. Butler). Only Hill employed symmetrical equality in his defense of anti-miscegenation statutes.

269. One Democrat, Representative King of Missouri, reported that Sumner, early in the 2d session of the 42d Congress, introduced an amendment to the Constitution "prohibiting the intermarriage of the black and white races, and restoring to the States the right to prohibit mixed schools if they thought proper." Cong Globe App, 42d Cong, 2d Sess 383 (1872). Scrutiny of the Globe reveals no such amendment. It clearly would have been out of character for Sumner to propose an amendment like this while his amendment to the Amnesty Bill contained a provision to desegregate schools. Avins concluded that this amendment was proposed by King himself, although he provided no citation to the submission of such an amendment and this interpretation does not accord with King's statement that "he introduced . . . an amendment." Avins, 52 Va L Rev at 1245 (cited in note 10).

of thirty-four to twenty-five despite the availability of the less controversial criticism that it would also repeal naturalization laws.²⁷⁰ If Avins is correct that no one “ever seriously thought that these state laws were within the pale of the amendment’s prohibitions,” and that the miscegenation question was merely a “political smokescreen,”²⁷¹ it is all the more amazing that any Republicans saw the need to take seriously the Democrats’ charges and to argue for the repeal of anti-miscegenation laws. Throughout the bill, such resoluteness in the face of the miscegenation question defies the conventional logic that Republicans distinguished miscegenation from other issues by employing a symmetrical understanding of equality.²⁷²

Some may object to drawing this conclusion because of the passage of time and the change in members of Congress between the framing of the Fourteenth Amendment and the debates over the Civil Rights Act of 1875. Such an objection has considerable merit given that miscegenation was discussed during the debates over the Civil Rights Act of 1866. These debates were closer in time to the adoption of the Fourteenth Amendment, and many contend that the Civil Rights Act of 1866 was “the forerunner of section one of the amendment.”²⁷³

Any difference between Republican statements in 1866 and 1875, though, may reflect a change in the classification of miscegenation from the social to the civil realm, rather than a change in the underlying doctrine of equality. On several occasions in 1866, Trumbull maintained that “[t]he bill is applicable exclusively to civil rights.”²⁷⁴ Representative James Wilson of Iowa, who assisted in the passage of the bill through the House Judiciary Committee, argued that the bill did not mean “that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal.”²⁷⁵ Equality was only sought with respect to civil rights and marriage was not included within those rights. During the debates over the Freedman’s Bureau, Republican Representative Samuel Moulton of Illinois argued that it is not “a civil right for a white man to marry a black woman or for a black man to marry a white woman. It is a simple matter of taste, of contract, of arrangement between the parties.”²⁷⁶ Even if it were a civil right, Moulton suggested, there still would be no discrimination

270. Some of the votes against repealing the section were clearly intended to make Sumner’s amendment to the Amnesty Bill as obnoxious as possible. Senator Trumbull publicly declared his intention to vote against all amendments to Sumner’s amendment without considering the merits of each. *Cong Globe*, 42d Cong, 2d Sess 896 (1872). Another member of Congress commented that Senator Thurman of Ohio joined Trumbull in voting against all amendments in an attempt to leave the measure weak and vulnerable. *Id* at 897 (Sen. Hamlin). It appears that the section died in committee after it survived the vote on the floor.

271. Avins, 52 *Va L Rev* at 1253 (cited in note 10).

272. See Tushnet, 25 *Loyola LA L Rev* at 1208 (cited in note 5).

273. William Edward Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 133 (Harvard, 1988).

274. *Cong Globe*, 39th Cong, 1st Sess 599 (1866).

275. *Id* at 1117.

276. *Id* at 632.

because the laws apply equally to both parties.²⁷⁷ When Moulton's colleague, Representative Marshall from Illinois, persisted in claiming that the equal right to contract prohibited denying the black man his civil right to marry a white woman, Moulton retreated to his position "that marriage is not a civil right, as contemplated by the provisions of this bill."²⁷⁸ His primary objective was to define the miscegenation question out of the picture altogether through its definition as a social right, rather than to uphold the principle of symmetrical equality. Many state courts employed this same strategy in reviewing the legality of anti-miscegenation laws after the 1866 Act.²⁷⁹ According to Professor Benno Schmidt, even *Plessy*, which is the most famous enunciation of the "separate but equal" doctrine, "said nothing about equality;" rather, the opinion announced that "the purpose of the Fourteenth Amendment 'in the nature of things' could not have been to enforce social, as distinguished from political and civil, equality. Separation of the races in 'social relations' was the principle announced. . . ."²⁸⁰

Without any real attempt to give substance to the classification, miscegenation was thus left, along with other issues too controversial to be discussed, such as segregation, inside the little black box called "social rights." In 1866, the controversy over miscegenation was at its height. "The immediate postwar controversy over Negro rights had evoked the coarsest kind of anti-Negro polemic, frequently stressing the theme of miscegenation."²⁸¹ Republicans thus analyzed miscegenation differently than other issues during the early period in Reconstruction.²⁸² This special treatment of miscegenation may explain why Justice Harlan, who possessed "fundamentally southern social and religious convictions about the distinctiveness of the 'races,'"²⁸³ joined the Court's use of symmetrical equality in *Pace* while writing his famous dissent rejecting such an interpretation in *Plessy*.²⁸⁴

After the settlement of the suffrage issue, however, miscegenation "dropped nearly out of sight in public discussion of the 1870's in the North."²⁸⁵ "By 1871 the *Nation* commented that what it had deprecated as 'the intermarriage bugbear' in 1867 had virtually disappeared from serious discussion."²⁸⁶ This created a favorable climate for the repeal of anti-miscegenation statutes. "During the 1870's and 1880's Illinois, Michigan, and Ohio repealed their prohibitions of

277. *Id.*

278. *Id.* at 633.

279. See text accompanying notes 237-40.

280. Alexander M. Bickel and Benno C. Schmidt, 9 *History of the Supreme Court: 1910-1921* 755-56 (Macmillan, 1984). For a criticism of this interpretation of *Plessy*, see Currie, 52 *U Chi L Rev* at 369 n 272 (cited in note 9).

281. Fowler, *Northern Attitudes toward Interracial Marriage* at 238 (cited in note 84).

282. Tushnet, 25 *Loyola LA L Rev* at 1208 (cited in note 5).

283. Roche, 31 *U Chi L Rev* at 113 (cited in note 9).

284. *Id.*

285. Fowler, *Northern Attitudes toward Interracial Marriage* at 238 (cited in note 84).

286. *Id.* at 246.

intermarriage, as did Rhode Island and Maine in the Northeast. . . .”²⁸⁷ Louisiana allowed its anti-miscegenation statute to disappear when it revised its Civil Code in 1870,²⁸⁸ and Alabama’s supreme court declared its anti-miscegenation statute unconstitutional in 1872.²⁸⁹ Republicans also became more brazen in their discussion of the constitutionality of such laws. Segregation emerged from the black box of social rights; anti-miscegenation laws, somewhat hesitantly, followed behind.²⁹⁰

Thus, the political climate for discussing miscegenation, rather than the underlying principle of equality, may be the variable that changed during the interval between the 1866 and 1875 Civil Rights Acts and what subsequently changed again before *Pace* was decided. Since political controversy over interracial marriage was at a relative low point during the 1870s, the debates over the Civil Rights Act of 1875 provide an ideal period to examine the original understanding of equality in light of the dilemma over symmetry.

287. *Id.* at 247.

288. Dominguez, *White by Definition* at 26 (cited in note 230).

289. *Burns*, 48 Ala at 195; overturned by *Green*, 58 Ala at 190.

290. Of course, *Pace* allowed many states to keep or re-enact their anti-miscegenation statutes until the second half of this century. See *Loving*, 388 US at 1.