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ORIGINALISM AND THE DESEGREGATION DECISIONS

*Michael W. McConnell**

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INTRODUCTION

CHIEF Justice Earl Warren's unanimous opinion for the Supreme Court in *Brown v. Board of Education*¹ made no pretense that its interpretation was an authentic translation of what the Fourteenth Amendment meant to those who drafted and ratified it. The Court described the historical sources as "[a]t best, . . . inconclusive."² This "at best" carries the strong implication that in the cold, hard eye of objective historical examination, the sources point the other way. Stating that "we cannot turn the clock back to 1868 when the Amendment was adopted,"³ the Court based its decision primarily on the "modern authority" of social science.⁴ *Brown* was arguably the first explicit, self-conscious departure from the traditional view that the Court may override democratic decisions only on the basis of the Constitution's text, history, and interpretive tradition—not on considerations of modern social policy.⁵

¹ 347 U.S. 483 (1954).

² *Id.* at 489.

³ *Id.* at 492.

⁴ *Id.* at 494.

⁵ As recently as 1939, Jacobus tenBroek, probably the leading constitutional scholar of the Fourteenth Amendment at that time, could write:

Whenever the United States Supreme Court has felt itself called upon to announce a theory for its conduct in the matter of constitutional interpretation, it has insisted, with almost uninterrupted regularity, that the end and object of constitutional construction is the discovery of the intention of those persons who formulated the instrument or of the persons who adopted it.

Jacobus tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 27 Cal. L. Rev. 399 (1939). Another candidate for the first departure—but of less importance than *Brown*—is *Home Bldg. Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

In the forty years since *Brown*, legal scholars generally have concluded that the Court did not rely on the historical understanding because it could not. Shortly after the decision, in what remains the leading article on the issue, Professor Alexander Bickel surveyed the events leading up to the ratification of the Fourteenth Amendment and stated that the "obvious conclusion," to which the legislative history "easily leads," is that the Amendment "as originally understood, was meant to apply neither to jury service, nor suffrage, nor anti-miscegenation statutes, nor segregation."⁶ A decade later, constitutional historian Alfred Avins wrote an article pointing out that efforts by members of the Reconstruction Congresses to prohibit school desegregation in the 1875 bill to enforce the Fourteenth Amendment were defeated.⁷ He described as "inevitable" the conclusion that the *Brown* decision was "an unwarranted exercise of "non-existent authority . . . illegitimate in its origin. . . ."⁸ With remarkably few exceptions,⁹ later scholarship has continued to accept this historical assessment (though not nec-

⁶ Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 *Harv. L. Rev.* 1, 58 (1955). Bickel's article was based on research he had done as law clerk for Justice Frankfurter during the course of deliberations over *Brown*.

⁷ Alfred Avins, *De Facto and De Jure School Segregation: Some Reflected Light On the Fourteenth Amendment From the Civil Rights Act of 1875*, 38 *Miss. L.J.* 179 (1967).

⁸ *Id.* at 246.

⁹ The only unequivocal statements I have found in the academic literature since *Brown* arguing that the decision was correct on originalist principles are in Michael Perry, *The Constitution in the Courts*, 145-46 (1994) and John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 *Yale L.J.* 1385, 1462-63 (1992). These scholars deal with the segregation issue, however, in a few short paragraphs with little historical detail. See also Note, *Is Segregation Consistent with Equal Protection of the Laws? Plessy v. Ferguson Reexamined*, 49 *Colum. L. Rev.* 629, 631-33 (1949) (pre-*Brown* Note presenting brief summary of the evidence that segregation was understood to be unconstitutional). More equivocal, but still an exception, is John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws"*, 1972 *Wash. U. L.Q.* 421, 456-67. "We conclude that it was accepted virtually unanimously by all who supported the fourteenth amendment that it required equal schools and that a very large number of its supporters thought that the amendment forbade segregated schools." *Id.* at 467. An earlier version of this article was published under the same title at 50 *Colum. L. Rev.* 131 (1950). In addition, two leading historians of the period have treated the evidence as inconclusive. See Charles A. Lofgren, *The Plessy Case* 65 (1987) ("The evidence points both ways."); William E. Nelson, *The Fourteenth Amendment* 134-35 (1988) (there is "evidence that at least some members of Congress and the state legislatures may have appreciated the capacity of the Fourteenth Amendment to promote desegregation[,] but "Congress never institutionalized this judgment in its debates on the Fourteenth Amendment").

essarily the jurisprudential conclusion). In a recent article, for example, Professor Michael Klarman states that:

When Chief Justice Warren declared in *Brown* that evidence of the framers' views on school segregation was "inconclusive," he was being considerably less than candid. Evidence regarding the original understanding of the Fourteenth Amendment is ambiguous as to a wide variety of issues, but not school segregation. Virtually nothing in the congressional debates suggests that the Fourteenth Amendment was intended to prohibit school segregation, while contemporaneous state practices render such an interpretation fanciful; twenty-four of the thirty-seven states then in the union either required or permitted racially segregated schools.¹⁰

In a similar vein, Robert Bork states that "[t]he inescapable fact is that those who ratified the amendment did not think it outlawed segregated education or segregation in any aspect of life."¹¹ From the other side of the ideological spectrum, Mark Tushnet agrees: "Suppose that we [turned] back the clock so that we could talk to the framers of the fourteenth amendment. If we asked them whether the amendment outlawed segregation in public schools, they would answer 'No.'"¹²

These expressions of scholarly judgment are strong and unequivocal. The evidence is "obvious" and "[un]ambiguous," the conclusion is "inevitable" and "inescapable," and "[v]irtually nothing" supports the opposite claim, which is said to be "fanciful." This is

¹⁰ Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 Mich. L. Rev. 213, 252 (1991) (citations omitted).

¹¹ Robert H. Bork, *The Tempting of America* 75-76 (1990). Bork nonetheless defends the result, though not the opinion, in *Brown* on the ground that—as "had been demonstrated in a long series of cases"—"segregation rarely if ever produced equality." *Id.* at 82. Bork argues that holding segregation unconstitutional was necessary to bring to a halt the "[e]ndless litigation" over the quality of segregated facilities, which would impose a "burden on the courts" and "never produce the equality the Constitution promised." *Id.* To my mind, this argument is more typical of the constitutional methodology Bork criticizes than it is of his own professed originalist methodology. If segregation is not unconstitutional, how can the burden of litigation on the courts justify striking it down? For critiques of Bork's position, see Richard A. Posner, *Bork and Beethoven*, 42 Stan. L. Rev. 1365, 1375-76 (1990); Raoul Berger, *Robert Bork's Contribution To Original Intention*, 84 Nw. U. L. Rev. 1167, 1176-83 (1990) (reviewing Robert Bork, *The Tempting of America* (1990)); David A.J. Richards, *Originalism Without Foundations*, 65 N.Y.U. L. Rev. 1373, 1379-82 (1990) (reviewing Bork).

¹² Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 781, 800 (1983).

one point on which Raoul Berger, Ronald Dworkin, Richard Kluger, Earl Maltz, Bernard Schwartz, Laurence Tribe, Thomas Grey, Donald Lively, Richard Posner, and David Richards—not to mention Bickel, Avins, Klarman, Bork, Tushnet, and countless others—can agree.¹³ In the fractured discipline of constitutional law, there is something very close to a consensus that *Brown* was inconsistent with the original understanding of the Fourteenth Amendment, except perhaps at an extremely high and indeterminate level of abstraction.¹⁴ According to one recent survey of the literature, “the ‘original understanding’ on the issue of school segregation is not genuinely in doubt.”¹⁵

The supposed inconsistency between *Brown* and the original meaning of the Fourteenth Amendment has assumed enormous importance in modern debate over constitutional theory. Such is the moral authority of *Brown* that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited.¹⁶ Thus, what once was seen as a weak-

¹³ Raoul Berger, *Government By Judiciary* 117-33, 241-45 (1977); Ronald Dworkin, *Law's Empire* 360-61, 366 (1986); Richard Kluger, *Simple Justice* 634 (1975); Earl M. Maltz, *Civil Rights, the Constitution and Congress, 1863-1869*, at 113 (1990); 1 Bernard Schwartz, *Statutory History of the United States* 660 (1970); Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution* 12-13 (1991); Thomas C. Grey, *Do We Have An Unwritten Constitution?*, 27 *Stan. L. Rev.* 703, 712 (1975); Donald E. Lively, *Constitutional Turf Wars: Competing for the Consent of the Governed*, 42 *Hastings L.J.* 1527, 1538 (1991); Posner, *supra* note 11, at 1374; David A.J. Richards, *Abolitionist Political and Constitutional Theory and the Reconstruction Amendments*, 25 *Loy. L.A. L. Rev.* 1187, 1188 (1992); Mark Tushnet, *What Really Happened in Brown v. Board of Education*, 91 *Colum. L. Rev.* 1867, 1919 (1991).

¹⁴ The historicity of *Brown* is often defended by invoking abstract ideas of “equality” at odds with those of the Framers. See, e.g., Bickel, *supra* note 6, at 61-65; Walter E. Dellinger, III, *School Segregation and Professor Avins' History: A Defense of Brown v. Board of Education*, 38 *Miss. L.J.* 248 (1967); Alfred H. Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 *Mich. L. Rev.* 1049 (1956); cf. Robert J. Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 *Cornell L. Rev.* 811, 829 n.67 (1990) (discussing why abstract values, as opposed to concrete intentions, are a problematic basis for originalism).

¹⁵ Andrew Kull, *The Color-Blind Constitution* 258 n.26 (1992).

¹⁶ Professor Mark Tushnet has written: “For a generation, one criterion for an acceptable constitutional theory has been whether that theory explains why [*Brown*] was correct.” Mark V. Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses*, 27 *Wm. & Mary L. Rev.* 997, 999 n.4 (1986); accord Bork, *supra* note 11, at 77; Lawrence Lessig, *Fidelity in Translation*, 71 *Tex. L. Rev.* 1165, 1242-43 (1993); Posner, *supra* note 11, at 1374; Stephen L. Carter, *Bork Redux, or How the Tempting of*

ness in the Supreme Court's decision in *Brown* is now a mighty weapon against the proposition that the Constitution should be interpreted as it was understood by the people who framed and ratified it.

The thesis of this Article is that the consensus is wrong. I will show in Part I that the evidence purportedly supporting the scholarly consensus is far from conclusive. Parts II and III then demonstrate that the belief that school segregation¹⁷ does in fact violate the Fourteenth Amendment was held during the years immediately following ratification by a substantial majority of political leaders who had supported the Amendment. In a large number of votes over a three and one half year period, between one-half and two-thirds of both houses of Congress voted in favor of school desegregation and against the principle of separate but equal. These deliberations, which were conducted in explicitly constitutional terms by Congresses charged with enforcing the new Amendment in the years immediately following its enactment, constitute the best available evidence of its meaning. Part II presents the constitutional and other arguments of both proponents and opponents of the Civil Rights Act of 1875, and Part III recounts the tortuous history of the bill, including each of the many votes on the bill and on important amendments.

The analysis of the constitutional arguments in Part II will reveal that there are two, and only two, plausible interpretations of the Fourteenth Amendment under which school segregation would be lawful. The first is that segregation is not a form of inequality prohibited by the Amendment. Because neither whites nor blacks would be permitted to commingle, segregation could be said to subject whites and blacks alike to the same rule of law. The second is that the Fourteenth Amendment did not command equality with regard to everything, but only with regard to "civil rights" or (to use the Fourteenth Amendment's own language) "privileges or

America Led the People to Rise and Battle for Justice, 69 *Tex. L. Rev.* 759, 777-78 (1991) (reviewing Robert Bork, *The Tempting of America* (1990)).

¹⁷ By "segregation," I mean the exclusion of a child from a particular school on the basis of race, or de jure segregation. There was widespread expectation and approval of the proposition that both blacks and whites would freely choose to attend schools of their own race, and thus that actual "race mixing" would be rare. See *infra* text accompanying notes 626-32.

immunities of citizens of the United States," and that education was not among these protected rights. Education was, rather, a "social right," or maybe no right at all—a mere benefit that could be withheld at the government's discretion. For the Court to have decided *Brown* in favor of the school defendants on originalist principles, it would have had to conclude that the original understanding of the Amendment embraced one or both of these ideas. Part III will show that neither of these propositions commanded majority support among the framers and ratifiers of the Fourteenth Amendment. Properly understood, the authoritative actions of the Reconstruction Congress in passing the Civil Rights Act of 1875 contradicted both.

For these purposes there is no need to plumb the inner feelings, motivations, or private opinions of the participants in the controversy over the 1875 Act—to separate sincerity from hypocrisy, political calculation from principle, or ambivalence from conviction. Other studies of the period have emphasized the sociological and political context. Constitutional interpretation by its nature depends on public statements and public acts. An argument made on the floor of Congress, even if insincere, tells us something about the speaker's judgment of his audience: what arguments the speaker thought were likely to persuade. I do not doubt that many of the proponents of strong civil rights measures in Congress entertained misgivings in private and had mixed motives for their actions.¹⁸ But what matters is their public position on what the Constitution means. This is a study of the legal thinking of the antagonists in the debate, and for this purpose it is necessary to take their arguments seriously on their own terms.

Finally, in Part IV, I will discuss the Supreme Court's major segregation decisions in light of the original understanding. I will show that the Court's first desegregation case, *Railroad Company v. Brown*,¹⁹ decided in 1873, powerfully supports the position that segregation was understood at the time to violate the principle of equality; that *Plessy v. Ferguson*,²⁰ far from being an accurate reflection of the original understanding, adopted a position more

¹⁸ See William Gillette, *Retreat From Reconstruction 1869-1879*, at 202-08, 214-20, 260-66, 271 (1979).

¹⁹ 84 U.S. (17 Wall.) 445 (1873).

²⁰ 163 U.S. 537 (1896).

extreme than even most opponents of civil rights could maintain in the early 1870s; and that *Brown v. Board of Education*, decided in 1954, while correctly answering the question presented, adopted a nonhistorical interpretive methodology that seriously weakened the decision. An originalist approach in *Brown* would have paved the way for a more powerful judicial assault on the Jim Crow laws of the South.

It should be obvious that the historical issue raised here is more important for its implications for constitutional interpretive methodology than for the legitimacy of *Brown*, which is utterly secure. But I believe it casts light on the meaning of the Fourteenth Amendment, as well. To understand how Congress went about enforcing the Fourteenth Amendment is to gain insight into many doctrinal issues of importance today, including state action; the extent of congressional enforcement authority; the relevance of intent and effect; the meaning of "equality" as a matter of formally equal treatment or of racial subordination; the relation between due process, equal protection, and privileges and immunities; and many more. Although my focus here is on the question of school segregation, I will comment briefly on other constitutional issues as they arise.

I. THE STANDARD ACCOUNT RECONSIDERED

The argument that *Brown* was inconsistent with the historical understanding of the Fourteenth Amendment is primarily based on three types of evidence. First, the legislative history of the Fourteenth Amendment, including the related history of the Civil Rights Act of 1866, contains almost no evidence that the framers and ratifiers expected the Amendment to affect school segregation and one clear statement by a prominent supporter that it would not. Moreover, although this legislative history contains little direct reference to the issue of school desegregation, its treatment of such collateral issues as voting rights, jury service, and miscegenation suggests that the Amendment was not understood to have the sweeping consequences that advocates of school desegregation typically attribute to it. This was the burden of Bickel's famous article. Second, the practice of school segregation was widespread in both Southern and Northern states, as well as the District of Columbia, at the time of the proposal and ratification of the

Amendment, and almost certainly enjoyed the support of a majority of the population even at the height of Reconstruction.²¹ This makes it doubtful that the Congress would have proposed, or that the people of the various states would have ratified, an Amendment understood to outlaw so deeply engrained an institutional practice. Indeed, even in the North most state supreme courts in which the issue was raised concluded that school segregation did not violate the Fourteenth Amendment, and Congress actually maintained segregated schools in the District of Columbia throughout Reconstruction. This is the evidence that Klarman and others have found so compelling. Third, the Reconstruction Congress considered, debated, and ultimately rejected measures to prohibit school segregation under its power to enforce the Fourteenth Amendment. This was the evidence from which Avins concluded that the *Brown* decision was unwarranted.

This Part will explore the evidence from the framing of the Fourteenth Amendment and the practices of the time and show that this evidence is far more equivocal than the scholarly consensus suggests. It may come as a surprise to those who have read that there is "virtually nothing" in the historical record to support the "fanciful" claim that the Fourteenth Amendment prohibited segregated education to learn that there was genuine debate and uncertainty about this issue throughout the period. This Part is not intended to establish that the Fourteenth Amendment as originally understood outlawed school segregation, but merely that these aspects of the

²¹ See Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877*, at 367 (1988) ("Whatever their political affiliation, moreover, white parents proved unwilling to have their children sit alongside blacks in the classroom."); Nelson, *supra* note 9, at 135 ("Historians who conclude that most Americans in 1866 favored segregated schools are probably correct in their assessment."); Joel Williamson, *After Slavery: The Negro In South Carolina During Reconstruction, 1861-1877*, at 216 (1965) ("Native whites were virtually unanimous in their opposition to 'mixing' the races in the schools."). Alfred Kelly observed that:

[T]here was comparatively little popular interest in national mixed school legislation. Even in the North most communities were content to allow the issue to be settled as a local or state matter rather than by a federal law. The demand from Negro voters for mixed school legislation, to be sure, was powerful and insistent, . . . [but] virtually all southern whites were extremely hostile to school desegregation. . . .

Alfred H. Kelly, *The Congressional Controversy over School Segregation, 1867-1875*, 64 *Am. Hist. Rev.* 537, 539 (1959).

history do not conclusively establish the contrary proposition. Parts II and III, which are based on congressional deliberations over the Civil Rights Act of 1875, will make the affirmative case.

A. *The Civil Rights Act of 1866 and the Framing of the Fourteenth Amendment*

As Alexander Bickel found forty years ago, the direct evidence about school segregation in the legislative history of the Amendment, including deliberations over the Civil Rights Act of 1866, is quite scanty.²² Through the entire course of the debate, there is no explicit affirmation of school desegregation. Historian William Nelson has noted that "the segregation issue simply was not an important one in those debates."²³ More colorfully, John W. Davis, arguing for the State of South Carolina in *Brown*, told the Supreme Court that "perhaps there has never been a Congress in which the debates furnished less real pabulum on which history might feed."²⁴ The legislative history of the Fourteenth Amendment contains surprisingly little discussion of the meaning of the substantive provisions of Section One, with respect to segregation or anything else. I think this is largely because the framers of Section One of the Fourteenth Amendment employed language ("due process" and "privileges or immunities") that was present in the Constitution in other contexts and that already had reasonably established meanings.²⁵ But whatever the reason, this sparsity of discussion makes interpretation difficult.

Any analysis of the Fourteenth Amendment must begin with its statutory precursor, the Civil Rights Act of 1866. This Act guaranteed to all "citizens, of every race and color" the "same right . . . as is enjoyed by white citizens" to make and enforce contracts; to sue, be parties, and give evidence in court; to buy, sell, lease, hold, and inherit both real and personal property; and to receive the full and

²² Bickel, *supra* note 6, at 56-59.

²³ Nelson, *supra* note 9, at 135.

²⁴ Argument of John W. Davis, Esq., on behalf of Appellees R.W. Elliott et al., *Brown*, in 49A Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 481 (Philip B. Kurland & Gerhard Casper eds. 1975).

²⁵ See Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?* 25 Loy. L.A. L. Rev. 1159, 1160-64 (1992).

equal benefit of laws for the security of person and property.²⁶ Note that the bill neither forbade racial discrimination generally nor did it guarantee particular rights to all persons. Rather, it required an equality in certain specified rights. *If* a state provided these rights to its "white citizens," it had to provide the "same right" to all citizens. Moreover, the enumerated rights were of a particular sort and did not include political rights. As explained by Lyman Trumbull of Illinois, who introduced the Act in the Senate, the bill protected "civil liberty," by which he meant that part of "natural liberty" which was left after the creation of civil society.²⁷ These rights bore a strong resemblance to basic common law rights; although there was no discussion of the point, if pressed the lawyers of that day would probably have said that the common law and civil liberty were virtually indistinguishable.

The bill was passed pursuant to Congress's authority to enforce the provisions of the Thirteenth Amendment, and was designed to counter the so-called "Black Codes" passed by the Southern states, denying fundamental civil rights to the freedmen. From its inception, however, the 1866 Act was plagued with doubts as to its constitutionality. President Andrew Johnson vetoed the Act for that reason, and although his veto was overridden, constitutional concerns were sufficiently serious that supporters of the Act set to work on a constitutional amendment to cure them. These concerns were not confined to members of the political opposition. The principal draftsman of the Fourteenth Amendment, Representative John A. Bingham of Ohio, was among those who believed the principles of the 1866 Act to be desirable, but Congress's power to be lacking.²⁸ The principal purpose of Section 1 of the Fourteenth Amendment, as virtually all students of the subject agree, was to provide a firm constitutional basis for the 1866 Act and to ensure that future Congresses would not be able to repeal it.²⁹

The Civil Rights Act of 1866 was evidently never intended by its sponsors to speak to the issue of school segregation, but the debate

²⁶ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866).

²⁷ Cong. Globe, 39th Cong., 1st Sess. 474 (Jan. 29, 1866).

²⁸ See Nelson, *supra* note 9, at 48.

²⁹ See, e.g., Berger, *supra* note 13, at 22-23; Nelson, *supra* note 9, at 48; Bickel, *supra* note 6, at 58; Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863, 910-11 (1986).

over its phrasing has considerable bearing. As originally introduced by Senator Trumbull, the bill, as amended, began with a statement of general principle: "there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery."³⁰ It then enumerated a list of specific rights that would be guaranteed to persons of "every race and color."³¹

Controversy revolved around the opening statement forbidding "discrimination in civil rights or immunities." Trumbull equated this phrase with the privileges and immunities protected under Article IV, as interpreted in the famous case of *Corfield v. Coryell*.³² This broad interpretation inspired opponents of the bill to stress its radical implications, and to claim that it exceeded Congress's authority under Section 2 of the Thirteenth Amendment. Senator Edgar Cowan, a conservative Republican from Pennsylvania, expressly charged that the bill would outlaw segregated schools in his state, a result he professed to find "monstrous."³³ Representatives Michael Kerr of Indiana and Andrew Rogers of New Jersey made similarly dire references to school segregation in the lower chamber.³⁴ The mere fact that opponents of the bill would leap to the conclusion that segregated schools are a violation of "civil rights or immunities" suggests that the institution of segregation was understood to be problematic. Other speakers warned of different perils, a favorite being that the bill would forbid anti-miscegenation statutes.³⁵ Some said it might include political rights.³⁶ The basic theme was that the terms of the bill were so broad that they would swallow up the powers of the states. "What

³⁰ Cong. Globe, 39th Cong., 1st Sess. 474 (Jan. 29, 1866).

³¹ *Id.*

³² 6 F. Cas. 546, No. 3230 (C.C.E.D. Pa. 1823) (No. 3230); see Cong. Globe, 39th Cong., 1st Sess. 474 (Jan. 29, 1866).

³³ Cong. Globe, 39th Cong., 1st Sess. 500 (Jan. 30, 1866).

³⁴ *Id.* at 1268 (Mar. 8, 1866) (statement of Rep. Kerr); *id.* at 1121 (March 1, 1866) (statement of Rep. Rogers); see also *id.* at app. 183 (Apr. 6, 1866) (statement of Sen. Davis) (asserting that the bill would make any enforcement of racial distinctions criminal).

³⁵ See, e.g., *id.* at 1122 (Mar. 1, 1866) (statement of Rep. Rogers); *id.* at 505-06 (Jan. 30, 1866) (statement of Sen. Johnson). President Johnson reiterated this charge in his veto message. *Id.* at 679-80 (Mar. 27, 1866).

³⁶ E.g., *id.* at 1157 (Mar. 2, 1866) (statement of Rep. Thornton); accord *id.* at 1291 (Mar. 9, 1866) (statement of Rep. Bingham); *id.* at 476 (Jan. 29, 1866) (colloquy between Sen. Trumbull and Sen. McDougall); *id.* at 477 (statement of Sen. W. Saulsbury).

broader words than privileges and immunities are to be found in the dictionary?" Rogers asked.³⁷

James Wilson, Chairman of the House Judiciary Committee and leading supporter of the bill, attempted to quiet these fears with a narrow construction of the term "civil rights or immunities." He expressly denied that the term would encompass the right to sit on juries or to attend the same schools.³⁸ This was the only statement by a proponent of the bill during the debates specifically denying its applicability to school desegregation. It is the most direct piece of evidence invoked by Alexander Bickel;³⁹ Raoul Berger calls it "proof positive that segregation was excluded from the scope of the bill."⁴⁰

Wilson's assurances did not satisfy the opposition, however, and Bingham himself eventually moved to strike out the "no discrimination" clause.⁴¹ Wilson supported this change on the ground that the original language "might give warrant for a latitudinarian construction not intended."⁴² The motion carried unanimously, and without further delay the bill passed by an overwhelming margin.⁴³

This course of events strongly suggests that the Civil Rights Act of 1866 was not understood to forbid school segregation,⁴⁴ but it does not necessarily mean the same for the Fourteenth Amendment. To be sure, the principal purpose of the Fourteenth Amendment was to constitutionalize the 1866 Act, and speakers on both sides often spoke as if the substance of the two measures were identical.⁴⁵ If we were to interpret the Amendment as meaning no more than the 1866 Act, we would have to conclude that the

³⁷ *Id.* at 1122 (Mar. 1, 1866).

³⁸ *Id.* at 1117.

³⁹ Bickel, *supra* note 6, at 56.

⁴⁰ Berger, *supra* note 13, at 119.

⁴¹ Cong. Globe, 39th Cong., 1st Sess. 1291 (Mar. 9, 1866). Bingham's principal concern in making the amendment was to ensure that the bill was not interpreted to include "political rights," the rights to vote and hold office. *Id.*

⁴² Cong. Globe, 39th Cong., 1st Sess. 1366 (Mar. 13, 1866).

⁴³ *Id.* at 1366-67.

⁴⁴ Some Northern Republican newspapers nonetheless reported that the Act would require admission of blacks to schools on the same terms and conditions as whites, and after passage of the Act there was a flurry of litigation based on that reading. See Lofgren, *supra* note 9, at 65; Kelly, *supra* note 14, at 1070.

⁴⁵ See Bickel, *supra* note 6, at 47; Kaczorowski, *supra* note 29, at 911.

Amendment did not forbid school segregation.⁴⁶ But the Fourteenth Amendment did not enumerate a list of protected rights, as did the 1866 Act. Rather, it provided that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”⁴⁷ If we accept Trumbull’s equation of “civil rights or immunities” to the phrase “privileges and immunities,”⁴⁸ the Amendment contains a provision identical to the clause of the 1866 bill that was dropped on account of being too broad. A fair inference is that the Amendment was understood to encompass the broad range of “civil rights and immunities” that were entailed by the original draft of the 1866 Act.

The linchpin of Alexander Bickel’s argument is that the Joint Committee’s decision not to include the language “civil rights and immunities” (using the phrase “privileges or immunities” instead) was a “deliberate choice” that constituted a “rejection of what were deemed [the] wider implications” of the original draft of the 1866 Act.⁴⁹ But this interpretation is implausible in the context of the debate. Not only did Lyman Trumbull specifically equate the terms, but supporters linked both the substance of the 1866 Act and the meaning of the new Privileges or Immunities Clause of the Fourteenth Amendment to the rights protected under the Privileges and Immunities Clause of Article IV and described in *Corfield*. To be sure, as Bickel stresses, the moderate Republicans whose votes were needed to secure a two-thirds majority would not have supported a sweeping provision outlawing all forms of racial discrimination,⁵⁰ but the focus was on the distinction between civil

⁴⁶ This, in a nutshell, is Berger’s argument. Berger, *supra* note 13, at 22-23.

⁴⁷ U.S. Const. amend. XIV, § 1.

⁴⁸ This congruence is probable but not certain. Some moderate Republicans understood the term “privileges and immunities” as narrower than the term “civil rights,” the latter possibly encompassing “every right that pertains to the citizen under the Constitution, laws, and Government of this country,” including political rights. Cong. Globe, 39th Cong., 1st Sess. 1291 (1866) (statement of Rep. Bingham); see Maltz, *supra* note 13, at 101. If so, the understanding was short-lived, for the term “civil rights” was frequently used in debates in the 1870s as a shorthand description for the set of protected rights, excluding both “political rights” and “social rights.” For a particularly clear example, see Trumbull’s speech of February 8, 1872, in which he stated that the Civil Rights Act of 1866 “was based upon this principle—confined exclusively to civil rights and nothing else, no political and no social rights.” Cong. Globe, 42d Cong., 2d Sess. 901 (Feb. 8, 1872).

⁴⁹ Bickel, *supra* note 6, at 57.

⁵⁰ *Id.* at 57-58.

rights (meaning privileges and immunities, as interpreted in *Corfield*), social rights, and political rights. The formula adopted by the Joint Committee responded to the moderates' principal concern (that the Amendment might extend to blacks the right to vote) but it did not weaken the Amendment's application to basic civil rights, the common law rights possessed by all free persons. Whether segregation of schools, transportation, or places of public accommodation represented an inequality with respect to those rights was not debated or resolved in 1866. As will be seen, the issue arose soon after ratification and was debated at length. Those later debates, rather than the debates of 1866, hold the real answer to the segregation question.

B. *School Desegregation at the State Level*

Although it is true that most states maintained segregated schools both before and after ratification of the Fourteenth Amendment, it is not true that this passed without comment or controversy. Indeed, the first attacks on racially segregated education occurred at the state level, in both the South and the North. Developments in the two regions, however, were so different that they must be considered separately.

1. *Southern States*

Because no state that had seceded could be readmitted to the Union until Congress had examined its state constitution and ruled that it was "in conformity with the Constitution of the United States in all respects,"⁵¹ the issue of segregation had to be faced more immediately and more explicitly in the South than in the North. The Southern states followed a consistent pattern: drafting constitutions for review in Congress that either explicitly outlawed school segregation or were, at a minimum, silent on the subject, while (with few exceptions) instituting segregation as a matter of state statute or local policy.

⁵¹ Reconstruction Act of 1867, ch. 153, 14 Stat. 428 (1867). Tennessee was readmitted before passage of the Act, and is therefore the only Confederate state to be readmitted under its antebellum state constitution, amended to abolish slavery. S. Con. Res. 73, 39th Cong., 1st Sess., 14 Stat. 364 (1866).

Delegates to virtually every Southern state constitutional convention argued that desegregated education was necessary to comply with the new national norms of equality.⁵² A state representative in North Carolina, for example, stated that he “would prefer that the two races should not be educated together,” but that the new state constitution, written pursuant to Reconstruction principles, “had neither the word ‘white’ nor the word ‘black’ in it, and therefore class legislation, so far as mere color is concerned, was gone forever.”⁵³ Significantly, no constitutional convention of a Southern state seeking readmission to the Union openly adopted a policy of racially segregated education. Although amendments to this effect were proposed, they were uniformly rejected.⁵⁴ This presumably is attributable to a belief that such a policy would doom readmission. During congressional debate over Arkansas, the first state to seek readmission after passage of the Reconstruction Act, an amendment to permit the state to establish segregated schools was defeated in the Senate by an overwhelming vote of 5-30.⁵⁵ No such attempt was made again. Three states (Texas, Mississippi and Virginia) were readmitted upon the stipulation “that the constitution of [the state] shall never be so amended as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said

⁵² Frank & Munro, *supra* note 9, at 459; see also Foner, *supra* note 21, at 322 (noting that in every state black delegates successfully opposed constitutional language requiring segregation in education).

⁵³ Remarks of Rep. Sweatt, *quoted in* Legislature of North-Carolina, *Weekly North-Carolina Standard*, July 22, 1868, at 4, *quoted in* Nelson, *supra* note 9, at 133.

⁵⁴ See, e.g., *Official Journal of the Constitutional Convention of the State of Alabama* 237-38, 242 (1868); *Journal of the Proceedings of the Constitutional Convention of the People of Georgia* 151, 558 (1867); *Journal of the Proceedings in the Constitutional Convention of the State of Mississippi*, 1868, at 316-18, 479-80 (1871); Edgar W. Knight, *The Influence of Reconstruction on Education in the South* 22 (1923) (describing North Carolina's constitutional convention); *Journal of the State of Virginia Constitutional Convention* 299-301 (1867).

⁵⁵ *Cong. Globe*, 40th Cong., 2d Sess. 2748 (June 1, 1868). The amendment, proposed by Missouri Unionist Senator John Henderson, provided that “no person on account of race or color shall be excluded from the benefits of education, or be deprived of an equal share of the moneys or other funds created or used by public authority to promote education in said State.” *Id.* Henderson offered the amendment as a substitute for a provision that “there shall never be in said State any denial or abridgment of the elective franchise, or of any other right, to any person by reason or on account of race or color, excepting Indians not taxed.” *Id.* He explained that unless his amendment were adopted, the provision would deny the state the authority “to provide separate schools for whites and blacks.” *Id.*

State."⁵⁶ In other instances, the school segregation issue went unaddressed.

In 1867, Senator Charles Sumner of Massachusetts, who had argued against school segregation as a lawyer in 1850 and would later be the champion of the Civil Rights Act of 1875, proposed legislation that would compel the states of the former confederacy to establish "public schools open to all, without distinction of race or color."⁵⁷ The proposal evenly split the Senate (by a vote of 20-20⁵⁸) and thus did not carry, but it was a show of strength for Sumner's position. The vote does not, however, cast much light on the meaning of the Fourteenth Amendment, because the Amendment had not yet been ratified and the source of congressional authority was likely some combination of the war power and the Guarantee Clause.⁵⁹

Two Southern states, Louisiana and South Carolina, explicitly prohibited racially segregated public education. Louisiana's Constitution of 1868 provided:

All children of this State between the years of six and twenty-one shall be admitted to the public schools or other institutions of learning sustained or established by the State in common, without distinction of race, color, or previous condition. There shall be no separate schools or institutions of learning established exclusively for any race by the State of Louisiana.⁶⁰

South Carolina's Constitution of 1868 provided that "[a]ll the public schools, colleges and universities of this State . . . shall be free and open to all the children and youths of the State, without regard to race or color."⁶¹ Less explicitly, Florida's Constitution of 1868 provided that "[i]t is the paramount duty of the State to make

⁵⁶ Act of Mar. 30, 1870, ch. 39, 16 Stat. 81 (Texas); Act of Feb. 23, 1870, ch. 19, 16 Stat. 68 (Mississippi); Act of Jan. 26, 1870, ch. 10, 16 Stat. 63 (Virginia).

⁵⁷ Cong. Globe, 40th Cong., 1st Sess. 165 (Mar. 16, 1867).

⁵⁸ *Id.* at 170.

⁵⁹ A similar proposal, also made by Sumner, was later ruled out of order. *Id.* at 581 (July 11, 1867).

⁶⁰ La. Const. of 1868, tit. VII, art. 135, *reprinted in* 3 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories and Colonies Now or Heretofore Forming the United States of America 1449, 1465* (Francis N. Thorpe ed. 1909) [hereinafter *Constitutions*].

⁶¹ S.C. Const. of 1868, art. X, § 10, *reprinted in* 6 *Constitutions*, *supra* note 60, at 3281, 3300.

ample provision for the education of all the children residing within its borders, without distinction or preference."⁶² This appears to have outlawed school segregation without calling attention to the fact.⁶³ Alabama adopted a provision almost identical to that of Iowa, which was interpreted by the Iowa courts as outlawing segregation.⁶⁴ A motion to require school boards to make "proper provision" for "the education of the children of white and colored persons in separate schools" was defeated.⁶⁵ Other Southern states repealed earlier education provisions of their state constitutions containing express racial distinctions, replacing them with provisions containing neither explicit nor implicit reference to the race question.⁶⁶ Conservatives charged that these provisions would lead to mixed schools.⁶⁷

But constitutional language and actual practice were far apart. Shortly after gaining readmission with colorblind state constitutions, most Southern state legislatures enacted laws permitting or requiring segregated schools,⁶⁸ and Congress had no authority (or no inclination) to review the domestic legislation of sovereign states.⁶⁹ One state, Tennessee, was so bold as to revise its state

⁶² Fla. Const. of 1868, art. IX, § 1, *reprinted in* 2 *Constitutions*, supra note 60, at 704, 716.

⁶³ In 1873, the Florida legislature passed a statute forbidding any racial distinction in the full and equal enjoyment of public schools, conveyances, accommodations, and amusements. Act of Jan. 25, 1873, 1873 Fla. Laws ch. 1947, § 1.

⁶⁴ Ala. Const. of 1867, art. XI, § 6, *reprinted in* 1 *Constitutions*, supra note 60, at 132, 149; see *Clark v. Board of Directors*, 24 Iowa 266, 274 (1868).

⁶⁵ Horace M. Bond, *Negro Education in Alabama: A Study in Cotton and Steel* 93 (1939).

⁶⁶ Compare Tex. Const. of 1866, art. X, § 2, *reprinted in* 6 *Constitutions*, supra note 60, at 3569, 3588-89 and Act of Feb. 6, 1867, No. 35, § 5, 1867 Ark. Acts 100 (containing express racial distinctions) with Tex. Const. of 1868, art. IX, § 1, *reprinted in* 6 *Constitutions*, supra note 60, at 3591, 3609 and Ark. Const. of 1868, Art. IX, § 6, *reprinted in* 1 *Constitutions*, supra note 60, at 306, 323 (including no racial distinctions).

⁶⁷ See Thomas S. Staples, *Reconstruction in Arkansas* 245 (*Studies in History, Economics & Public Law* Vol. 59, 1923) (noting that conservatives denounced the school provision in the 1868 constitution, which removed all mention of separate schools, as requiring schools in which there would be "indiscriminate social intercourse between whites and blacks") (citation omitted in original).

⁶⁸ For example, Arkansas instituted segregated schools a month after achieving readmission. Act of July 23, 1868, no. 52, § 107, 1868 Ark. Acts 196 as amended by Act of Apr. 29, 1873, No. 130, § 108, 1873 Ark. Acts 423. See also Act of July 11, 1870, ch. 259, § 47, 1870 Va. Acts 413 (providing for segregated education within six months of the congressional vote on readmission).

⁶⁹ No one in Congress even protested when the Virginia legislature adopted a mandatory school segregation statute in 1870. Kelly, supra note 21, at 542.

constitution after readmission to require segregated schools.⁷⁰ (The other Southern states waited until after Reconstruction.⁷¹) Only one major Southern school system, that of New Orleans, was "thoroughly and successfully integrated."⁷² Even in South Carolina, with a state constitutional requirement of desegregated education and a strong black political presence, separate schools were universal except in remote areas, where only white schools existed and black children were often given no schooling at all.⁷³ Generally, it was difficult enough to build, fund, and staff schools for the freedmen, without the additional problems of desegregation. Whites stayed away from "mixed" schools;⁷⁴ thus, blacks generally found "separate schools infinitely superior to no schools at all."⁷⁵ In Mississippi, according to Henry Pease, who was state Superintendent of Education from 1869-74, "under the law regulating the system the child of the colored man can enter the school where white children are taught, and the laws of the State will protect him," but "not one instance has come to my knowledge where a colored man has attempted to enforce the law in this respect."⁷⁶

⁷⁰ Tenn. Const. of 1870, art. XI, § 12, *reprinted in* 6 Constitutions, *supra* note 60, at 3448, 3469 ("No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school.").

⁷¹ See Ala. Const. of 1875, art. XII, § 1, *reprinted in* 1 Constitutions, *supra* note 60, at 153, 176; Fla. Const. of 1885, art. XII, § 12, *reprinted in* 2 Constitutions, *supra* note 60, at 732, 754; Ga. Const. of 1877, art. VIII, § 1, *reprinted in* 2 Constitutions, *supra* note 60, at 842, 868; La. Const. of 1898, art. 248, *reprinted in* 2 Constitutions, *supra* note 60, at 1522, 1575; Miss. Const. of 1890, art. 8, § 207, *reprinted in* 4 Constitutions, *supra* note 60, at 2090, 2115; N.C. Const. of 1876, art. IX, § 2, *reprinted in* 4 Constitutions, *supra* note 60, at 2822, 2838; S.C. Const. of 1895, art. XI, § 7, *reprinted in* 6 Constitutions, *supra* note 60, at 3307, 3339; Tex. Const. of 1876, art. VII, § 7, *reprinted in* 6 Constitutions, *supra* note 60, at 3621, 3644; Va. Const. of 1902, art. IX, § 140, *reprinted in* 7 Constitutions, *supra* note 60, at 3904, 3934.

⁷² Foner, *supra* note 21, at 367; C. Vann Woodward, *The Strange Career of Jim Crow* 24 (3d rev. ed. 1974). The New Orleans schools remained integrated until 1877, when Reconstruction came to an end. For a description of the success of desegregation in Louisiana, see 2 Cong. Rec. app. 478-79 (June 16, 1874) (statement of Rep. Darrall). For a more ambivalent assessment, see Gillette, *supra* note 18, at 195.

⁷³ Williamson, *supra* note 21, at 222.

⁷⁴ Meyer Weinberg, *A Chance To Learn: The History of Race and Education in the United States* 51 (1977); Williamson, *supra* note 21, at 216-17; Woodward, *supra* note 72, at 24-25.

⁷⁵ Foner, *supra* note 21, at 367 (quoting Frederick Douglass' *New National Era*).

⁷⁶ 2 Cong. Rec. 4154 (May 22, 1874).

The evidence thus shows that during Reconstruction, antisegregation forces in Congress were strong enough to block overt state constitutional measures permitting or requiring segregated schools, and in some cases strong enough to force states to embrace school desegregation as a matter of formal policy. This shows at least some degree of concern about school segregation as a constitutional issue. In most cases, however, the Southern states could satisfy federal demands by silence or studied ambiguity about segregation, since Congress lacked sufficient energy or will to pursue the matter to the extent of actual enforcement.

2. Northern States: Antebellum Practice and Post-War Legislative Action

Even in the North, school segregation was widespread before the Civil War. It has been estimated that 90% of the 28,000 black children attending Northern schools in 1860 attended all-black schools,⁷⁷ and many more black children were denied admission to public schools altogether.⁷⁸ Nonetheless, agitation against segregated education began in the 1840s, through political action, petitions, mass meetings and school boycotts by black pupils. The first desegregation lawsuit was filed in 1850 by abolitionist lawyer and future Senator Charles Sumner, who represented black plaintiffs in a suit against separate but equal public schools in Massachusetts, *Roberts v. City of Boston*.⁷⁹ Sumner argued that “[t]he separation of children in the public schools of Boston, on account of color or race, is in the nature of caste, and is a violation of equality.”⁸⁰ With the insouciance toward niceties of legal doctrine that later characterized his fight for the Civil Rights Act of 1875, Sumner appealed

⁷⁷ Weinberg, *supra* note 74, at 26.

⁷⁸ See, e.g., *Lewis v. Henley*, 2 Ind. 332, 334-35 (1850); *Chalmers v. Stewart*, 11 Ohio 386 (1842) (holding that admission of black children to the public school is unlawful).

⁷⁹ 59 Mass. (5 Cush.) 198 (1850). On the background of the case, see Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society, 1780-1860*, at 176-79 (1983); Kull, *supra* note 15, at 40-52; Roderick T. Baltimore & Robert F. Williams, *The State Constitutional Roots of the “Separate But Equal” Doctrine: Roberts v. City of Boston*, 17 Rutgers L.J. 537 (1986). Previously, the schools of Lowell, Nantucket, New Bedford, Worcester and Salem had integrated as a result of political action. See Kaestle, *supra*, at 177.

⁸⁰ *Roberts*, 59 Mass. (5 Cush.) at 202.

broadly to "the spirit of American institutions, and especially of the constitution of Massachusetts."⁸¹ Sumner maintained that

the separate school inflicts upon [colored children] the stigma of caste; and although the matters taught in the two schools may be precisely the same, a school exclusively devoted to one class must differ essentially, in its spirit and character, from the public school known to the law, where all classes meet together in equality.⁸²

In a unanimous decision delivered by Chief Justice Lemuel Shaw, the Supreme Judicial Court rejected Sumner's argument, concluding that discretion in the matter was vested in the school committee, and that the Board's conclusion that the best interests of both races would be served by segregation was "the honest result of their experience and judgment."⁸³ The legislature promptly responded, however, with legislation ending the segregation of Massachusetts schools.⁸⁴

In Minnesota, Maine, New Hampshire, and Vermont, all states with tiny black populations, the schools had never been segregated.⁸⁵ Connecticut and Rhode Island had no state laws permitting segregation, but it was practiced in some local schools.⁸⁶ In most of the Northern states outside of New England, racial segregation was either allowed or required in the public schools until after the Civil War.⁸⁷ In 1866, some efforts were made in Illinois to bring desegregation to the public schools by political means,⁸⁸ and elsewhere lawsuits were filed challenging school segregation under the newly enacted Civil Rights Act of 1866.⁸⁹

Some Northern state legislatures (New Jersey, Rhode Island, Michigan, Connecticut and Illinois) desegregated their schools

⁸¹ *Id.* at 201.

⁸² *Id.* at 203.

⁸³ *Id.* at 209.

⁸⁴ Act of Apr. 28, 1855, ch. 256, § 1, 1855 Mass. Acts 674.

⁸⁵ Act of Mar. 3, 1864, ch. IV, § 1, 1864 Minn. Laws 25-26 (Minnesota); Segregation and the Fourteenth Amendment in the States 248 (Bernard D. Reams, Jr. & Paul E. Wilson eds. 1975) [hereinafter Segregation] (Maine); *id.* at 388 (New Hampshire); *id.* at 680 (Vermont).

⁸⁶ Segregation, *supra* note 85, at 60 (Connecticut); *id.* at 548-50 (Rhode Island).

⁸⁷ Kaestle, *supra* note 79, at 179.

⁸⁸ Robert L. McCaul, *The Black Struggle for Public Schooling in Nineteenth-Century Illinois* 67-72, 83-85, 108-42 (1987); Nelson, *supra* note 9, at 134.

⁸⁹ Nelson, *supra* note 9, at 134.

shortly after ratification of the Fourteenth Amendment,⁹⁰ but most Northern states were slow to act. They may not have fully recognized that the new Amendment would force the North to change as well as the South. Many Northerners assumed that the Thirteenth and Fourteenth Amendments were for the reconstruction of the rebel states, not of their own.⁹¹ Moreover, at least after 1870, the focus of antisegregation political activity, especially by African-Americans, was on obtaining nationwide relief through what would be the Civil Rights Act of 1875. This distracted from efforts at the state level.⁹²

In four Western or Midwestern states (Nevada, Kansas, Indiana and California), laws creating or recognizing school segregation were passed even after ratification of the Fourteenth Amendment,⁹³ which strongly suggests that in those states the Amendment was not initially understood to foreclose school segregation (at least outside the South). School segregation laws were also passed in Kentucky and Maryland, former slaveholding states that rejected the Fourteenth Amendment,⁹⁴ and in their fellow border

⁹⁰ See N.J. Const. of 1844, art. II, § 1, *reprinted in* Segregation, *supra* note 85, at 395; Act of Mar. 7, 1866, ch. 609, 1866 R.I. Acts & Resolves 186; Act of Feb. 28, 1867, No. 34, § 28, 1867 Mich. Pub. Acts I 42, 43; Act of Aug. 1, 1868, ch. 108, § 1, 1868 Conn. Pub. Acts 206; Act of Apr. 1, 1872, Schools, § 48, 1872 Ill. Laws 700, 720-21. Michigan made the prohibition of separate schools even more explicit in 1871, Act of Apr. 17, 1871, No. 170, § 28, 1871 Mich. Pub. Acts I 271, 274, as did New Jersey in 1881, Act of Mar. 23, 1881, ch. 149, § 1, 1881 N.J. Laws 186.

⁹¹ See Cong. Globe, 39th Cong., 1st Sess. 1761 (statement of Sen. Trumbull) (Apr. 4, 1866) (the 1866 Act "could have no operation in Massachusetts, New York, Illinois, or most of the states of the Union"); *id.* at 474 (statement of Sen. Trumbull) (Jan. 29, 1866) (commenting that the impetus for the 1866 Act was the behavior of the "insurrectionary states"); see generally Nelson, *supra* note 9, at 111 ("inhabitants of 'good' states would never sense that the act applied to them"); Kaczorowski, *supra* note 29, at 881 (describing the perception by Northern whites of civil rights enforcement as a Southern problem).

⁹² McCaul, *supra* note 88, at 110.

⁹³ Act of Mar. 8, 1867, ch. 52, § 50, 1867 Nev. Stat. 89, 95; Act of Mar. 3, 1868, ch. 18, art. 1, § 75, 1868 Kan. Sess. Laws 129, 146; Act of May 13, 1869, ch. 16, § 2, 1869 Ind. Acts 41; Act of Apr. 4, 1870, ch. 556, § 56, 1870 Cal. Stat. 824, 839. The Kansas legislation applied only to cities of more than 15,000 inhabitants. See *infra* text accompanying notes 130-32.

⁹⁴ Act of Mar. 22, 1904, ch. 85, 1904 Ky. Acts 181-82; Act of Mar. 30, 1868, ch. 407, tit. 1, ch. 9, § 1, 1868 Md. Laws 745, 766. In these states, which had not seceded from the Union and had not been subject to the Emancipation Proclamation, slavery did not end until ratification of the Thirteenth Amendment. Not having been through Reconstruction, Kentucky was probably the state with greatest political resistance to the principles of the Fourteenth Amendment.

states, Missouri and West Virginia, where resistance to civil rights was almost equally strong.⁹⁵

Within a decade, however, opinion had changed. Almost all Northern states abolished school segregation by the end of the 1880s.⁹⁶ Although it is not always possible to know why this happened, in at least one state desegregation was expressly linked to the demands of the Fourteenth Amendment. When Pennsylvania repealed its law allowing school segregation in 1881, the sponsor of the repealing legislation stated:

In proposing the repeal of the act of 1854, which in terms would be prohibited by the present State and Federal Constitutions, it seems a matter of surprise that an act so directly in conflict with the Fourteenth and Fifteenth Amendments of the Constitution of the United States should have been permitted to have remained in the statute book until this time.⁹⁷

Similarly, two successive governors of Ohio advocated school desegregation legislation in language borrowed from the federal constitution, declaring separate schools to be "a badge of servitude" and a denial of "equal privileges,"⁹⁸ and stating that the legislation would give "our colored fellow citizens . . . the enjoyment of the rights of citizenship that other citizens have."⁹⁹ At the same time, however, the chief sponsor of the desegregation legislation in

⁹⁵ Mo. Const. of 1875, art. XI, § 3, *reprinted in* 4 Constitutions, *supra* note 60, at 2229, 2263; W. Va. Const. of 1872, art. XII, § 8, *reprinted in* 7 Constitutions, *supra* note 60, at 4033, 4061.

⁹⁶ See, e.g., Act of Apr. 1, 1872, Schools, Sec. 1, § 48, 1872 Ill. Laws 700, 720-21; Act of Feb. 28, 1867, No. 34, § 28, 1867 Mich. Pub. Acts I 42, 43; Act of Mar. 23, 1881, Ch. 149, § 1, 1881 N.J. Laws 186; Act of Apr. 9, 1873, ch. 186, § 1, 1873 N.Y. Laws 303; Act of Feb. 22, 1887, House Bill No. 71, § 1, 1887 Ohio Laws 34; Act of June 8, 1881, No. 83, § 1, 1881 Pa. Laws 76. The New York statute, which provided that all citizens were entitled to the "full and equal enjoyment of any accommodation, advantage, facility or privilege" furnished by school authorities, was interpreted in 1883 as allowing separate but equal schools. *People ex rel. King v. Gallagher*, 93 N.Y. 438, 456-57 (1883). The legislature did not again abolish segregation until 1900. Act of Apr. 18, 1900, ch. 492, § 1, 1900 N.Y. Laws II 1173. Even then, the legislation appears to have exempted rural districts from the desegregation requirement. See Bickel, *supra* note 6, at 37 & n.71. Indiana did not repeal its school segregation law until 1949. See Act of Mar. 8, 1949, ch. 186, § 1, 1949 Ind. Acts 603, 604.

⁹⁷ Penn. Senate Journal (May 26, 1881) (statement of Sen. Sill).

⁹⁸ Inaugural Address of Governor Hoadley (1884), *quoted in* Frederick A. McGinnis, *The Education of Negroes In Ohio* 59 (1962).

⁹⁹ Inaugural Address of Governor Foraker (1886), *quoted in* McGinnis, *supra* note 98, at 60.

the Ohio House of Representatives (Benjamin Arnett, an African-American), delivered a speech containing twelve principal arguments which, while including "the teachings of the Son of Man and God and the Golden Rule," did not mention the possibility that the status quo was in violation of the federal Constitution.¹⁰⁰

3. *Northern States: Early Judicial Interpretation*

The standard account relies heavily on what is said to be the "nearly unanimous judicial response" among state courts during Reconstruction "that the recent constitutional amendments made no difference to the existing law of segregation."¹⁰¹ This account essentially echoes the rhetorically effective claim made by the *Plessy* majority that "the establishment of separate schools for white and colored children . . . has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."¹⁰² This picture of school segregation litigation in the Northern states, however, is highly misleading.

Between 1868 and 1883, the issue of school segregation reached the supreme courts of nine Northern states. Far from being unanimous, the opinions were almost evenly split, with five upholding segregation and four striking it down.¹⁰³ Admittedly, with few exceptions, the cases holding school segregation unlawful were decided under state law, while the cases holding school segregation lawful generally reached the federal constitutional issue and held that school segregation is consistent with the Fourteenth Amendment. This creates the impression of unanimity on the federal constitutional question. But we must bear in mind that proper legal practice, and in some cases jurisdictional requirements, led state courts to consider issues of state law *first*, and if they found a basis in state law for invalidating segregation there was no need to

¹⁰⁰ Benjamin W. Arnett & Jere A. Brown, *The Black Laws, Speeches 15-17* (1887), quoted in McGinnis, *supra* note 98, at 60-61.

¹⁰¹ Kull, *supra* note 15, at 95.

¹⁰² *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

¹⁰³ California, Indiana, Nevada, New York and Ohio upheld segregation, whereas Illinois, Iowa, Kansas and Michigan held segregation to be unlawful. See *infra* notes 104-37 and accompanying text.

address federal law.¹⁰⁴ Only if a court was willing to say that segregation was lawful under state law did it reach the Fourteenth Amendment issue. When a state court interpreted equality language in its own state constitution or statutes as prohibiting segregation, it may be fair to infer that the court would have given the Fourteenth Amendment a similar construction had it reached the federal constitutional issue. The strength of this inference depends, of course, on the language being interpreted.

The first state supreme court decision on school segregation after the Civil War was *Clark v. Board of Directors*,¹⁰⁵ rendered by the Supreme Court of Iowa in 1868, shortly before the completion of ratification of the Fourteenth Amendment. Because the Amendment was not yet effective, the federal constitution was not at issue. The court held racial segregation unconstitutional under a vaguely worded provision of the Iowa Constitution of 1857 requiring the school board to "provide for the education of all the youths of the State, through a system of common schools."¹⁰⁶ The court declared the principle that "all the youths are equal before the law" and concluded that the board of education could not "in their discretion, or otherwise, deny a youth admission to any particular school because of his or her nationality, religion, color, clothing or the like."¹⁰⁷ The court acknowledged the school board's argument that "'public sentiment in their district is opposed to the intermingling of the white and colored children in the same school,'" ¹⁰⁸ but held that to require students of any particular class or origin to attend a separate school "would be to sanction a plain violation of the spirit of our laws not only, but would tend to perpetuate the national differences of our people and stimulate a constant strife, if not a war of races."¹⁰⁹ In 1873, in its first segregation case after ratification of the Amendment, the Iowa Supreme Court explicitly associated the principle of *Clark* with the new Amendment, and

¹⁰⁴ See *People ex rel. Longress v. Board of Educ.*, 101 Ill. 308, 316 (1882); *Board of Educ. v. Tinnon*, 26 Kan. 1, 16-18 (1881) (each mentioning the federal constitutional argument but looking to state law as the actual ground of decision).

¹⁰⁵ 24 Iowa 266 (1868).

¹⁰⁶ Iowa Const. of 1857, art. 9, § 12, reprinted in 2 *Constitutions*, supra note 60, at 1136, 1150.

¹⁰⁷ 24 Iowa at 277.

¹⁰⁸ *Id.* at 276.

¹⁰⁹ *Id.*

extended the requirement of desegregation to common carrier transportation.¹¹⁰

In 1869, just after completion of ratification, the Michigan Supreme Court held racial segregation unlawful under a Michigan statute providing that “[a]ll residents of any district shall have an equal right to attend any school therein.”¹¹¹ The opinion, which was written by Chief Justice Thomas Cooley, the most celebrated constitutional scholar and judge of the last half of the nineteenth century, relied entirely on the state statute. In the last sentence of the opinion, Cooley made what appears to be an oblique reference to the Fourteenth Amendment, but pointed out: “As the statute of 1867 is found to be applicable to the case, it does not become important to consider what would otherwise have been the law.”¹¹²

In 1872, by contrast, the Ohio Supreme Court rendered an opinion squarely upholding segregated schools under the Fourteenth Amendment. In *State ex rel. Garnes v. McCann*,¹¹³ the Ohio court declined to hold that racial segregation works a “substantial inequality of school privileges between the children of both classes.”¹¹⁴ According to the court, “[e]quality of rights does not involve the necessity of educating white and colored persons in the same school, any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school.”¹¹⁵ This opinion carried particular weight because it was rendered in a generally progressive state by a court composed entirely of Republicans.¹¹⁶ In the same year, the Nevada Supreme Court stated, in dictum, that a statute establishing separate schools for “Negroes, Mongolians and Indians” violated the “spirit” but did not violate the “letter” of the United States Constitution.¹¹⁷ In 1874, the supreme courts of California

¹¹⁰ *Coger v. North W. Union Packet Co.*, 37 Iowa 145, 153-55 (1873).

¹¹¹ *People ex rel. Workman v. Board of Educ.*, 18 Mich. 399, 408-09 (1869) (citing Act of Feb. 28, 1867, No. 34, § 28, 1867 Mich. Pub. Acts I 42, 43).

¹¹² *Id.* at 414.

¹¹³ 21 Ohio St. 198 (1872).

¹¹⁴ *Id.* at 211.

¹¹⁵ *Id.*

¹¹⁶ See J. Morgan Kousser, *Dead End: The Development of Nineteenth-Century Litigation on Racial Discrimination in Schools* 19 (1986).

¹¹⁷ *State ex rel. Stoutmeyer v. Duffy*, 7 Nev. 342, 346 (1872). The statement is dictum because the court ordered relief for the excluded black child on state constitutional

and Indiana held that exclusion of black children from school on account of race would violate the Equal Protection Clause, but that a policy of separation of the races for educational purposes on equal terms was constitutional.¹¹⁸ These decisions carried less weight than did the Ohio decision. California had not ratified the Fourteenth Amendment, Indiana was notoriously the most racist of the Northern states, and both courts were dominated by Democrats, the party hostile to Reconstruction.¹¹⁹ Indeed, the author of the Indiana opinion had issued a decision three years earlier holding the Civil Rights Act of 1866 unconstitutional.¹²⁰

Two years after *Garnes*, the Illinois Supreme Court, with only one dissent, interpreted a provision of state law requiring that the state provide "all" the children of the State with an "equal" education as prohibiting a school board from setting up a separate school for the four black children in the district.¹²¹ The attorneys for the school board cited the *Garnes* decision for the proposition that a requirement of "equality" is not inconsistent with segregation,¹²² but the Illinois court—notwithstanding its 5-2 Democratic majority¹²³—found the rationale of *Garnes* unpersuasive. The "free schools of the State are public institutions," the court reasoned, and although their directors "have large and discretionary powers in regard to the management and control of schools, . . . they have no power to make class distinctions, neither can they discriminate

grounds. *Id.* at 346-47. Although the case involved exclusion rather than segregation, the court explained that under state law school authorities "may not deny to any resident person of proper age an equal participation in the benefits of the common schools"; however, the authorities would be permitted "to send all blacks to one school, and all whites to another; or, without multiplying words, to make such a classification . . . as may seem to them best." *Id.* at 348.

¹¹⁸ *Ward v. Flood*, 48 Cal. 36, 51-52 (1874); *Cory v. Carter*, 48 Ind. 327, 361-62 (1874).

¹¹⁹ See Kousser, *supra* note 116, at 19-21.

¹²⁰ *State v. Gibson*, 36 Ind. 389, 402-03 (1871).

¹²¹ *Chase v. Stephenson*, 71 Ill. 383, 385 (1874). The court declined to address whether separate schools would have been lawful "[h]ad the district contained colored children sufficient for one school, and white children for another." *Id.* at 385-86. Such a case could theoretically present a different question, because the plaintiffs in *Chase* were white taxpayers who complained of the expense of building and staffing a separate school when the facilities of the white school were adequate for the education of the black children as well. The prohibition on segregation was extended to all schools in *People ex rel. Longress v. Board of Education*, 101 Ill. 308 (1882).

¹²² McCaul, *supra* note 88, at 132.

¹²³ *Id.* at 131. A Democratic justice, Alfred M. Craig, wrote the opinion in *Chase*.

between scholars on account of their color, race or social position."¹²⁴

With the exception of a New York case in 1883,¹²⁵ no court in any other Northern state upheld school segregation after 1874. The legislatures of California¹²⁶ and Ohio¹²⁷ reversed the judicial decisions upholding segregation and banned separate schools in 1880 and 1887, respectively. A lower court in Pennsylvania held in 1881 that education is a privilege or immunity of United States citizens and that segregation, being "the very personification of caste" is therefore unconstitutional.¹²⁸ Because of enactment of desegregation legislation a few months later, however, this decision, which is the only explicit judicial holding that school segregation violates the Fourteenth Amendment, was never appealed.¹²⁹ The same year, the Kansas Supreme Court struck down the segregation policy of a local school board.¹³⁰ Although it never reached the Fourteenth Amendment argument, the court devoted a page of its opinion to discussing why the constitutionality of segregated schools "may be doubted,"¹³¹ and engaged in a lengthy discussion of why it was "better for the grand aggregate of human society, as well as for individuals, that all children should mingle together and learn to know each other."¹³²

It bears mention that the focus of nineteenth-century civil rights litigation was on equal rights rather than on governmental discrimi-

¹²⁴ *Chase*, 71 Ill. at 385.

¹²⁵ *People ex rel. King v. Gallagher*, 93 N.Y. 438 (1883).

¹²⁶ Cal. Political Code, § 1662 (as amended Apr. 7, 1880 & Mar. 12, 1885); see *Wysinger v. Crookshank*, 82 Cal. 588 (1890). Note, however, that the 1885 amendment to the Code gave school boards power to establish separate schools for children of Chinese or Mongolian descent. Act of Mar. 12, 1885, ch. 117, § 1, 1885 Cal. Stat. 99, 100. This amendment was approved just nine days after the California Supreme Court held that § 1662 did not allow teachers to exclude Chinese students from public schools. *Tape v. Hurley*, 66 Cal. 473 (1885).

¹²⁷ Act of Feb. 22, 1887, House Bill No. 71, § 1, 1887 Ohio Laws 34.

¹²⁸ *Commonwealth ex rel. Allen v. Davis*, 10 *Weekly Notes of Cases (Pennsylvania)* 156, 159-60 (1881). The case is discussed in *Kousser*, *supra* note 116, at 21-22. For a complete listing of school desegregation litigation in the nineteenth century, see *id.* at 56-58.

¹²⁹ *Kousser*, *supra* note 116, at 22.

¹³⁰ *Board of Educ. v. Tinnon*, 26 Kan. 1 (1881).

¹³¹ *Id.* at 17-18. The dissenter, future United States Supreme Court Justice David J. Brewer, interpreted this dictum as a statement of the court's opinion on the constitutional issue, and expressed his disagreement with it. *Id.* at 23-24 (Brewer, J., dissenting).

¹³² *Id.* at 19.

nation or wrongdoing. The issue posed would be whether a black child had a right to be admitted to a particular school without regard to his race, not whether the state behaved wrongfully in establishing a separate school. Thus, even when black children won lawsuits entitling them to admission to the (formerly) "white" school, the state remained free to operate separate schools for black children. Unless or until there was political pressure for reform, civil rights could be enforced only person-by-person, at considerable expense. Thus, even in the North, separate schools remained widespread even after the right to desegregated schooling was established.¹³³

Moreover, even as the Northern states approached consensus on the proposition that requiring black children to attend racially separate schools is a violation of their right to equality in education, the national picture was more clouded than ever. As will be recounted in detail below, the congressional effort to end school segregation under authority of the Fourteenth Amendment collapsed in 1875. Reconstruction came to a close in 1877, and the Southern states moved quickly and unanimously toward a system of de jure segregated education—to be followed a decade later by segregation throughout the Southern economy and public life. In light of the retreat from federal enforcement of civil rights, it became difficult to sustain the argument that federal law required desegregation. In 1882, Federal Circuit Court Judge John Baxter, an opponent of school segregation, concluded reluctantly that Ohio's segregated schools were not unconstitutional (though he insisted upon a degree of material equality among the separated schools that was unheard of again until the 1940s, and that resulted in substantial desegregation of Ohio schools).¹³⁴ Similarly, Justice Cooley, who had held segregation of the Detroit schools unlawful in 1869,¹³⁵ wrote in the 1880 edition of his constitutional law treatise

¹³³ See Weinberg, *supra* note 74, at 64-80.

¹³⁴ See *United States v. Buntin*, 10 F. 730, 735-36 (C.C.S.D. Ohio 1882). Newspaper accounts reported Judge Baxter's statement that he

"had come to the conclusion, after much deliberation, that the [state segregation] statute was constitutional, yet he did not desire to be understood as saying that he approved of the law which recognized separate schools, because he believed it would be far better policy for the State to remove such irritating differences."

Springfield Daily Republic, Nov. 4, 1882, *quoted in* Kousser, *supra* note 116, at 25.

¹³⁵ See *People ex rel. Workman v. Board of Educ.*, 18 Mich. 399 (1869).

tise that under the Fourteenth Amendment, "it seems to be admissible to require colored persons to attend separate schools, provided the schools are equal in advantages, and the same measure of privilege and opportunity is afforded in each."¹³⁶

The experience in the Northern states during the fifteen year period after ratification of the Fourteenth Amendment thus falls short of proving that school segregation was understood to violate the Amendment, but it is also inconsistent with the equally extreme view that the Amendment had no bearing on the issue. Confronting the Fourteenth Amendment for the first time, five Northern state supreme courts (those of California, Indiana, Nevada, New York and Ohio) upheld segregation of public schools, while another four Northern state supreme courts (those of Illinois, Iowa, Kansas and Michigan) held segregation unlawful. As the implications of the new constitutional regime came to be more fully understood in the North, segregation eventually was prohibited, either by legislative or judicial action, in every state.¹³⁷

C. *The District of Columbia*

The single piece of evidence most often cited in support of the proposition that the framers of the Fourteenth Amendment did not deem school segregation unconstitutional is the fact that the schools of the District of Columbia, under the direct constitutional authority of Congress, remained segregated by law during the entire period of proposal, ratification, and enforcement of the Amendment (and indeed remained segregated until after *Brown*). In 1862, shortly after emancipation in the District, Congress passed statutes "initiating a system of education of colored children," to be financed by a special tax on property "owned by persons of color."¹³⁸ Prior to that time, there were no publicly supported schools for black children in the District.¹³⁹ In 1864, Congress

¹³⁶ Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 230-31 (Boston, Little, Brown 1880).

¹³⁷ This is not to say that de jure segregation was eliminated in the North. Segregation survived in many areas, including southern Illinois, southern New Jersey, and parts of rural Ohio, despite legislation and judicial rulings. See Kousser, *supra* note 116, at 7 n.23; McGinnis, *supra* note 98, at 64-70; Weinberg, *supra* note 74, at 68-71, 75-76.

¹³⁸ Act of May 20, 1862, ch. 77, § 35, 12 Stat. 394, 402 (County of Washington); Act of May 21, 1862, ch. 83, § 1, 12 Stat. 407 (Cities of Washington and Georgetown).

¹³⁹ See Cong. Globe, 36th Cong., 1st Sess. 1677-87 (Apr. 12, 1860).

abolished the special tax and required the school authorities to use a proportionate share of the common school funds for the education of black children, evidently assuming that the schools would be separate.¹⁴⁰ The Fourteenth Amendment was proposed in 1866 and in the same year, Congress made appropriations for the two separate school systems without reexamining the segregation issue.¹⁴¹

In 1870, eighteen months after ratification of the Amendment, Senator Sumner introduced legislation that would eliminate separate schools in the District.¹⁴² The trustees of the separate black school system issued a formal report supporting desegregation on the ground that this would be in "the best interests of the colored people" as well as "those of all classes."¹⁴³ Neither Sumner nor the trustees treated the issue as one of constitutional obligation (perhaps because the newly ratified Fourteenth Amendment did not apply to either the national government or, consequently, to the District of Columbia). The trustees stated that they regarded it "as but a question of time" that the "custom of separation on account of color must disappear from our public schools, as it has from our halls of justice and of legislation," but acknowledged that "[w]hether this unjust, unreasonable, and unchristian discrimination against our children shall continue at the capital of this great Republic is for the wisdom of Congress to determine."¹⁴⁴

On February 8, 1871, the District of Columbia Committee of the Senate, over the objections of its chairman, reported a bill that would have reorganized the public school system of the District and eliminated all racial distinctions in the admission of pupils to the schools.¹⁴⁵ A similar bill was reported in the House of Repre-

¹⁴⁰ Act of June 25, 1864, ch. 156, §§ 18, 23, 13 Stat. 187, 191, 193.

¹⁴¹ Act of July 28, 1866, ch. 296, 14 Stat. 310, 316 (appropriations act for various civil expenses); Act of July 28, 1866, ch. 308, 14 Stat. 343 (1866) (granting land for colored schools within the district). Neither bill was seriously debated.

¹⁴² Cong. Globe, 41st Cong., 2d Sess. 323 (Jan. 10, 1870).

¹⁴³ Cong. Globe, 41st Cong., 3d Sess. 1055 (Feb. 8, 1871) (quoted in speech by Sen. Sumner).

¹⁴⁴ *Id.* at 1056.

¹⁴⁵ *Id.* at 1054 ("[N]o distinction on account of race, color, or previous condition of servitude shall be made in the admission of pupils to any of the schools under the control of the board of education, or in the mode of education or treatment of pupils in such schools."). The chairman of the committee, Sen. Patterson, stated that he "was overruled

sentatives, together with an amendment to strike the desegregation clause.¹⁴⁶ Some proponents of the bills argued that desegregation was required by the spirit of the recent constitutional amendments,¹⁴⁷ but for the most part the bills were debated as issues of policy.¹⁴⁸ The sponsor of the amendment to strike the desegregation requirement stressed repeatedly that he did “not differ with the [proponents of the bill] as to principle, but as to policy, in this matter.”¹⁴⁹ He believed that immediate desegregation would “destroy the schools of the city, or . . . put them back at least ten or fifteen years” and that desegregation should be postponed until the black children had been given a certain degree of education and the prejudice against them, which he described as “transitory,” had passed away.¹⁵⁰ Another opponent asked: “[I]s it a crime to be practical?”¹⁵¹ The Senate bill died without further debate, and the House bill was defeated by a vote of 71-88.¹⁵² A similar effort in the Senate during the next Congress prevailed by a margin of 35-20 on a procedural test,¹⁵³ but never came to a final vote. Sumner thereafter devoted his efforts to general civil rights legislation, which would have ended school segregation not only in the District

in the committee in this matter” and proposed an amendment deleting the desegregation provision. *Id.*

¹⁴⁶ *Id.* at 1365-66 (Feb. 17, 1871). The bill provided that it shall be the duty of the board of directors

to determine what particular school each scholar shall attend; and no distinction shall be made on account of race or color, so that all unmarried youth resident in the District of Columbia, between the said ages of six and eighteen years, shall be entitled to and receive equal benefits of the public schools of their respective districts.

Id. at 1366.

¹⁴⁷ See, e.g., *id.* at 1055 (Feb. 8, 1871) (statement of Sen. Harris) (“We have adopted the principle of equality in the Constitution of the United States, and I think this is a proper place to enact a law in accordance therewith.”); *id.* at 1056 (statement of Sen. Carpenter) (“[T]his bill . . . declares a principle which is sound if the amendments to the Constitution are correct[,] . . . that there shall be no distinction on account of race, color, or previous condition of servitude made in our common schools.”).

¹⁴⁸ See, e.g., *id.* at 1059 (statement of Sen. Revels) (arguing that a law compelling school segregation would encourage racial prejudice).

¹⁴⁹ *Id.* at 1054 (statement of Sen. Patterson). He later repeated these sentiments. *Id.* at 1057.

¹⁵⁰ *Id.* at 1054.

¹⁵¹ *Id.* at 1059 (statement of Sen. Tipton).

¹⁵² *Id.* at 1367 (Feb. 17, 1871).

¹⁵³ Cong. Globe, 42d Cong., 2d Sess. 3124 (May 7, 1872).

but nationwide. By the time that effort failed, Republicans had lost control of the Congress, Reconstruction was over, and the question of segregation in District of Columbia schools had disappeared from public attention.

The segregation of schools in the nation's capital was a powerful symbol. But as a legal matter it is less significant than may appear. At no time after the Fourteenth Amendment did Congress vote in favor of segregated schools in the District (although Congress appropriated money for the segregated schools that already existed). The sin was one of omission. More importantly, since the Fourteenth Amendment did not apply to congressional legislation, senators were free to vote in accordance with their assessments of practical impact (and even according to their personal preferences about the schools their children attended) rather than according to the perceived dictates of the Constitution. Opponents of desegregation followed a strategy of preventing an up-or-down vote, and extraordinary numbers of representatives and senators failed to vote even on procedural motions. One member said outright that he could not cast a vote that might be interpreted as condoning segregation, but that he preferred that the issue not be raised.¹⁵⁴ To read this as proof that the Congress of the day viewed segregation as constitutionally legitimate is to overread the evidence.

D. Segregation in Common Carriers

A final source of evidence regarding the legal conception of segregation at the time of the Fourteenth Amendment involves segregation of transportation common carriers. Even scholars who find the historical argument in favor of *Brown* implausible acknowledge that "the originalist constitutional argument against racial segregation was always stronger in the public transportation than in the public school context."¹⁵⁵

Racial discrimination by common carriers raised a legal issue under the common law even before the Fourteenth Amendment because of the carriers' legal duty to serve all customers equally,

¹⁵⁴ See Cong. Globe, 41st Cong., 3d Sess. 1058 (Feb. 8, 1871) (statement of Sen. Sawyer).

¹⁵⁵ Michael J. Klarman, *Brown v. Board of Education: Facts and Political Correctness*, 80 Va. L. Rev. 185, 191 (1994); see also Earl M. Maltz, "Separate But Equal" and the Law of Common Carriers in the Era of the Fourteenth Amendment, 17 Rutgers L.J. 553 (1986). But see Kull, *supra* note 15, at 96.

subject only to reasonable restrictions and regulations. Under the common law, the legality of segregation thus depended upon whether a potential passenger's race constituted a "reasonable" ground for distinction. This was usually considered a question of law for the court or for the jury rather than a matter of private business judgment for the railroad. On this reasonableness issue, authorities split. One prominent railroad law treatise, written in 1857, summarized the law as follows:

The company is under a public duty, as a common carrier of passengers, to receive all who offer themselves as such and are ready to pay the usual fare, and is liable in damages to a party whom it refuses to carry without a reasonable excuse. It may decline to carry persons after its means of conveyance have been exhausted, and refuse such as persist in not complying with its reasonable regulations, or whose improper behavior—as by their drunkenness, obscene language, or vulgar conduct—renders them an annoyance to other passengers. *But it cannot make unreasonable discriminations between persons soliciting its means of conveyance, as by refusing them on account of personal dislike, their occupation, condition in life, complexion, race, nativity, political or ecclesiastical relations.*¹⁵⁶

By contrast, in an often-cited opinion involving the refusal of a black woman to sit at the rear of a railway car, the Pennsylvania Supreme Court held in 1867 that the railroad's racial distinction was reasonable.¹⁵⁷ "The natural separation of the races," the court found, is "an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature."¹⁵⁸ Earlier the same year, however, the Pennsylvania legislature had passed a statute "[m]aking it an offence for railroad corporations . . . to make any distinction with their passengers, on account of race or color."¹⁵⁹ Earl Maltz concludes that "in the 1860's the rights of blacks with respect to public transportation were somewhat uncertain. All agreed that blacks could not be totally

¹⁵⁶ Edward L. Pierce, *A Treatise on American Railroad Law* 489 (New York, Voorhies 1857) (emphasis added) (footnote omitted).

¹⁵⁷ *West Chester & Phila. R.R. Co. v. Miles*, 55 Pa. 209, 212-13 (1867).

¹⁵⁸ *Id.* at 213.

¹⁵⁹ Act of Mar. 22, 1867, No. 21, 1867 Pa. Laws 38.

excluded from common carriers; the authorities disagreed, however, . . . on the segregation issue."¹⁶⁰

In its role as legislator for the District of Columbia, Congress took an increasingly strong stand against segregation in public transportation through the 1860s. Between 1863 and 1865, narrow majorities in Congress passed a series of amendments to the charters of railway and streetcar companies operating in the District of Columbia, prohibiting exclusion on grounds of race.¹⁶¹ Most of these amendments unmistakably prohibited segregated cars as well as outright denial of service (prohibiting exclusion from "any car").¹⁶² Both proponents and some opponents maintained that black passengers already enjoyed legal protection against discrimination under the common law. Opponents thus argued that the specific amendments were unnecessary, while proponents said they would be useful to guard against judicial misinterpretation.¹⁶³ After 1865, support for these amendments in the Senate swelled to over two-thirds.¹⁶⁴ This was on the eve of passage of the Fourteenth Amendment.

After enactment of the Fourteenth Amendment, a state's decision to treat racial distinctions as "reasonable" could be seen as discriminatory state action, thus transforming a question of common law into a constitutional issue. The Iowa Supreme Court concluded that "[t]he doctrines of natural law and of christianity forbid that rights be denied on the ground of race or color"¹⁶⁵ and found segregation in common carriers to be a violation of the Privileges or Immunities Clause of the Fourteenth Amendment, which guarantees to "the colored man . . . equality with the white man in all affairs of life, over which there may be legislation, or of which the

¹⁶⁰ Maltz, *supra* note 155, at 558.

¹⁶¹ Cong. Globe, 37th Cong., 3d Sess. 1329 (Feb. 27, 1863); Cong. Globe, 38th Cong., 1st Sess. 1156, 1161 (Mar. 17, 1864); *id.* at 3137 (June 22, 1864); see Maltz, *supra* note 155, at 558-63.

¹⁶² Cong. Globe, 38th Cong., 2d Sess. 294 (Jan. 17, 1865); Cong. Globe, 38th Cong., 1st Sess. 3131 (June 21, 1864); *id.* at 1156 (Mar. 17, 1864).

¹⁶³ Cong. Globe, 38th Cong., 1st Sess. 3132 (Jun. 21, 1864) (colloquy between Sen. Sumner and Sen. Trumbull); *id.* at 1158 (Mar. 17, 1864) (colloquy between Sen. Johnson and Sen. Sumner); *id.* at 1159 (statement of Sen. Morrill).

¹⁶⁴ Cong. Globe, 38th Cong., 2d Sess., 604 (Feb. 6, 1865) (measure approved 26-10); *id.* at 294 (Jan. 17, 1865) (measure approved 24-6).

¹⁶⁵ *Coger v. North W. Union Packet Co.*, 37 Iowa 145, 154 (1873).

courts may take cognizance."¹⁶⁶ Other courts continued to follow the line of cases upholding the "reasonableness" of racial distinctions.¹⁶⁷

Historians disagree about the degree of segregation and desegregation in actual practice during the period following ratification of the Fourteenth Amendment. In his classic study, *The Strange Career of Jim Crow*,¹⁶⁸ C. Vann Woodward made the surprising case that public transportation was desegregated in actual practice (and not just in legal theory) in most Southern jurisdictions from the early 1870s until 1900.¹⁶⁹ Desegregation was sometimes a result of black-organized boycotts and political action, and perhaps more often of the fact that railroads found it inefficient and expensive to provide duplicate facilities for the two races.¹⁷⁰ Other historians report that desegregation was less common.¹⁷¹ Actual desegregation, they maintain, was often confined to lower-class accommodations, such as railroad "smoking cars," and a combination of custom, company regulation, and economics often barred black passengers from first class accommodations.¹⁷²

Almost every Southern state passed laws during Reconstruction guaranteeing equal access to transportation and public accommodations,¹⁷³ and none mandated segregation by law. The first major

¹⁶⁶ *Id.* at 155-56.

¹⁶⁷ For a survey of decisions in Pennsylvania, New Jersey, and New York, see David McBride, *Mid-Atlantic State Courts and the Struggle with the "Separate But Equal" Doctrine: 1880-1939*, 17 *Rutgers L.J.* 569 (1986).

¹⁶⁸ Woodward, *supra* note 72.

¹⁶⁹ *Id.* at 33-34 (Virginia); C. Vann Woodward, *American Counterpoint: Slavery and Racism in the North-South Dialogue* 253 (1964) [hereinafter Woodward, *American Counterpoint*] (discussing the situation in New Orleans, Charleston, Richmond, Savannah, and Louisville).

¹⁷⁰ Woodward, *American Counterpoint*, *supra* note 169, at 253; August Meier & Elliott Rudwick, *A Strange Chapter in the Career of "Jim Crow,"* in 2 *The Making of Black America* 14, 14-19 (August Meier & Elliott Rudwick, eds., 1976) (Savannah, Georgia).

¹⁷¹ See Lofgren, *supra* note 9, at 7-27 (presenting a balanced account of the evidence); Richard C. Wade, *Slavery in the Cities: The South, 1820-1860* (1964) (tracing origins of Jim Crow practices to the cities of the South prior to the War); Williamson, *supra* note 21 (discussing Southern movement toward segregation in the early years after the War); Bruce A. Glasrud, *Jim Crow's Emergence in Texas*, 15 *Am. Stud.* 47, 52 (1974) (reporting that racial segregation was widespread in Texas between 1865 and 1877). Woodward acknowledges the historical dispute in Woodward, *American Counterpoint*, *supra* note 169, at 253.

¹⁷² Foner, *supra* note 21, at 368, 371-72; Lofgren, *supra* note 9, at 9-17.

¹⁷³ See Foner, *supra* note 21, at 370.

wave of segregation legislation did not occur until the 1880s.¹⁷⁴ The first genuine Jim Crow law requiring segregation of all railroad facilities was passed by Florida in 1887, followed by Mississippi in 1888 and Texas in 1889.¹⁷⁵ The Louisiana statute upheld in *Plessy* was passed in 1890.¹⁷⁶ In *Plessy*, the Court spoke as if Jim Crow laws were part of the "established usages, customs and traditions of the people,"¹⁷⁷ but in fact the laws were of very recent vintage.

II. THE CIVIL RIGHTS ACT OF 1875

In contrast to the scant discussion of segregated education during debate over the Fourteenth Amendment, the Reconstruction Congresses during the period 1868-1875 were forced to confront the issue repeatedly. While the Thirty-ninth Congress concentrated on passing the Amendment—a context in which avoidance or obfuscation of controversial issues is often the best strategy—later Congresses were forced to determine what it meant, in the context of the most difficult questions of the day. The actions taken by Congress from 1868 through 1875 to enforce the Fourteenth Amendment and the congressional deliberations over those measures thus present the best available evidence of the original understanding of the meaning of the Amendment as it bears on the issue of school segregation. Although this evidence might be inferior in principle to information directly bearing on the opinions and expectations of the framers and ratifiers during deliberations over the Amendment itself, there is no significant body of evidence concerning the latter. The relatively modest evidence that does exist is overwhelmed by the abundance of evidence from the enforcement period.

The principal focus of this Article is therefore on the effort from 1870 through 1875, led by Charles Sumner in the Senate and General Benjamin F. Butler in the House, to enact legislation pursuant

¹⁷⁴ For detailed accounts of the emergence of Jim Crow laws in four Southern jurisdictions, see Glasrud, *supra* note 171; Linda M. Matthews, *Keeping Down Jim Crow: The Railroads and the Separate Coach Bills in South Carolina*, 73 S. Atl. Q. 117 (1974); Meier & Rudwick, *supra* note 170 (Savannah, Georgia); Stanley J. Folmsbee, Note, *The Origin of the First "Jim Crow" Law*, 15 J.S. Hist. 235 (1949) (Tennessee).

¹⁷⁵ Lofgren, *supra* note 9, at 22.

¹⁷⁶ Act of July 10, 1890, No. 111, 1890 La. Acts 152, 154 (quoted in *Plessy*, 163 U.S. at 540).

¹⁷⁷ 163 U.S. at 550.

to the Fourteenth Amendment to abolish de jure segregation in public schools. The ultimate result of their efforts was the enactment of the Civil Rights Act of 1875,¹⁷⁸ which forbade racial discrimination in inns, theaters, common carriers, and other forms of public accommodation. Although this legislation, together with the Civil Rights Act of 1866,¹⁷⁹ was the centerpiece of enforcement of the Fourteenth Amendment, its constitutional underpinnings and legal substance have received little attention, perhaps because the Act was struck down by the Supreme Court only eight years after enactment, in the *Civil Rights Cases*.¹⁸⁰ Because of this decision, scholarly analysis of the 1875 Act has been directed almost exclusively to the problem of “state action” under the Amendment, which was the focal point of the *Civil Rights Cases*, to the neglect of the equally important implications for the questions of segregation and the scope of the civil rights protected by the Amendment. Moreover, because the legislation ultimately adopted in 1875 did not apply to schools and made no overt reference to segregation, there has been little recognition of the relevance of this legislation to the issue later faced in *Brown*. But in fact, the most important and controversial question raised by the legislation was the constitutionality of de jure segregation of the public schools. This topic dominated debate in Congress for a three and a half year period.

It is during this debate over what ultimately became the Civil Rights Act of 1875 that constitutional theories of the day regarding school segregation were most fully developed. The school desegregation effort was ultimately unsuccessful, but the degree of support it commanded belies the standard account, according to which it is “fanciful” to suppose that the generation that enacted the Fourteenth Amendment understood it to forbid segregated schools. In a series of votes in different procedural contexts, opponents of school segregation were able to muster significant support—often large majorities—in both houses of Congress. Perhaps more importantly, Congress eventually *did* pass legislation requiring desegregation of common carriers and places of public accommo-

¹⁷⁸ 18 Stat. 335 (1875).

¹⁷⁹ Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).

¹⁸⁰ 109 U.S. 3 (1883).

dition, and expressly *refused* to enact an amendment that would sanction separate but equal schools.

Although the case for *Brown* would be stronger if school desegregation legislation had actually passed, it is extremely significant that half or more of the Congress voted repeatedly to abolish segregated schools under authority of the Fourteenth Amendment. This is especially true given that the opponents of these measures could not agree on any particular constitutional theory under which segregation could be defended as lawful, and many of them were acting out of evident hostility or indifference to the goals of the Fourteenth Amendment.

It may be helpful to understanding the following account to have reference to a chronology of the relevant events:

CHRONOLOGY OF EVENTS

- 1866 Congress enacts Civil Rights Act of 1866 (property, contract, capacity to sue, etc.)—now 42 U.S.C. § 1981
Fourteenth Amendment proposed by Congress
 - 1868 Fourteenth Amendment ratified
 - 1870 1866 Act reenacted
Sumner introduces desegregation bill
 - 1872 Debates on Sumner's bill as rider to amnesty bill
Introduction and debate on House desegregation bill
 - 1873 *Slaughter-House Cases*
Railroad Co. v. Brown
 - 1874 Sumner dies
Desegregation bill revised to reflect reliance on Equal Protection Clause
Revised bill passes the Senate, but floor vote is forestalled in the House
Congressional elections; Democratic landslide
 - 1875 Lameduck House deletes schools provision; rejects separate-but-equal alternative
House passes Civil Rights Act of 1875
Senate passes Civil Rights Act as amended
President Grant signs act into law
Democrats assume control of both Houses of Congress
 - 1876 Disputed presidential election between Hayes and Tilden
 - 1877 Compromise of 1877 recognizes Hayes as President and brings Reconstruction to an end
 - 1883 Civil Rights Act of 1875 struck down in *Civil Rights Cases*
 - 1884 Congress fails to prohibit segregation in Interstate Commerce Act
 - 1887 First Jim Crow law passed in Florida, requiring segregation in railway transportation
 - 1896 *Plessy v. Ferguson*
-

A. *Sumner's Bill*

In 1870, Charles Sumner inaugurated the first attempt, pursuant to the Fourteenth Amendment, to outlaw school segregation in common schools, public accommodations, common carriers, and other institutions throughout the United States. In introducing the bill, Sumner declared: "I will say that when this bill shall become a law, as I hope it will very soon, I know nothing further to be done in the way of legislation for the security of equal rights in this Republic."¹⁸¹ The effort was to outlive the Massachusetts Republican. It would pass both houses of Congress only after his death, and then only after it had been stripped of its most controversial features, including the schools provision. Sumner was both the best and the worst champion a cause could have. He was single-minded and persistent, self-righteous and overbearing to his allies and insufferable to his enemies. He was not well liked. But no one can question his sincere and lifelong commitment to achievement of the equality of rights for all Americans that he considered to be the unfulfilled promise of the Declaration of Independence. Even on his deathbed, he told his friend, Representative E.R. Hoar, "You must take care of the civil-rights bill,—my bill, the civil-rights bill, don't let it fail."¹⁸²

There is no doubt that Sumner's bill required desegregation, and not merely equality of resources. The language of the bill forbade "distinction of race, color, or previous condition of servitude" and guaranteed "the equal and impartial enjoyment of *any* accommodation, advantage, facility, or privilege" furnished by the covered institutions.¹⁸³ The term "any" was understood to preclude exclu-

¹⁸¹ Cong. Globe, 41st Cong., 2d Sess. 3434 (May 13, 1870).

¹⁸² David Donald, *Charles Sumner and the Rights of Man* 586 (1970).

¹⁸³ Cong. Globe, 42d Cong., 2d Sess. 244 (1872) (read on Dec. 20, 1871) (emphasis added). The first section of the bill provided in full:

That all citizens of the United States, without distinction of race, color, or previous condition of servitude, are entitled to the equal and impartial enjoyment of any accommodation, advantage, facility, or privilege furnished by common carriers, whether on land or water; by inn-keepers; by licensed owners, managers, or lessees of theaters or other places of public amusement; by trustees, commissioners, superintendents, teachers, or other officers of common schools and other public institutions of learning, the same being supported or authorized by law; by trustees or officers of church organizations, cemetery associations, and benevolent institutions incorporated by national or State authority; and this right shall not be

sion of black citizens from *any* accommodation or facility—even if another facility of comparable quality was provided. Similar language had been used by Congress to forbid segregation of railroads operating in the District of Columbia, and was so interpreted by the Supreme Court.¹⁸⁴ Moreover, if the language of the bill left any doubt, the debate quickly cleared it up. Senator Joshua Hill, a Republican from Georgia, rose to declare that he did not “hold that if you have public schools, and you give all the advantages of education to one class as you do to another, but keep them separate and apart, there is any denial of a civil right in that.”¹⁸⁵ He made the same point with respect to hotels, dining rooms, railways, and churches. Sumner responded that Hill’s speech was “a vindication on this floor of inequality as a principle, as a political rule,” and that segregation imposed an inequality on both races.¹⁸⁶ The following exchange ensued:

Mr. SUMNER. . . . The Senator mistakes substitutes for equality. Equality is where all are alike. A substitute can never take the place of equality. It is impossible; it is absurd. And still further, I must remind the Senator that it is very unjust; it is terribly unjust. Why, sir, we have had in this Chamber a colored Senator from Mississippi; but according to the rule of the Senator from Georgia we should have set him apart by himself; he should not have sat with his brother Senators. Do I understand the Senator from Georgia as favoring such a rule?

Mr. HILL. No, sir.

Mr. SUMNER. The Senator does not.

Mr. HILL. I do not, sir, for this reason: it is under the institutions of the country that he becomes entitled by law to his seat here; we have no right to deny it to him.

denied or abridged on any pretense of race, color, or previous condition of servitude.

Id. The fourth section of the bill prohibited both state and federal courts from excluding jurors on the basis of race. Remaining sections of the bill dealt with penalties, enforcement, and preemption of inconsistent national and state law. Id.

¹⁸⁴ *Railway Co. v. Brown*, 84 U.S. (17 Wall.) 445 (1873). See *infra* notes 792-805 and accompanying text.

¹⁸⁵ Cong. Globe, 42d Cong., 2d Sess. 241 (1872) (statement of Sen. Hill on Dec. 20, 1871).

¹⁸⁶ Id. at 242.

Mr. SUMNER. Very well; and I intend to the best of my ability to see that under the institutions of his country he is equal everywhere.¹⁸⁷

Upon Hill's further argument that proximity of black to white, or white to black, in hotels or railroads, does not affect their "comfort or security"—an unambiguous defense of "separate-but-equal"—Sumner hotly responded: "The Senator does not seem to see that any rule excluding a man on account of his color is an indignity, an insult, and a wrong; and he makes himself on this floor the representative of indignity, of insult, and of wrong to the colored race."¹⁸⁸ Further debate contained similarly unambiguous statements, from supporters and opponents alike, indicating that the bill was clearly understood as prohibiting segregation.¹⁸⁹ Senator Thurman said of a later version of the bill: "I do not think there is one member of the majority of the Judiciary Committee who will not say, if the question is put directly to him, that the meaning of the section is that there shall be mixed schools."¹⁹⁰

In all the debates, the only statement by a supporter of Sumner's bill that appears to countenance segregated schools is a speech by Senator John Sherman of Ohio.¹⁹¹ On May 8, 1872, he endorsed the result in *State ex rel. Garnes v. McCann*,¹⁹² the decision of the Ohio Supreme Court discussed in the previous Section, which upheld separate but equal schools under the Fourteenth Amendment. This statement is difficult to square with Sherman's consis-

¹⁸⁷ Id.

¹⁸⁸ Id.

¹⁸⁹ E.g., id. at 3256-58 (May 9, 1872) (speech by Sen. Ferry defending separate schools and opposing a requirement of "mixed schools"); id. at app. 42 (Feb. 8, 1872) (statement by Sen. Vickers) ("The friends of this measure are unwilling that separate schools for the races shall be provided . . ."); id. at app. 26-27 (Feb. 6, 1872) (statement by Sen. Thurman criticizing the bill on the ground that separation of the races is not unequal); id. at app. 27 (Feb. 6, 1872) (statement by Sen. Trumbull describing the bill as forcing poor white and colored children into the same schools); id. at 384 (Jan. 15, 1872) (statement by Sen. Sumner) ("It 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, while as a pretended equivalent it is an utter failure.").

¹⁹⁰ 2 Cong. Rec. 4088 (May 20, 1874). Thurman's statement was not quite accurate, for many supporters of the bill distinguished between "mixed schools" (meaning mandatory integration) and desegregation. See *infra* notes 626-40 and accompanying text. As an opponent of the measure, Thurman was inclined to blur the distinction.

¹⁹¹ Cong. Globe, 42d Cong., 2d Sess. 3193 (May 8, 1872).

¹⁹² 21 Ohio St. 198 (1872); see *supra* notes 113-17 and accompanying text.

tent opposition to attempts to substitute a separate-but-equal provision in the bill. It is possible that Sherman did not accurately understand the court's holding, since the decision had come down the preceding day and he was presumably relying on newspaper accounts. His summary of the *Garnes* decision was ambiguous; he explained that the State "does in certain cases provide for separate schools,"¹⁹³ which could refer to either a freedom of choice plan or a system of de jure segregation. The full opinion in *Garnes* makes clear that de jure segregation was in fact the issue, but Sherman may not have known that. In any event, the incident passed without further comment, and is buried by the numerous statements of both supporters and opponents that the bill outlawed segregated schools.

B. *The Proponents' Constitutional Theory*

The debate over Sumner's proposal was a mixture of constitutional arguments and arguments regarding policy and expedience—with doses of overt racism and obstructionism thrown in by some of the opponents. Proponents maintained that the bill was an appropriate means of enforcing the provisions of the new Amendment,¹⁹⁴ opponents maintained that it was not.¹⁹⁵ It was impossible

¹⁹³ Cong. Globe, 42d Cong., 2d Sess. 3193 (May 8, 1872).

¹⁹⁴ For instance, Representative Walls explained his support for the bill on the ground that:

[if] there is a denial, tacit or direct, to any person in any State of the equal protection of all law[,] . . . then the spirit of the provisions of the fourteenth article of amendment to the Federal Constitution is violated, and there is need for the appropriate legislation for the enforcement of the same as provided for in section 5 of said article.

2 Cong. Rec. 416 (Jan. 6, 1874).

¹⁹⁵ See, e.g., Cong. Globe, 42d Cong., 2d Sess. at 3733 (May 21, 1872) (statement by Senator Casserly that he was against the bill because it was "grossly and wantonly unconstitutional"); id. at 3257 (May 9, 1872) (statement by Sen. Ferry) ("[I]t has been the assertion of those who support this bill with regard to the schools that compelling the separation of the races into different buildings was a violation of the fourteenth amendment . . ."); id. at 3261 (statement of Sen. Bayard) ("Under this Government of ours, where is the power delegated to Congress to perform these acts? There is none expressed; there is none justly to be implied."); id. (argument of Sen. Casserly that desegregated education is not a privilege and immunity under the Fourteenth Amendment); id. at app. 41-42 (Feb. 8, 1872) (argument by Sen. Vickers that school desegregation does not violate the privileges and immunities clause, which he understood to be the basis for the legislative proposal).

to support the bill without at least implicitly taking the position that segregation was a denial of the equality of rights mandated by the Amendment. The only plausible source of congressional authority to interfere with such matters of state law as inns, theaters, schools, and intrastate transportation was the power under Section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of this article."¹⁹⁶ At that time no one would have conceived of the commerce power as a source of authority to pass legislation governing the domestic practices of the states,¹⁹⁷ and there were no federal appropriations to provide a basis for regulation under the spending power.¹⁹⁸ In order to vote for a bill outlawing segregation, a congressman thus had to conclude that segregation was in violation of the Amendment; otherwise the bill would not be an "appropriate" enforcement measure. As the principal sponsor and Chairman of the Judiciary Committee in the House commented, supporters of the bill "have all come to a conclusion on this subject . . . that these are rights guaranteed by the Constitution to every citizen, and that every citizen of the United States should have the means by which to enforce them."¹⁹⁹

Supporters of the measure readily admitted that if the states retained the authority to maintain segregated schools under the Fourteenth Amendment, "we cannot interfere with it" by legislation.²⁰⁰ Indeed, supporters frequently averred not only that the bill was within the power of Congress, but that Congress had the con-

¹⁹⁶ U.S. Const. amend. XIV, § 5.

¹⁹⁷ The commerce power, Art. I, § 8, was the source of authority to pass Title II of the Civil Rights Act of 1964. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). The only reference to the commerce power during the course of the debates was Sen. Carpenter's final speech on the bill in 1875, in which he opined that the provision of the bill involving "public conveyance on land or water . . . might be sustained as a regulation of commerce if confined to that commerce over which Congress possesses the power of regulation . . ." 3 Cong. Rec. 1861 (Feb. 27, 1875); see also *id.* at 1862 (distinguishing interstate commerce over which Congress has power to regulate from intrastate commerce over which it does not). He went so far as to suggest that theaters might be covered with respect to persons traveling in interstate commerce, though he admitted that such a construction of the commerce power was "somewhat fantastic." *Id.* at 1861.

¹⁹⁸ The spending power, Art. I, § 8, was the source of authority to pass Title VI of the Civil Rights Act of 1964. See *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 598 (1982) (White, J., plurality *op.*).

¹⁹⁹ 2 Cong. Rec. 457 (Jan. 7, 1874) (statement of Rep. Butler).

²⁰⁰ *Id.* at 4173 (May 22, 1874) (statement of Sen. Edmunds).

stitutional responsibility to pass such a bill. Senator Pratt of Indiana was typical in declaring that he had

[a] duty, as a member of this body, sworn to support this Constitution in all its parts, a plain one, to aid by my voice and vote in doing whatever is necessary to enforce and carry into effect this article [the Fourteenth Amendment] wherever I find a single right or privilege of citizenship withheld from the colored man.²⁰¹

A vote for the bill, therefore, was tantamount to an interpretation of the Amendment as barring segregation of the covered facilities. A vote against the bill was—with a few exceptions noted below—equally an affirmation of the opposite interpretation.²⁰²

1. *Equal Rights, Common Carriers, and Common Schools*

The affirmative case for desegregation of the schools was, to its proponents, quite simple. To them, the Fourteenth Amendment stood for the proposition that all citizens are entitled to the same civil rights, regardless of their race, color, nationality, social standing, or previous condition of servitude. This did not mean that citizens were entitled to equality with respect to everything; supporters and opponents of the bill alike had definite views about the limited nature of “civil rights,” which did not encompass all privileges or benefits. The dominant understanding has been labeled the theory of “limited absolute equality”—equality that is limited to certain spheres (“civil rights”) but is absolute within those spheres.²⁰³ Senator George Edmunds explained that the civil rights bill

proceeds upon the idea that the Constitution does secure to the citizen certain inherent rights, because they are rights, and then it merely undertakes to enforce those rights, not to enter into a parley with the States about them and say “you may or may not

²⁰¹ Id. at 4081 (May 20, 1874). For a similar statement, see 3 Cong. Rec. 980 (Feb. 4, 1875) (statement of Rep. Hale).

²⁰² See *infra* notes 767-91 and accompanying text.

²⁰³ For an excellent discussion of this theory, see Maltz, *supra* note 13, at 68, 157-58; Earl M. Maltz, *Reconstruction Without Revolution: Republican Civil Rights Theory In the Era of the Fourteenth Amendment*, 24 *Houston L. Rev.* 221 (1987) [hereinafter Maltz, *Reconstruction Without Revolution*].

enforce them as you may think is desirable," or say "you may enforce them in this way or that way."²⁰⁴

A particular subject, such as common school education, "is either an absolute right that the Constitution gives to the citizens, or it is nothing at all and does not touch the case."²⁰⁵

This approach differs from standard Fourteenth Amendment doctrine today. At considerable risk of oversimplification, it can be said that the current law of equal protection is oriented not toward the rights of the individual but toward the decisionmaking processes of the government. It is designed to root out intentional discrimination across the entire range of state action.²⁰⁶ To the supporters of the civil rights bills during the Reconstruction period, however, the focus was on an equality of *rights*, not on whether the processes of government were infected by discriminatory intent. The Fourteenth Amendment (first by virtue of the Privileges or Immunities Clause, later shifting to the Equal Protection Clause) meant that legally enforceable civil rights are the same for all citizens (or, after the shift to Equal Protection, all persons), without distinction on the basis of race, color, or previous condition of servitude. The practical test was to ask which rights a white citizen would be able to enforce, and to extend the same set of rights to all.

The legal theory supporting the Act was set forth at length by Senator Sumner when he first proposed his civil rights rider, and was repeated by proponents throughout the debate. Sumner explained that the "inn is a public institution, with well-known rights and duties," among which is "the duty to receive all paying travelers decent in appearance and conduct."²⁰⁷ He distinguished the inn from "a lodging-house or boarding-house, which is a private concern, and not subject to the obligations of the inn."²⁰⁸ The coverage of the civil rights bill was not based on the distinction

²⁰⁴ 2 Cong. Rec. 4172-73 (May 22, 1874).

²⁰⁵ *Id.* at 4172. See also Cong. Globe, 42d Cong., 2d Sess. 3253 (May 9, 1872) (statement of Sen. Wilson) (viewing "perfect and absolute equality" as a fundamental ideal of American institutions).

²⁰⁶ *Washington v. Davis*, 426 U.S. 229, 246-48 (1976). See David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. Chi. L. Rev. 935 (1989).

²⁰⁷ Cong. Globe, 42d Cong., 2d Sess. 383 (Jan. 15, 1872).

²⁰⁸ *Id.*

between the governmental and the private, but on whether the entities in question, public or private, had a general legal obligation to serve all comers. Sumner cited a variety of legal authorities, including Story's *Commentaries on the Law of Bailments*, Kent's *Commentaries*, Parsons' *Contracts*, the entry on "Inn" in Chamber's *Encyclopedia*, and the *Chronicles* of Holingshed, written in the reign of Queen Elizabeth. These authorities demonstrated that the common law provided a "peremptory rule opening the doors of inns to all travelers, without distinction, to the extent of authorizing not only an action but an indictment for the refusal to receive a traveler."²⁰⁹ Thus, the civil rights bill "is only declaratory of existing law giving to it the sanction of Congress."²¹⁰ Sumner explained that this common law protection "ought to be sufficient," but that "it is set at naught by an odious discrimination," making it necessary for Congress to "interfere." He applied the same analysis, using similar citations, to public conveyances, theaters, and places of amusement.²¹¹

Thus, in the view of its supporters, the civil rights bill did not create any new rights or obligations. According to William Lawrence of Ohio, one of the most careful lawyers among the Republican proponents, the bill "simply declares that wherever public rights already exist by law in favor of citizens generally, none shall be excluded merely on account of race or color."²¹² Most of these rights derived from the common law.²¹³ The Civil Rights Act of 1866 protected the common law rights of contract, property, and security of the person. The Civil Rights Act of 1875 protected the common law rights of access to public inns and accommodations,

²⁰⁹ Id.

²¹⁰ Id. For similar legal analyses, see 2 Cong. Rec. 412 (Jan. 6, 1874) (statement of Rep. Lawrence); Cong. Globe, 42d Cong., 2d Sess. 3264 (May 9, 1872) (statement of Sen. Edmunds); id. at 3192 (May 8, 1872) (statement of Sen. Sherman); id. at 843-44 (Feb. 6, 1872) (statement of Sen. Sherman).

²¹¹ See Cong. Globe, 42d Cong., 2d Sess. 383 (Jan. 15, 1872) (statement of Sen. Sumner) ("Public conveyances, whether on land or water, are known to the law as common carriers, and they, too, have obligations not unlike those of inns."); id. ("Theaters and other places of public amusement . . . are public institutions, regulated if not created by law, enjoying privileges, and in consideration thereof, assuming duties not unlike those of the inn and the public conveyance.")

²¹² 2 Cong. Rec. 412 (Jan. 6, 1874); accord id. at 410 (statement of Rep. Elliott).

²¹³ See Cong. Globe, 42d Cong., 2d Sess. 844 (Feb. 6, 1872) (statement of Sen. Sherman).

amusements, common carriers, and the like. To its supporters, the constitutional basis for the two Acts was the same.²¹⁴

Enforcement was the issue. Advocates of the civil rights bill maintained that the right to equality of treatment in the covered facilities already existed in the law, but that racial prejudice rendered actual enforcement defective. As Senator Sherman explained, "we know as a matter of fact that in many States, in many communities, a man cannot, on account of his color, exercise these rights; and this [bill] merely supplements and gives him an additional remedy."²¹⁵ Alonzo Ransier, a black Representative from South Carolina, more pointedly asserted: "the States will not give us protection in these matters, and well do these 'State-rights' men know this."²¹⁶ A letter from a black citizen of Arkansas, read into the record, reported that the state legislature had enacted "good, if not entirely sufficient" laws securing equal rights in steamboats, railroads and public thoroughfares generally, but that "those charged under oath to see the laws faithfully executed look on with seeming heartless indifference, while the law remains a dead letter on the statute-book."²¹⁷ Lawrence said that the "bill is necessary because the common law has been changed by local statutes" making protections unavailable to blacks.²¹⁸ The purpose of the bill, then, was to provide federal enforcement to ensure that

²¹⁴ *Id.* at 383 (Jan. 15, 1872) (statement of Sen. Sumner) ("The bill for Equal Rights is simply supplementary to the existing Civil Rights Law, which is one of our great statutes of peace, and it stands on the same requirements of the Constitution."); accord *id.* at 3191-92 (May 8, 1872) (statement of Sen. Sherman).

²¹⁵ *Cong. Globe*, 42d Cong., 2d Sess. 3192 (May 8, 1872). Sherman also pointed out that the enforcement by black citizens of their rights was impeded by "local laws still alleged to be in force." *Id.* Senator Pratt later repeated this point:

But it is asked, if the law be as you lay it down, where the necessity for this legislation, since the courts are open to all? My answer is, that the remedy is inadequate and too expensive, and involves too much loss of time and patience to pursue it. . . . [T]his bill is justified in providing a more efficient remedy, one that is so stringent in its penalties that it is likely to be obeyed, and render litigation unnecessary.

2 *Cong. Rec.* 4082 (May 20, 1874)

²¹⁶ 2 *Cong. Rec.* 383 (Jan. 5, 1874). See also 3 *Cong. Rec.* 940 (Feb. 3, 1875) (statement of Rep. Butler) ("[W]e put in this penalty because there are portions of the country where there is not any law which can be enforced in favor of a colored man.").

²¹⁷ Letter from E.A. Fulton to Sen. Charles Sumner (Jan. 30, 1872), *quoted in Cong. Globe*, 42d Cong., 2d Sess. 726-27 (Jan. 31, 1872).

²¹⁸ 3 *Cong. Rec.* 940 (Feb. 3, 1875).

black citizens would not be denied the rights white citizens already had to nondiscriminatory treatment by common carriers and other institutions with a preexisting legal obligation to serve all comers without discrimination.

Common school education, according to Sumner, presented an easier and yet a more important case. It falls "into the same category" as public fairs, conveyances, and places of amusement, because "[l]ike the others, it must be open to all or its designation is a misnomer and a mockery."²¹⁹ Indeed, the "common school has a higher character," both because of the importance of its function and because "it is sustained by taxation to which all contribute."²²⁰ Senator Matthew H. Carpenter of Wisconsin, who questioned extension of the bill to "voluntary institutions, whether incorporated or not, which we ought not to interfere with," had "no doubt of the power of this Government under the fourteenth amendment . . . to say that a colored man shall have his right in the common school."²²¹ Schools, he insisted, are among the institutions that "are supported by law and maintained by general taxation," and thus required to extend their benefits to all. Although not a member of the Thirty-ninth Congress, Carpenter had probably studied the Fourteenth Amendment more intensively than any other member of the Reconstruction Congress, since he represented litigants in the first two Fourteenth Amendment cases to reach the Supreme Court.²²² His formulation came close to the modern public-private distinction. Senator Sherman expressed the point as follows:

It is the privilege of every person born in this country, of every inhabitant of the country whether born here or not, of a certain age, to attend our public schools which by law are set aside for the public benefit. Boys and girls go to the schools. It is the privilege of all, and declared to be so. All contribute to the taxes for their support; all are benefited by the education given to the rising generation; and therefore all are entitled to equal privileges in the public schools.²²³

²¹⁹ Cong. Globe, 42d Cong., 2d Sess. 383-84 (Jan. 15, 1872).

²²⁰ Id. at 384.

²²¹ Id. at 763 (Feb. 1, 1872).

²²² Carpenter represented the monopoly butchers in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 57 (1873), and a woman denied admission to the practice of law on the basis of her gender in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 133 (1873).

²²³ Cong. Globe, 42d Cong., 2d Sess. at 844 (Feb 6, 1872).

Proponents of the bill had no difficulty declaring that racial segregation was a plain effort “to defeat equal rights” to which all citizens are entitled under the Fourteenth Amendment.²²⁴ They professed to consider the point obvious and “self-evident.”²²⁵ In his first major introductory speech, Sumner stated 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.”²²⁶ He recounted an “incident occurring in Washington, but which must repeat itself where ever separation is attempted,” where black children living near the public school were “driven from its doors, and compelled to walk a considerable distance . . . to attend the separate school.” Not only was this “super-added pedestrianism and its attendant discomfort” a “measure of inequality in one of its forms,” but more importantly, “[t]he indignity offered to the colored child is worse than any compulsory exposure, and here not only the child suffers, but the race to which he belongs is blasted and the whole community is hardened in wrong. . . . This is plain oppression,” Sumner declaimed, “which you, sir, would feel keenly were it directed against you or your child.”²²⁷

2. *Basis in Constitutional Text*

While clear about the legal theory for the bill, Sumner appeared unconcerned about the precise textual source of constitutional authority for it. He stated that he found constitutional authority for the bill “not in one place or in two places or three places, but I find it almost everywhere, from the preamble to the last line of the last amendment.”²²⁸ At various times he invoked the Declaration of Independence and the Thirteenth Amendment, as well as the Fourteenth.²²⁹ Sumner’s arguments based on the Declaration were not well-received, even by his supporters.²³⁰ Other advocates of

²²⁴ See *id.* at 3264 (May 9, 1872) (statement of Sen. Sumner).

²²⁵ See 2 Cong. Rec. 4147 (May 22, 1874)

²²⁶ Cong. Globe, 42d Cong., 2d Sess. 384 (Jan. 15, 1872).

²²⁷ *Id.*

²²⁸ *Id.* at 727 (Jan. 31, 1872).

²²⁹ *Id.* at 728.

²³⁰ See *Id.* at 760-61 (Feb. 1, 1872) (statement of Sen. Carpenter); *id.* at 730 (Jan. 31, 1872) (statement of Sen. Lot Morrill); *id.* at app. 1 (Jan. 25, 1872) (statement of Sen. Lot Morrill).

the measure, fortunately, were more precise. In a lengthy speech, Carpenter located the source of the power in the Privileges or Immunities clause, augmented by Section 5.²³¹ This was the most obvious and natural source of authority, for this was the clause that extended fundamental private rights to all citizens, without regard to race, color or other irrelevant characteristics. Senator John Sherman of Ohio, who had been a leading supporter of the Fourteenth Amendment, provided a similar constitutional analysis, likewise relying on Congress's power to enforce the Privileges or Immunities clause.²³² In the House, the bill's sponsor, General Benjamin Butler of Massachusetts, also relied on Privileges or Immunities.²³³ Senator Oliver Morton of Indiana relied instead on Equal Protection,²³⁴ as did Senator George Edmunds of Vermont, another prominent supporter of the Amendment.²³⁵

The constitutional argument took an abrupt and surprising turn in 1873, when the Supreme Court handed down its first decision interpreting the Fourteenth Amendment, in the *Slaughter-House Cases*.²³⁶ The decision involved a controversy seemingly far removed from the concerns of the framers of the Amendment or of the antagonists in the struggle over the civil rights bill. The State of Louisiana had passed an ordinance granting a monopoly over the business of meat butchery in New Orleans and surrounding parishes to a single firm, the Crescent City Live-Stock Landing and Slaughter-House Company. The excluded butchers of the City challenged the ordinance on the ground that it reserved the right to engage in a common trade or business, which is a privilege or immunity of citizens, to a particular class of persons, in violation of the equality of rights protected under the Fourteenth Amendment. The Supreme Court rejected that argument. In so doing, it adopted an extraordinarily narrow reading of the Privileges or Immunities Clause, which had been understood to be the central and most important substantive provision of the Amendment. In

²³¹ *Id.* at 761-63 (Feb. 1, 1872); see also *id.* at 763-64 (statement by Sen. Davis) (interpreting Carpenter's position as relying on the Privileges and Immunities Clause).

²³² *Id.* at 843-44 (Feb. 6, 1872). For a detailed analysis of the Privileges or Immunities Clause, see Harrison, *supra* note 9.

²³³ 2 Cong. Rec. 340 (1874) (statement of Rep. Butler on Dec. 19, 1873).

²³⁴ Cong. Globe, 42d Cong., 2d Sess. 847 (Feb. 6, 1872).

²³⁵ Cong. Globe, 42d Cong., 2d Sess. app. 26 (Feb. 6, 1872).

²³⁶ 83 U.S. (16 Wall.) 36 (1873).

essence, the Court held that the Privileges or Immunities Clause protected only against infringements of rights of United States citizens and not rights that derive from state law. As a result, such rights as habeas corpus, interstate travel, and the care and protection of the federal government while on the high seas or abroad would be protected,²³⁷ but common law rights of tort, property, and personal security would not be.²³⁸

This interpretation is implausible for three nearly incontrovertible reasons. First, it makes the Privileges or Immunities Clause redundant: rights derived from federal law already are protected against hostile state legislation under the Supremacy Clause.²³⁹ Second, it is inconsistent with the universal view that the Fourteenth Amendment encompassed (at least) the rights protected by the Civil Rights Act of 1866. The 1866 Act protected black citizens in their enjoyment of numerous rights derived from state law, including the right to make and enforce contracts, to acquire, hold, and dispose of property, and to testify in court.²⁴⁰ If *Slaughter-House* is correct, then these rights were not privileges or immunities of citizens—a position impossible to square with the legislative history of the Amendment. Third, the *Slaughter-House* decision means that the Privileges or Immunities Clause of the Fourteenth Amendment protects a different set of rights than the Privileges and Immunities Clause of Article Four, which is both textually improbable and contrary to extensive legislative history.²⁴¹ The better view is that the Privileges or Immunities Clause of the Fourteenth Amendment protected citizens against denials *by their own*

²³⁷ Id. at 79-80.

²³⁸ See Id. at 75-76.

²³⁹ See Harrison, *supra* note 9, at 1415. This point was effectively made by Justice Field in his *Slaughter-House* dissent. 83 U.S. at 96 (Field, J., dissenting). Interestingly, the point was admitted by prominent Democratic opponents of the Act. See 2 Cong. Rec. app. 312 (May 22, 1874) (statement of Sen. Merrimon) ("That provision [referring to the Privileges or Immunities Clause] is merely surplusage; if there was a citizenship of the United States before the adoption of this amendment to the Constitution, the States could not abridge the rights of a citizen of the United States before its adoption.").

²⁴⁰ See Harrison, *supra* note 9, at 1416.

²⁴¹ See, e.g., Cong. Globe, 39th Cong., 1st Sess. 1835-37 (Apr. 7, 1866) (statement of Rep. Lawrence, citing antebellum interpretations of the Privileges and Immunities Clause of Article IV in explaining the content of the Privileges or Immunities Clause of the Fourteenth Amendment); id. at 474-75 (Jan. 29, 1866) (statement of Sen. Trumbull to similar effect).

states of the same set of rights that the Privileges and Immunities Clause of Article Four protected against infringement by *other states*, and possibly, in addition, other rights of United States citizenship. On this reading of the Privileges and Immunities Clause, the rights that once were guaranteed to out-of-staters were now guaranteed to all citizens.²⁴²

Democratic opponents of the bill immediately seized on the *Slaughter-House* decision and quoted it over and over. The rights protected by the proposed civil rights bill all were derived from state law, mostly state common law. It followed, these opponents said, that Congress had no authority under the Fourteenth Amendment to legislate with respect to these rights. Congressman Roger Mills of Texas put the point in these words:

From the authority of adjudged cases it is clear that the privileges and immunities mentioned in the fourteenth amendment are only such as are conferred by the Constitution itself as the supreme law over all

. . . .

. . . Whatever rights the State confers are subject to its own sovereign pleasure. Whether it shall grant them, how grant them, and what discriminations it shall make in granting them, are questions left entirely to its own discretion.²⁴³

Senator Norwood stated:

no one, lawyer or layman, will deny that every privilege named in this bill before the adoption of the fourteenth amendment, was derived by those who enjoyed them exclusively from the States of which they were citizens. To keep a public inn; to bury the dead; to construct and manage railroads and other modes of conveyance; to

²⁴² See Harrison, *supra* note 9, at 1418-19, 1452. For an example of this point in the debates over the Sumner rider prior to the *Slaughter-House* decision, Senator Carpenter stated:

"[P]rivileges and immunities" were then what they are now. Privileges and immunities are protected differently now from what they were then Now these same privileges and immunities are protected in a different way, but they are the same. The same things which were then at the mercy of the States in a certain particular, are now secured and guaranteed by the fourteenth amendment.

Cong. Globe, 42d Cong., 2d Sess. 762 (Feb. 1, 1872).

²⁴³ 2 Cong. Rec. 384-85 (Jan. 5, 1874). Similar speeches were made by Representatives Bright, *id.* at 414-15 (Jan. 6, 1874); Herndon, *id.* at 419; Durham, *id.* at 405-06; Harris, *id.* at 376 (Jan. 5, 1874); and Stephens, *id.* at 379-80; Beck, *id.* at 342-43 (1874) (speaking on Dec. 19, 1873).

open and manage a theater, are privileges conferred by each State.²⁴⁴

It followed, under the logic of *Slaughter-House*, that Sumner's bill overstepped federal authority.

The *Slaughter-House* decision changed the tenor of the debate and forced the Republicans to clarify or revise the textual basis for their constitutional position. Some Republicans simply insisted that the *Slaughter-House* decision "is not the law" and should not be followed by the Congress.²⁴⁵ Senator Howe predicted that the *Slaughter-House* opinion would never "be accepted by the profession or the people of the United States."²⁴⁶ So unnatural was the *Slaughter-House* reasoning that most members of Congress continued to speak in terms of privileges and immunities except when explicitly discussing the decision itself. Others interpreted *Slaughter-House* as standing for the proposition that the Fourteenth Amendment prohibits "distinctions and discriminations . . . made on account of race, color, or previous condition of servitude," but has no application when distinctions are "made upon any other ground."²⁴⁷ The main Republican response, however, was to shift the weight of their position from the Privileges or Immunities Clause to the Equal Protection Clause.

The relation between the Equal Protection and Privileges or Immunities Clauses is an unsettled question, to which little scholarly or judicial attention has been paid.²⁴⁸ This is what we can say

²⁴⁴ *Id.* at app. 240 (Apr. 30, and May 4, 1874).

²⁴⁵ See 3 Cong. Rec. 1792 (Feb. 26, 1875) (statement of Sen. Boutwell) (stating, in terms reminiscent of Lincoln's remarks on *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), that the *Slaughter-House* decision "is the law of the case, but it is not law beyond the case; it is not law with reference to the rights of the States generally, and certainly is not law for the Senate"). Senator Alcorn stated:

This is one branch of this Government, the legislative department; the judiciary is another branch; and we go forward without regard to the opinions of each other unless those opinion have taken the form of judicial decision rendered in answer to the demands of a case properly brought before the court.

2 Cong. Rec. app. 304 (May 22, 1874).

²⁴⁶ 2 Cong. Rec. 4148 (May 22, 1874). He was, of course, mistaken in a literal sense, as the Privileges or Immunities Clause has essentially been read out of existence; but the substance of his prediction has been fulfilled circuitously by the expansive interpretation now afforded to the Equal Protection Clause.

²⁴⁷ See, e.g., 3 Cong. Rec. 943 (Feb. 3, 1875) (statement of Rep. Lynch).

²⁴⁸ Maltz, *supra* note 13, at 96-102, and Harrison, *supra* note 9, are the principal exceptions.

with confidence: the Privileges or Immunities Clause by its terms applies only to United States citizens, while the Equal Protection Clause applies to "any person within [a state's] jurisdiction."²⁴⁹ The Equal Protection Clause clearly applies to laws passed for the security of persons and property,²⁵⁰ and perhaps to other laws for the benefit or protection of persons;²⁵¹ but it falls short of protecting the full range of privileges and immunities of citizens.²⁵² Thus, the Privileges or Immunities Clause applies to a smaller class of persons and a larger class of rights.²⁵³ The only clear example we have of a right that was protected on behalf of citizens under the Privileges or Immunities Clause but not on behalf of noncitizens under the Equal Protection Clause was the right to own real property,²⁵⁴ but in theory there must have been others.

Republican supporters of the civil rights bill turned to the Equal Protection Clause as a solution to the *Slaughter-House* problem because that Clause was not limited to rights of federal citizenship. In one of the most important speeches in the House debates, Robert Elliott of South Carolina reasoned as follows:

²⁴⁹ U.S. Const. am. XIV, § 1.

²⁵⁰ See Harrison, *supra* note 9, at 1435-38; see also Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 *Duke L.J.* 507, 566-70 (1991) (defining the scope of the Equal Protection Clause, as originally understood, as encompassing civil protection, criminal protection, and prevention of injury).

²⁵¹ Harrison, *supra* note 9, at 1441; see *Cong. Globe*, 42d Cong., 2d Sess. 847 (Feb. 6, 1872) (statement of Sen. Morton) (Equal Protection "means not simply the protection of the person from violence, the protection of his property from destruction, but it is substantially in the sense of the equal benefit of the law"); accord 2 *Cong. Rec.* 412 (Jan. 6, 1874) (statement of Rep. Lawrence). As Harrison points out, this was distinctly a minority position before *Slaughter-House*, but was more commonly held after the decision. Harrison, *supra* note 9, at 1430. A good statement of the prevailing view prior to *Slaughter-House* was made by Senator Allen Thurman, Democrat from Ohio, at *Cong. Globe*, 42d Cong., 2d Sess. 496 (Jan. 22, 1872).

²⁵² Harrison, *supra* note 9, at 1449-51.

²⁵³ See Maltz, *supra* note 13, at 102.

²⁵⁴ This can be deduced from the fact that section 18 of the Enforcement Act of 1870, which reenacted the Civil Rights Act of 1866, applied only to citizens and included the rights of property, while section 16, which was new, applied to all persons and conspicuously did not include the rights of property. See Act of May 31, 1870, Ch. 114, §§ 16, 18, 16 Stat. 140, 144. This distinction survives in current law. Compare 42 U.S.C. § 1981 (1988) (applicable to all persons) with 42 U.S.C. § 1982 (1988) (applicable only to citizens). For a more detailed discussion, see Harrison, *supra* note 9, at 1442-51; Earl M. Maltz, *The Constitution and Nonracial Discrimination: Alienage, Sex, and the Framers' Ideal of Equality*, 7 *Const. Comm.* 251, 257-65 (1990).

There are privileges and immunities which belong to me as a citizen of the United States, and there are other privileges and immunities which belong to me as a citizen of my State. . . . But what of that? Are the rights which I now claim [summarizing the rights protected by the bill] rights which I hold as a citizen of the United States or of my State? Or, to state the question more exactly, is not the denial of such privileges to me a denial to me of the equal protection of the laws? For it is under this clause of the fourteenth amendment that we place the present bill, no State shall "deny to any person within its jurisdiction the equal protection of the laws." No matter, therefore, whether his rights are held under the United States or under his particular State, he is equally protected by this amendment.²⁵⁵

William Lawrence, a former judge and a supporter of the Fourteenth Amendment in the Thirty-ninth Congress, delivered a lengthy and meticulous analysis of the constitutional issue, in which he argued that the word "protection" in the Equal Protection Clause "must not be understood in any restricted sense, but must include every benefit to be derived from laws."²⁵⁶ This included the right "to an equal participation in the benefit to result from the law regulating common carriers."²⁵⁷ He explained that "[a]ll these [civil rights] acts proceed upon the idea that if a State omits or neglects to secure the enforcement of equal rights, that it 'denies' the equal protection of the laws within the meaning of the fourteenth amendment."²⁵⁸ These speeches established the new constitutional theory of the bill.

Democrats did not bother to respond to the equal protection argument. They continued to make speeches quoting from *Slaughter-House* and insisting that the rights protected by the bill were not privileges or immunities of United States citizens.²⁵⁹

It is evident that Equal Protection would not have emerged as the basis for the bill if not for *Slaughter-House*. The Republicans'

²⁵⁵ 2 Cong. Rec. 409 (Jan. 6, 1874).

²⁵⁶ Id. at 412.

²⁵⁷ Id.

²⁵⁸ Id. at 414; accord id. at 416 (statement of Rep. Walls) (conceding for sake of argument that the privileges or immunities of citizens were not presently being denied under state law but basing support for the bill on the denial of equal protection).

²⁵⁹ See, e.g., id. at 741-42 (Jan. 17, 1874) (statement of Rep. Hamilton); id. at app. 1-3 (Jan. 7, 1874) (statement of Rep. Southard).

resourceful reliance on the Equal Protection Clause as the principal provision dealing with issues of racial discrimination persists to this day. The Privileges or Immunities Clause is a virtual dead letter, while the Equal Protection Clause has expanded to cover all the rights previously protected by the Privileges or Immunities Clause, and more. This is a remarkable inversion, since the Privileges or Immunities Clause was viewed by the framers as the principal provision, and the Equal Protection Clause received little attention. The most important practical effect of the doctrinal shift has been to obscure the distinction between rights pertinent to citizens and rights pertinent to noncitizens, which was significant to the framers of the Fourteenth Amendment (as is obvious on the face of the text), but is largely inconsequential to the constitutional law of today.²⁶⁰

So far as the debates reveal, only one member of Congress changed his position as result of the *Slaughter-House* decision, but he was an influential convert: Senator Matthew Carpenter of Wisconsin. Carpenter is also the only member of Congress who spoke in favor of the policy and justice of the bill,²⁶¹ but against its constitutionality.²⁶² As already noted, prior to *Slaughter-House*, Carpenter had stated that he had "no doubt of the power of this Government under the fourteenth amendment" to pass the bill as applied to schools and other institutions "supported by law and maintained by general taxation."²⁶³ After *Slaughter-House*, in

²⁶⁰ See, e.g., *Sugarman v. Dougall*, 413 U.S. 634, 642-43 (1973) (holding alienage to be a suspect basis of classification under the Equal Protection Clause). The holding of *Sugarman* is ironic, because the very text of the Fourteenth Amendment discriminates between "citizens" and other "persons." As a practical matter, the elevation of alienage to protected status creates serious difficulties only as applied to political rights, which, as has been noted, were not originally understood to be encompassed by the Fourteenth Amendment at all. Having collapsed the distinction between the privileges and immunities of *citizens* and the right of all *persons* to the equal protection of the laws, as well as the distinction between civil and political rights, the Supreme Court has been forced to recreate the distinction between citizens and persons for purposes of political rights cases under the Equal Protection Clause. See, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (upholding a citizen/alien distinction where the restriction on aliens has a political, as opposed to economic, function). Thus, the original logical structure of the Amendment reemerges from the rubble of the Court's decisions.

²⁶¹ See 3 Cong. Rec. 1861 (Feb. 27, 1875).

²⁶² *Id.* at 1861-63.

²⁶³ Cong. Globe, 42d Con., 2d Sess. 763 (Feb. 1, 1872). From the beginning, Carpenter believed that the jury provisions of the bill were unconstitutional. See Cong. Globe, 42d

which he was the lawyer for the monopoly butchers, Carpenter became convinced "that all of the provisions of this bill are in conflict with the Constitution of the United States as expounded by the Supreme Court."²⁶⁴ It is only natural for counsel to be persuaded by the opinion in a case that he won. But Carpenter found equal support for this conclusion in *Bradwell v. Illinois*,²⁶⁵ which he had lost. Carpenter did not defend *Slaughter-House* or *Bradwell* on the merits. "It may be said that these decisions are incorrect," he acknowledged, but "still it must be admitted that the decisions exist, and that they prescribe for the judicial department of the Government a rule which must be applied to this bill."²⁶⁶ Carpenter predicted that, by force of Supreme Court precedent, "every circuit court in which a suit may be commenced" would find the bill unconstitutional.²⁶⁷ He also predicted that "this bill, should it pass through all the forms of enactment, would be a dead letter."²⁶⁸ Its only effect would be "to involve the colored man in litigation in which he is certain to be defeated."²⁶⁹ In the end, the bill "would delay, not accelerate, the end desired."²⁷⁰ This was to prove a more accurate prophecy than he had any just cause to expect.

C. *Constitutional Arguments of the Opposition, and the Republican Response*

Two principal constitutional theories dominated the arguments of the opposition. Some opponents conceded that the Fourteenth Amendment guaranteed all persons an equality of rights, including education, but denied that segregated education is unequal if facilities are otherwise comparable in quality or cost. That argument will be considered in Subsection 1. Others maintained that the Amendment gave Congress no authority to interfere with the administration of public schools, which are a state and local

Cong., 2d Sess. 827-28 (1872). His other constitutional objections, having to do with churches and private organizations, had been remedied by amendments to the bill. See *infra* notes 497-504 and accompanying text.

²⁶⁴ 3 Cong. Rec. 1863 (Feb. 27, 1875).

²⁶⁵ 83 U.S. (16 Wall.) 130 (1873).

²⁶⁶ 3 Cong. Rec. 1863 (Feb. 27, 1875).

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 1862.

²⁶⁹ *Id.* at 1863.

²⁷⁰ *Id.* at 1861.

responsibility. Education, according to this theory, is not a civil right. That argument will be considered in Subsection 2. It should be noted at the outset that the second argument is in tension with the first. If the Fourteenth Amendment does not have application to education, then there is no constitutional requirement that facilities must be "equal," or indeed, that black children be allowed to attend school at all. In making the separate-but-equal argument, opponents of the bill implicitly (and often explicitly) disavowed the argument that education is not a civil right protected by the Amendment. The clearest example comes in this colloquy between Senators Morton and Merrimon:

Mr. MORTON. If I understand the scope of the Senator's question he now admits, in effect, . . . that if the State law excludes the colored children from the schools entirely, that is a violation of the fourteenth amendment.

Mr. MERRIMON. I admit that with all its force. But the point I make is this, that it is competent for the State to make a distinction on account of race or color if it shall make the same provision for the black race that it makes for the white race. . . .²⁷¹

This tension in the opponents' arguments is significant because it shows that no one constitutional theory opposed to school desegregation commanded more than a fraction of a minority.

1. *Segregation Is Not Unequal*

The legitimacy of separate but equal facilities was defended on three grounds: (a) the principle of formal (or "symmetrical") equality; (b) an interpretation of the social meaning of segregation; and (c) the distinction between civil rights and social rights.

a. *Formal Equality*

The formal equality argument was based on the proposition that laws permitting or requiring segregated facilities treat members of both races precisely alike. Blacks cannot attend white schools; whites cannot attend black schools; all persons are required to attend schools of their own race. The distinguishing character of the argument is that it is based on the formally symmetric treatment of the two races, without regard to the social context in which

²⁷¹ 2 Cong. Rec. app. 359 (May 21, 1874).

the system operates. It was first articulated (in these debates) by Senator Joshua Hill of Georgia. Hill took issue with

the proposition that if there be a hotel for the entertainment of travelers, and two classes stop at it, and there is one dining room for one class and one for another, served alike in all respects, with the same accommodations, the same attention to the guests, there is anything offensive or anything that denies the civil rights of one more than the other.²⁷²

Racial segregation, Hill argued, preserves a perfect equality of legal rights for all persons, black as well as white. "I myself am subject in hotels and upon railroads to the regulations provided by the hotel proprietors for their guests, and by the railroad companies for their passengers."²⁷³ Hill said he was "entitled, and so is the colored man, to all the security and comfort that either presents to the most favored guest or passenger," but proximity to a person of a different race "does not increase my comfort or security, nor does proximity to me on his part increase his; and therefore it is not a denial of any right in either case."²⁷⁴

The argument for separate but equal schools was essentially identical to the argument for separate facilities in inns and transportation, but more intense. Blacks and whites could have "equal" schools, opponents of the bill said, without going to the "same" schools.²⁷⁵ Senator Arthur Boreman of West Virginia stated that "it is just as much a violation of the right of a white child to keep him out of a black school as it is of a black child to keep him out of a white school."²⁷⁶ Similarly, Representative John Atkins of Tennessee argued:

²⁷² Cong. Globe, 42d Cong., 2d Sess. 241 (1872) (statement of Sen. Hill on Dec. 20, 1871).

²⁷³ *Id.* at 242.

²⁷⁴ *Id.*

²⁷⁵ 2 Cong. Rec. 4144 (May 22, 1874) (statement of Sen. Stockton).

²⁷⁶ Cong. Globe, 42d Cong., 2d Sess. 3195 (May 8, 1872); accord 2 Cong. Rec. app. 313, 315 (May 22, 1874) (statement of Sen. Merrimon). In a telling misstatement of the argument, Senator Francis Blair, an abolitionist Democrat from Missouri and former Union colonel, stated that the "white children can no more be compelled to enter schools in which black children are being taught than the blacks can enter those in which the whites are being taught, and the discrimination is as much against one as the other." Cong. Globe, 42d Cong., 2d Sess. 3251 (May 9, 1872). He seemed not to notice the difference between compulsion and permission.

Are the States to be forced, in the education of the youth, to a procrustean rule which requires children of all colors and both sexes to be together[?] May not equal advantages be enjoyed by all, and yet keep the sexes and colors apart? Would that not be a general law, and would it work any deprivation or hardship to any one? The social restriction would apply to the white child as well as to the black.²⁷⁷

Senator Orris Ferry of Connecticut, who as a Northern Republican was one of the most important opponents of the school desegregation proposal, argued that “[t]he same facilities, the same advantages, the same opportunities of education are given to the white child and the black child The only difference is that they do not receive those equal facilities and advantages in the same school-room”²⁷⁸ Thus, the separate-but-equal argument was clearly presented, in terms not dissimilar to those at the time of *Brown*.

Proponents countered that symmetrical restrictions on the two races do not constitute “equality.” They said that “free government demands the abolition of all distinctions founded on color and race.”²⁷⁹ “[Y]ou cannot get out by saying that there is an equality of right when you declare that you will put the black sheep in one place and the white sheep in another,” Edmunds asserted.²⁸⁰ As Sherman put the point: “The time has come when all distinctions that grew out of slavery ought to disappear . . . ; but, sir, as long as you have distinctions and discriminations between white and black in the enjoyment of legal rights and privileges[,] . . . you will have discontent and parties divided between black and white.”²⁸¹ Sumner characterized the proposal for “separate arrangements” for colored persons as “a substitute for equality.”²⁸²

²⁷⁷ 2 Cong. Rec. 453 (May 8, 1874).

²⁷⁸ Cong. Globe, 42d Cong., 2d Sess. 3190 (1872).

²⁷⁹ 2 Cong. Rec. 4083 (May 20, 1874) (statement of Sen. Pratt); accord 3 Cong. Rec. 945 (Feb. 3, 1875) (statement of Rep. Lynch); id. at 958 (statement of Rep. Harris); 2 Cong. Rec. 3260 (May 9, 1874) (statement of Sen. Edmunds); Cong. Globe, 42d Cong., 2d Sess. 819 (Feb. 5, 1872) (statement of Sen. Wilson).

²⁸⁰ Cong. Globe, 42d Cong., 2d Sess. 3190 (May 8, 1872).

²⁸¹ Id. at 3193.

²⁸² Id. at 382 (Jan. 15, 1872).

This he said was “clearly a contrivance, if not a trick, as if there could be any equivalent for equality.”²⁸³

Supporters of the bill found no incongruity in the proposition that segregation discriminates against members of *both* races. Thus, in a colloquy with Hill, Sumner was asked, “On which race . . . does the inequality to which the Senator refers operate?”²⁸⁴ Sumner replied, “On both.”²⁸⁵ That the discrimination was symmetrical did not make it any less discrimination.

Although the term “color-blind,” later made famous by the first Justice Harlan in his dissenting opinion in *Plessy v. Ferguson*,²⁸⁶ was not uttered during the debate, proponents of the bill used synonymous formulations. Representative John Lynch stated that “[t]he duty of the law-maker is to know no race, no color, no religion, no nationality, except to prevent distinctions on any of these grounds, so far as the law is concerned.”²⁸⁷ Sumner quoted from *Smith v. Gould*,²⁸⁸ that “[t]he common law takes no notice of negroes being different from other men,” which he then paraphrased as “[the law] makes no discrimination on account of color.”²⁸⁹ Sherman said that the way to restore peace in the South was to “[w]ipe out all legal discriminations between white and black, . . . make no distinction between black and white.”²⁹⁰ Representative Richard Cain, a black congressman from South Carolina, stated that “my understanding of human rights, of democracy if you please, is all rights to all men, . . . without regard to sections, complexions, or anything else.”²⁹¹

b. Social Meaning of Segregation

Opponents of the bill also offered arguments based on the social meaning of segregation, denying that, as a matter of practical reality, segregation was understood by blacks as a badge of inequality. In fact, supporters of segregation frequently stated, “the negro is as

²⁸³ *Id.*

²⁸⁴ *Id.* at 242 (1872) (statement of Sen. Hill on Dec. 20, 1871).

²⁸⁵ *Id.*

²⁸⁶ 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

²⁸⁷ 3 Cong. Rec. 945 (Feb. 3, 1875).

²⁸⁸ 92 Eng. Rep. 338, 338 (1706).

²⁸⁹ Cong. Globe, 42d Cong., 2d Sess. 385 (Jan. 15, 1872).

²⁹⁰ *Id.* at 3193 (May 8, 1872).

²⁹¹ 3 Cong. Rec. 956 (Feb. 3, 1875).

much interested in keeping aloof from the white man as the white man is interested in keeping aloof from the negro."²⁹² They professed not to understand why blacks would interpret segregation as a brand of inferiority. "Have they no pride of race and of kindred?" Senator Cooper of Tennessee inquired. "Think you that it would trouble the Anglo-Saxon for any other race to turn him aside? Think you he would care?"²⁹³

There was some validity to the claim that a significant number of black Americans supported, or at least tolerated, segregated education, though the degree of black support was greatly exaggerated.²⁹⁴ What the congressional spokesmen for segregation neglected to point out, however, is that a principal motivating factor in black support for segregated schools was the fear that their children would be insulted and mistreated in common schools.²⁹⁵

Opponents of the bill frequently drew analogies to forms of separation that do not ordinarily carry a connotation of subordination or inferiority, such as the separation of young from old, or boys from girls.²⁹⁶ In light of arguments a century later over whether the Fourteenth Amendment applies to gender discrimination, it is noteworthy that many members of Congress invoked the analogy of sex-segregated schools. Senator Thurman inquired, "Is not a female child a citizen? Is she not entitled to equal rights? Why, then, do you allow your school directors to provide a school for her separate from a school for the male?"²⁹⁷ Senator Carpenter argued that if

²⁹² 2 Cong. Rec. app. 316 (May 22, 1874) (statement of Sen. Merrimon); accord 2 Cong. Rec. 411 (Jan. 6, 1874) (statement of Rep. Blount); *id.* at 381 (Jan. 5, 1874) (statement of Rep. Stephens); Cong. Globe, 42d Cong., 2d Sess. 3259-60 (May 9, 1872) (statement of Sen. Hill); *id.* at 241 (1872) (statement of Sen. Hill on Dec. 20, 1871). This contradicted the opponents' other argument, that the Republicans were supporting the bill only for the purpose of currying favor with the 800,000 black voters in the South. See *id.* at 4083 (May 30, 1872) (statement of Sen. Thurman).

²⁹³ 2 Cong. Rec. 4155 (May 22, 1874).

²⁹⁴ See Gillette, *supra* note 18, at 201 (describing arguments within the black community); Kaestle, *supra* note 79, at 175-76 (same).

²⁹⁵ Kaestle, *supra* note 79, at 173, 178; Gillette, *supra* note 18, at 201. Black parents were also very concerned about having black teachers for their children, which would not be likely in integrated schools. Kaestle, *supra*, at 176.

²⁹⁶ See, e.g., 2 Cong. Rec. 4144 (May 22, 1874) (statement of Sen. Stockton); Cong. Globe, 42d Cong., 2d Sess. 3261 (May 9, 1872) (statement of Sen. Casserly).

²⁹⁷ Cong. Globe, 42d Cong., 2d Sess. app. 26 (Feb. 6, 1872).

these provisions of the fourteenth amendment require that colored persons should be eligible to serve as jurors in State courts . . . , then this bill ought to be so amended as to provide that women and babes at the breast should be so eligible; because they are *persons* equally with colored citizens entitled under these two clauses of the amendment to everything secured to colored citizens.²⁹⁸

Senator Merrimon noted that “[t]here is no provision in the Constitution of the United States which protects color any more than sex or age.”²⁹⁹ Proponents did not quite know how to respond. Even as well-informed a Senator as George Edmunds was unsure about the implications of the Fourteenth Amendment for the question of gender discrimination, stating that he had “never considered the female question.”³⁰⁰ Notably, they did *not* retort that the Fourteenth Amendment applies to racial classifications only, or that it is irrelevant to distinctions based on sex.

Proponents of the civil rights bill heaped scorn on the opposition’s claim that segregation was understood to be equal in its practical effect. The notion that “color and race are reasons for distinctions among citizens,” they said, is a “slave doctrine.”³⁰¹ When compelled by law, the segregation of the races is “an unjust and odious proscription.”³⁰² Segregation is tantamount to “caste.”³⁰³ Senator Frelinghuysen called segregation by law “an enactment of personal degradation” and a form of “legalized disa-

²⁹⁸ 3 Cong. Rec. 1861-62 (Feb. 27, 1875). For additional statements on the application of the Fourteenth Amendment to gender, see 2 Cong. Rec. 4171-72 (May 22, 1874) (statement of Sen. Sargent); *id.* at app. 359 (May 21, 1874) (statement of Sen. Merrimon); *id.* at 453 (Jan. 7, 1874) (statement of Rep. Atkins); Cong. Globe, 42d Cong., 2d Sess. 3190 (May 8, 1872) (statement of Sen. Ferry).

²⁹⁹ 2 Cong. Rec. app. 313 (May 22, 1874).

³⁰⁰ Cong. Globe, 42d Cong., 2d Sess. 3190 (May 8, 1872). For some of Senator Edmunds’ subsequent ruminations about sex and age discrimination, see *id.* at 3260 (May 9, 1872).

³⁰¹ Cong. Globe, 42d Cong., 2d Sess. 3260 (May 9, 1872) (statement of Sen. Edmunds); accord *id.* at app. 16 (Feb. 3, 1872) (statement of Rep. Rainey).

³⁰² 3 Cong. Rec. 945 (Feb. 3, 1875) (statement of Rep. Lynch).

³⁰³ 3 Cong. Rec. 1000 (Feb. 4, 1875) (statement of Rep. Burrows); 2 Cong. Rec. 407 (Jan. 6, 1874) (statement of Rep. Elliott); Cong. Globe, 42d Cong., 2d Sess. 383 (Jan. 15, 1872) (statement of Sen. Sumner). In 1869, Sumner delivered a lecture entitled “On the Question of Caste,” published in 13 Works of Charles Sumner 133 (Boston, Lee & Shepard 1880), in which he defined the term “caste” as “any separate and fixed order of society,” where one group “claim[s] hereditary rank and privilege” while another is “doomed to hereditary degradation and disability.” *Id.* at 140, 146.

bility or inferiority," effectively a denial of citizenship and a return to slavery.³⁰⁴ Representative Burrows stated that the sole purpose of the separate but equal schools proposal was "the subjugation of the weak of every class and race" and averred that he would "never give [his] vote or voice to the support of any such pernicious doctrine."³⁰⁵ Representative Rainey said that segregation treats the black man like a leper.³⁰⁶ Sumner declared that "any rule excluding a man on account of his color is an indignity, an insult, and a wrong."³⁰⁷ Speaking as floor leader for the bill after Sumner's death, Frelinghuysen addressed the argument at length:

If it be asked what is the objection to classification by race, separate schools for colored children, I reply, that question can best be answered by the person who proposes it asking himself what would be the objection in his mind to his children being excluded from the public schools that he was taxed to support on account of their supposed inferiority of race.

The objection to such a law in its effect on the subjects of it is that it is an enactment of personal degradation.

The objection to such a law on our part is that it would be legislation in violation of the fundamental principles of the nation.

The objection to the law in its effect on society is that "a community is seldom more just than its laws;" and it would be perpetuating that lingering prejudice growing out of a race having been slaves which it is as much our duty to remove as it was to abolish slavery.³⁰⁸

Proponents of the bill denied that segregated facilities were or could be equal, in light of the message of inferiority conveyed by the arrangement. For example, in answer to Senator Hill's argument that railroads should be permitted to segregate their passengers by race "provided all the comfort and security be furnished to passengers alike,"³⁰⁹ Sumner replied: "Now let me ask the Senator whether in this world the personal respect that one receives is not

³⁰⁴ 2 Cong. Rec. 3452 (Apr. 29, 1874).

³⁰⁵ 3 Cong. Rec. 999 (Feb. 4, 1875).

³⁰⁶ Cong. Globe, 42d Cong., 2d Sess. app. 16 (Feb. 3, 1872).

³⁰⁷ Cong. Globe, 42d Cong., 2d Sess. 242 (1872) (statement of Sen. Sumner on Dec. 20, 1871).

³⁰⁸ 2 Cong. Rec. 3452 (Apr. 29, 1874).

³⁰⁹ Cong. Globe, 42d Cong., 2d Sess. 242 (1872) (Sen. Hill speaking on Dec. 20, 1871).

an element of comfort? If a person is treated with indignity, can he be comfortable?"³¹⁰

The proponents also argued that desegregation was necessary as a political guarantee that facilities would even be materially equal. Sumner stated that it was "impossible. . . for a separate school to be the equivalent of the common school." He explained that "[w]hite parents will take care not only that the common school is not neglected, but that its teachers and means of instruction are the best possible, and the colored child will have the benefit of this watchfulness."³¹¹ Frelinghuysen asserted that "we know that if we establish separate schools for colored people, those schools will be inferior to those for the whites" because the whites are politically dominant and will favor their own.³¹² "The value of the principle of equality in government is that thereby the strength of the strong inures to the benefit of the weak . . ."³¹³ In a later speech, Edmunds presented extensive evidence of the actual inequality of the schools, arguing that segregation enabled states "to grind out every means of education that the colored man can have, and to feed the white at the expense of the black."³¹⁴

Sumner went to extraordinary lengths to refute the claim that black citizens favored racial segregation. For an entire day, January 15, 1872, Sumner read and commented upon a large number of letters, petitions, and resolutions from all over the country, representing many thousands of black citizens complaining of exclusion from schools, common carriers, and public accommodations on grounds of race and asking for enactment of the civil rights bill. The report of this oration consumes seventeen columns of small type in the *Congressional Globe*.³¹⁵ A typical letter was that from Mr. J.F. Quarles of Georgia, who wrote:

[I]n whatever direction we go, whether it be in public places of amusement, in the street cars, upon the railroad, in the hotel, or in the way-side inn, we encounter the invidious distinction of caste and oligarchy. We cannot think of these things without impa-

³¹⁰ Id. at 243.

³¹¹ Id. at 384 (Jan. 15, 1872).

³¹² 2 Cong. Rec. 3452 (Apr. 29, 1874).

³¹³ Id.

³¹⁴ Id. at 4173 (May 22, 1874).

³¹⁵ See Cong. Globe, 42d Cong., 2d Sess. 429-34 (Jan. 7, 1872).

tience; we cannot speak of them without denouncing them as unworthy of an intelligent and humane people. Nay, we would be less than men if we did not everywhere, and under all circumstances, utter our earnest and solemn protest against this inhuman outrage upon our manhood.³¹⁶

Two weeks later, Sumner was at it again, filling eleven more columns with letters and commentary to the same effect.³¹⁷ Similarly, in the House, Alonzo Ransier, a black South Carolinian, declared that "I know that I speak for five million people" in support of the bill, and read into the record memorials from three national or regional conventions of African-Americans expressing their support for the bill in the strongest of terms.³¹⁸

Most of all, proponents of the bill insisted that school segregation was based solely on "prejudice" and would foster "prejudice."³¹⁹ Representative Williams of Wisconsin interpreted segregation as "teach[ing] our little boys that they are too good to sit with these men's children in the public school-room, thereby nurturing a prejudice they never knew, and preparing these classes for mutual hatred hereafter. . . ."³²⁰ Representative Butler commented that "the only argument which has been introduced here [is] the argument to prejudice."³²¹ "The God-given color of the African," Sumner said, "is a constant offense to the disdainful white," but the "equal rights, promised by the great Declaration" must not be "sacrificed to a prejudice."³²²

c. The Distinction Between Civil Rights and Social Rights

The final argument in defense of segregation was that the intermingling of the races was not a civil, but a social right. This argument conceded that all citizens had a civil right to access to facilities of equal quality, but characterized the additional requirement of desegregation as an attempt to enforce "social equality," which was beyond the reach of congressional authority under the

³¹⁶ *Id.* at 429.

³¹⁷ See *id.* at 726-29 (Jan. 31, 1872).

³¹⁸ 2 Cong. Rec. 1311-12 (Feb. 7, 1874).

³¹⁹ See, e.g., *id.* at 408 (Jan. 6, 1874) (statement of Rep. Elliott).

³²⁰ 3 Cong. Rec. 1002 (Feb. 4, 1875).

³²¹ 2 Cong. Rec. 457 (Jan. 7, 1874).

³²² Cong. Globe, 42d Cong., 2d Sess. 384 (Jan. 15, 1872).

Fourteenth Amendment.³²³ Representative Robert Vance of North Carolina, for example, was willing to concede that “[o]ne of the civil rights of the colored man undoubtedly is the right to be educated out of moneys raised by taxation,” but maintained that the right to “go into the same school with white children, mixing the colored children and the white children in the same schools” is a “social right instead of a civil right.”³²⁴ Representative Aylett Buckner of Missouri claimed that

[the blacks’ complaint is] not that they are excluded from transportation on railroads and other means of conveyance, not that they do not frequent places of amusement, not that they are compelled to take shelter from the elements in the public street or in the open highway, nor that their children are deprived of elementary education in the public schools. This is not the ground of pretended complaint. It is that they do not eat at the same table and sleep in the same bed with the whites; that they do not ride in the same car, and laugh at the stale jokes of circus-clowns from the same seat; that their children are not sandwiched between the blue-eyed German and the black-eyed American, at the same desk and con the same lessons from the same book, and that the same earth that conceals the dead body of the white man from sight shall cover the corpse of the negro.³²⁵

According to Buckner, this meant that “[i]t is not civil rights but social rights that [the bill] seeks to enforce and protect. It is not equality before the law, but equality in society, that Massachusetts hankers after with such avidity.”³²⁶ Another opponent made the point by proposing an amendment to the title of the bill, to “change it from ‘civil rights’ to ‘social rights.’”³²⁷ This argument was repeated over and over again.³²⁸ So common was the social

³²³ This argument should not be confused with the argument, made most prominently by Senator Lyman Trumbull, that education itself is not a civil right. See *infra* Part II.C.2.

³²⁴ 2 Cong. Rec. 555 (Jan. 10, 1874).

³²⁵ *Id.* at 428 (Jan. 6, 1874).

³²⁶ *Id.*

³²⁷ Cong. Globe, 42d Cong., 2d Sess. 4321 (June 7, 1872) (statement of Sen. Brooks).

³²⁸ See, e.g., 3 Cong. Rec. 949 (Feb. 3, 1875) (statement of Rep. Finck); 2 Cong. Rec. 411 (Jan. 6, 1874) (statement of Rep. Blount); Cong. Globe, 42d Cong., 2d Sess. 3251 (May 9, 1872) (statement of Sen. Blair); *id.* at 819 (Feb. 5, 1872) (statement of Sen. Norwood); *id.* at app. 9 (Jan. 30, 1872) (statement of Sen. Saulsbury); *id.* at 242 (1872) (statement of Sen. Hill on Dec. 20, 1871).

equality argument that Republicans called it the "great bugaboo" of the opposition.³²⁹

No one seemed to notice that this argument contradicted the opposition's other argument: that segregation does not constitute inequality and is equally desirable for both races. Democrats were in the awkward position of arguing that segregation does not impart a social meaning of inequality, and that the inequality it imparts is merely social.

The "social rights" argument was based on a tripartite division of rights, universally accepted at the time but forgotten today, between civil rights, political rights, and social rights.³³⁰ Supporters and opponents of the bill alike agreed that the Fourteenth Amendment had no bearing on "social rights." This underscores that the dominant Republican position was based not so much on an abhorrence of racial discrimination as a general moral evil as on a particular understanding of the concept of citizenship.³³¹ Because of the modern association of desegregation with opposition to racism in all its forms, the persistence of racist attitudes and "negrophobia" among many Republicans has been taken as evidence that they could not have been committed to desegregation of schools and other public institutions.³³² But this inference is unreliable. To the Republicans of the Reconstruction period, equality of civil rights was not necessarily linked to equality in general, and particularly not to social equality. The issue, for them, was not relations between the races but realization of an ideal of a government of citizens who were equal in their rights before the law, however unequal they might be in other respects. Thus, General Butler, one of the most radical of the Radicals, could declare:

"Equality!" We do not propose to legislate to establish any equality. I am not one of those who believe that all men were created equal, if equality is to be used in its broadest sense. I believe that "equal" in the Declaration of Independence is a political

³²⁹ 3 Cong. Rec. 957 (Feb. 3, 1875) (statement of Rep. Cain).

³³⁰ See Cong. Globe, 42d Cong., 2d Sess. 901 (Feb. 8, 1872) (statement of Sen. Trumbull). This distinction is discussed at greater length below. See *infra* notes 365-69, 376-86 and accompanying text.

³³¹ See Maltz, *Reconstruction Without Revolution*, *supra* note 203, at 224.

³³² See Berger, *supra* note 13, at 10-16; Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 Duke L.J. 624, 638, 648.

word, used in a political sense, and means equality of political rights.³³³

Senator Morton similarly stated that “[w]e have a constitutional amendment that makes all men equal before the law. It does not make them all equal in point of intellect, in point of property, in point of education, but they have equal rights before the law.”³³⁴

But while agreeing that the Fourteenth Amendment did not extend to “social rights,” opponents and proponents of the bill were far from agreement about what those rights were. There were no attempts at systematic definition from either side,³³⁵ but opponents of the bill apparently viewed the category as encompassing all rights that relate to social interaction or contact between the races. Thus, Senator Saulsbury framed the argument in terms of the proponents’ supposed “desire to enforce familiarity, association, and companionship between the races.”³³⁶ Senator Blair called it an attempt “to impose upon the whites of the community the necessity of a close association in all matters with the negroes.”³³⁷ Several speakers claimed that the principle of the bill would extend to private homes and associations. Senator Hill, for instance, said that “[w]hat [Sumner] may term a right may be the right of any man that pleases to come into my parlor and to be my guest. That is not the right of any colored man upon earth, nor of any white man, unless it is agreeable to me.”³³⁸ Representative Durham argued that “[w]e have no more right or power to say who shall enter a theater or a hotel and be accommodated therein than to say who shall enter a man’s private house or enter into any social amusement to pass away an evening’s hour.”³³⁹

³³³ 2 Cong. Rec. 455 (Jan. 7, 1874).

³³⁴ 3 Cong. Rec. 1795 (Feb. 26, 1875).

³³⁵ But see 2 Cong. Rec. 407 (Jan. 6, 1874) (statement of Rep. Elliott, quoting Lieber on Civil Liberty at 25: “By civil liberty is meant, not only the absence of individual restraint, but liberty within the social system and political organism—a combination of principles and laws which acknowledge, protect, and favor the dignity of man.”) Neither this nor any other attempted definition explained the distinction between civil, political, and social rights, however.

³³⁶ 2 Cong. Rec. 4158 (May 22, 1874).

³³⁷ Cong. Globe, 42d Cong., 2d Sess. 3251 (May 9, 1872).

³³⁸ *Id.* at 242 (1872) (statement of Sen. Hill on Dec. 20, 1871).

³³⁹ 2 Cong. Rec. 405 (Jan. 6, 1874).

A significant undercurrent in the discussion of social rights was the fear that intermixing would lead to miscegenation, and that the theory of the Fourteenth Amendment underlying the bill would logically extend to a right of racial intermarriage.³⁴⁰ Representative James Harper of North Carolina, for example, posed the question:

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.³⁴¹

It was a telling argument, because perceived support for racial intermarriage was a clear political liability.³⁴² But it is striking that not a single supporter of the 1875 Act attempted to deny that under their interpretation, anti-miscegenation laws were unconstitutional.³⁴³ For the most part, Republicans diverted the argument with comments mocking Southerners for the frequency of miscegenation under slavery.³⁴⁴ African-American congressmen were es-

³⁴⁰ See 2 Cong. Rec. 556 (Jan. 10, 1874) (statement of Rep. Vance); Cong. Globe, 42d Cong., 2d Sess. 3252 (May 9, 1872) (statement of Sen. Blair); *id.* at 819 (Jan. 5, 1872) (statement of Sen. Norwood); *id.* at 242 (1872) (statement of Sen. Hill on Dec. 20, 1871). For a thorough analysis of the constitutional debates during this period on the issue of miscegenation, see Steven A. Bank, *Anti-Miscegenation Laws and the Dilemma of Symmetry: The Understanding of Equality in the Civil Rights Act of 1875*, 2 U. Chi. Sch. Roundtable 303 (1995).

³⁴¹ Cong. Globe, 42d Cong., 2d Sess. app. 372 (May 4, 1872).

³⁴² Rep. John Atkins commented 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." 2 Cong. Rec. 453 (Jan. 7, 1874). See Foner, *supra* note 21, at 321.

³⁴³ Remarkably, at least two state supreme courts struck down state anti-miscegenation laws as conflicting either with the Fourteenth Amendment or with the Civil Rights Act of 1866. *Burns v. State*, 48 Ala. 195 (1872), limited by *Ford v. State*, 53 Ala. 150 (1875), overruled by *Green v. State*, 58 Ala. 190 (1877); *Hart v. Hoss & Elder*, 26 La. Ann. 90 (1874); Glasrud, *supra* note 171, at 53 (reporting that "in 1877 the courts voided the [Texas] prohibition as a violation of the Fourteenth Amendment and the Civil Rights Act of 1875"). In addition, the legislatures of six states eliminated their anti-miscegenation laws in the 1870s or 1880s. See Bank, *supra* note 340, at 343-44; Virginia Dominguez, *White by Definition: Social Classification in Creole Louisiana* 26 (1986).

³⁴⁴ See, e.g., 2 Cong. Rec. 456 (Jan. 7, 1874) (statement of Rep. Butler); *id.* at 382 (Jan. 5, 1874) (statement of Rep. Ransier); see also Cong. Globe, 42d Cong., 2d Sess. 3253 (May 9,

pecially bitter. Typical was the comment of Representative Ranier of South Carolina:

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.³⁴⁵

Butler, noting that "the highest exhibition of social equality is communication between the sexes," remarked that he was "inclined to think that the only equality the blacks ever have in the South is social equality."³⁴⁶

But when forced to take a position, proponents defended the proposition that the law should make no distinction on the basis of race in marriage. Sumner himself responded to one Democratic diatribe about miscegenation as follows: "I desire that every word in the laws of this land shall be brought in harmony with the Constitution of the United States; and if in any way the legislation, which the Senator now calls attention to, is repealed or annulled, so much the better."³⁴⁷ Similar statements were made by Senators Harlan³⁴⁸ and Pomeroy.³⁴⁹ These particular comments may be dismissed on the ground that the speakers were Radicals and not representative of the Republican mainstream,³⁵⁰ but it is harder to dismiss the fact that other supporters of the bill refrained from

1872) (statement of Sen. Wilson) ("[U]nder freedom there is not a tenth part of the improper associations between the races that existed before the war.").

³⁴⁵ 2 Cong. Rec. 382 (Jan. 5, 1874). In a similar vein, see 3 Cong. Rec. app. 108 (Feb. 27, 1875) (statement of Rep. Lewis Carpenter); *id.* at 957 (Feb. 3, 1875) (statement of Rep. Cain).

³⁴⁶ 3 Cong. Rec. 1006 (Feb. 4, 1875).

³⁴⁷ Cong. Globe, 42d Cong., 2d Sess. 872 (Feb. 7, 1872).

³⁴⁸ *Id.* at 878 (Feb. 7, 1872).

³⁴⁹ *Id.* at 821 (Feb. 5, 1872) ("[W]e 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.")

³⁵⁰ See Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 Va. L. Rev. 1224, 1253-54 (1966).

defending anti-miscegenation laws despite what must have been substantial political pressure to do so.³⁵¹

In making these arguments, the Democrats frequently conflated the question of whether miscegenation should be permitted with the inflammatory proposition that the Republicans would make miscegenation mandatory. Representative James Beck of Kentucky asserted that some supporters of the bill 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."³⁵² Representative William Crutchfield of Tennessee sarcastically proposed an amendment to the bill that would make it a crime for a white woman to refuse the marriage proposal of a black man on account of race.³⁵³ This paralleled claims that the desegregation bill would outlaw discrimination in private homes or private relationships. The "next step," according to William Read of Kentucky, "will be that they [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."³⁵⁴

This hyperbole exposed the basic contradiction in the Democrats' position with regard to state interference in the private sphere. If it were true, as the opponents of the bill maintained, that individuals should be free to choose whether and on what terms to mingle with persons of the other race, then it should have followed that anti-miscegenation laws, which interfere with that freedom, are illegitimate. At the time of these debates, this contradiction did not extend to the issue of segregation in common carri-

³⁵¹ This is in contrast to the debates over the Civil Rights Act of 1866, during which several Republican supporters of the bill disavowed any intention to prohibit anti-miscegenation laws, and relied on the symmetrical equality argument in explanation of their position. See, e.g., Cong. Globe, 39th Cong., 1st Sess. 505 (Jan. 30, 1866) (statement of Sen. Fessenden); id. at 322 (Jan. 19, 1866) (statement of Sen. Trumbull).

³⁵² 2 Cong. Rec. 343 (1874) (statement of Rep. Beck on Dec. 19, 1873).

³⁵³ Id. at 452 (Jan. 7, 1874).

³⁵⁴ Id. at app. 343 (May 29, 1874). See also id. at 4171 (May 22, 1874) (statement of Sen. Sargent) ("I doubt if the office of the fourteenth amendment is to provide that I should receive any man into my house; that my liberties shall be encroached upon for the benefit of any man, be he white or black.").

ers, because no state then required segregation. But by the time of *Plessy*, after the passage of Jim Crow laws, the Democrats' position that "social rights" could not be the subject of legislation was—or should have been—a serious embarrassment.

The defense of the bill relied heavily on the distinction between the private and civil spheres. Locating the issue of "social equality" in the private sphere, supporters could deny that there was any "question of social equality in this bill."³⁵⁵ They distinguished between spheres of life, such as one's own home or friendships, in which each person has the unquestioned right to decide with whom he will associate, and public facilities, in which the individual has no option but to accept the company of others not of his own choosing. Senator Sumner stated that each person "is always free to choose who shall be his friend, his associate, his guest," but when he "walks the streets . . . he is subject to the prevailing law of Equality."³⁵⁶ Senator Pratt stated that "[t]he negro does not seek nor does this bill give him any of your peculiar social rights and privileges. You may still select your own society and invite whom you will to your table." But, he went on, "if you will travel in a public conveyance, you must be content to share your convenience with the Indian, negro, Turk, Italian, Swede, Norwegian, or any other foreigner who avails himself of the same facility, because it is public, and should therefore be open to all." He noted that "if you choose to sit down at a public table in a public inn open to all comers who behave themselves, you must be content to sit beside or opposite to somebody whose skin or language, manners or religion, may shock your sensibilities." You do not have to "talk to him or even look at him, much less make his acquaintance."³⁵⁷ He asserted that, within the public sphere everyone must accept the

³⁵⁵ 2 Cong. Rec. at 427 (Jan. 6, 1874) (statement of Rep. Stowell); accord 3 Cong. Rec. 979 (Feb. 4, 1875) (statement of Rep. E.R. Hoar); id. at 940 (Feb. 3, 1875) (statement of Rep. Butler); id. at 944 (statement of Rep. Lynch); id. at 960 (statement of Rep. Rainey); 2 Cong. Rec. 3451 (Apr. 29, 1874) (statement of Sen. Frelinghuysen); id. at 382 (Jan. 5, 1874) (statement of Rep. Ransier); id. at 344 (1874) (statement of Rep. Rainey on Dec. 19, 1873); Cong. Globe, 42d Cong., 2d Sess. 4321 (June 7, 1872) (statement of Sen. Poland); id. at 382 (Jan. 5, 1872) (statement of Sen. Sumner).

³⁵⁶ Cong. Globe, 42d Cong., 2d Sess. 382 (Jan. 15, 1872).

³⁵⁷ 2 Cong. Rec. 4082 (May 20, 1874)

equal right of negroes, to avail themselves of the same facilities.³⁵⁸ As Senator Nye pointed out, "If I am placed at a table in inconvenient juxtaposition to a man I do not like, it is not my work to get him out, but to get out myself."³⁵⁹

Representative Chester Darrall of Louisiana invoked the impeccable authority of former Confederate General P.G.T. Beauregard, commander during the assault on Fort Sumter. He quoted Beauregard as saying:

It would not be denied that in traveling and at places of public resort we often share these privileges in common with thieves, prostitutes, gamblers, and others who have worse sins to answer for than the accident of color; but no one ever supposed that we thereby assented to the social equality of these people with ourselves. I therefore say that participation in these public privileges involves no question of social equality.³⁶⁰

John Lynch, a black congressman from Mississippi, made a similar point:

[I]f 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.³⁶¹

Thus, under the proponents' analysis, a prohibition of segregation within the covered institutions was an issue of civil, not social, rights. The responsibilities of these institutions to serve all members of the public without unreasonable discrimination were governed by law. The individual's social rights included his own choice of associates, but did not include a right to expect that other persons whom he found undesirable (whether on the grounds of race or otherwise) would be denied access to common carriers or public accommodations, or shuffled off into separate facilities. The effect of the Fourteenth Amendment was not to alter the boundary

³⁵⁸ See *id.* For a similar analysis, see 3 Cong. Rec. 940 (Feb. 3, 1875) (statement of Rep. Butler).

³⁵⁹ Cong. Globe, 42d Cong., 2d Sess. 706 (Jan. 30, 1872).

³⁶⁰ 2 Cong. Rec. app. 479 (June 16, 1874).

³⁶¹ 3 Cong. Rec. 944 (Feb. 3, 1875).

between civil and social rights, but to make race an unreasonable basis for discrimination within the civil sphere.

2. *Education Is Not a Civil Right Protected by the Fourteenth Amendment*

The opponents' second principal constitutional argument was that schools are not within the coverage of the Fourteenth Amendment. From a modern perspective, this may seem a peculiar, even preposterous, point. Public schools are an arm of the state; all state action is covered by the Fourteenth Amendment. But from the perspective of the Reconstruction era, the issue was far more complicated, and there is a plausible argument that the public schools as they existed at that time, especially in the South, were *not* covered. As discussed above, under the theory of "limited absolute equality"³⁶² that prevailed at the time, the Amendment did not require equality with respect to everything, but only with respect to civil rights, the "privileges or immunities of citizens." To the constitutional lawyers of the Reconstruction Congress, the key question was whether public education was a civil right.

a. *The Concept of "Civil Rights"*

The most important member of the forces opposing Sumner's civil rights bill in the early years was Senator Lyman Trumbull of Illinois.³⁶³ Trumbull, a highly respected constitutional lawyer and former state supreme court justice, had begun his career as a Free Soil Democrat but had shifted parties to become one of the leading Republicans in the Senate during the Lincoln administration. As Chairman of the Judiciary Committee, he had introduced the resolution that became the basis for the Thirteenth Amendment, supported the Freedmen's Bureau, and been the principal author of the Civil Rights Act of 1866. By 1872, however, he was shifting back to the Democratic fold: he supported Greeley in 1872, was counsel to Tilden in 1876-77, and ran for governor of Illinois as a Democrat in 1880. Trumbull's opposition to Sumner's bill was instrumental in preventing its consideration for almost two years,

³⁶² See Maltz, *supra* note 13, at 68; *supra* notes 203-206 and accompanying text.

³⁶³ For background on Trumbull's life, see 19 *Dictionary of American Biography* 19-20 (Dumas Malone, ed., 1936); Horace White, *The Life of Lyman Trumbull* (1913).

from 1870 until late in 1871. Trumbull was joined in his opposition by two other prominent Republicans, Lot Morrill of Maine³⁶⁴ and Orris Ferry of Connecticut, whose arguments were similar to Trumbull's.

Trumbull based his argument against the bill on the widely accepted taxonomy of rights as civil, political, and social. It was generally understood that the nondiscrimination requirement of the Fourteenth Amendment applied only to "civil rights." Political and social rights, it was agreed, were not civil rights and were not protected.³⁶⁵ (The issue was complicated by the adoption of the Fifteenth Amendment, which forbade racial discrimination with respect to the quintessential political right, the right to vote, making the lack of protection for lesser political rights anomalous.) This taxonomy of rights is rooted in the relationship of the Privileges or Immunities Clause of the Fourteenth Amendment to the Privileges and Immunities Clause of Article IV. The most fundamental conception of the Fourteenth Amendment was that it would extend to the citizens of each state, without regard to race or color, the same legal rights (privileges and immunities) that would have been available to citizens of other states under Article IV.³⁶⁶ This included such civil rights as the right to contract, own property, and sue, but not political rights such as the right to vote, hold office, or serve on a jury. This explains why Section 2 of the Fourteenth Amendment presupposes the rights of states to restrict the

³⁶⁴ This Morrill should not be confused with his cousin, Justin Morrill of Vermont. The latter Morrill voted in favor of the Fourteenth Amendment in the 39th Congress and consistently supported Sumner's bill.

³⁶⁵ See, e.g., Cong. Globe, 42d Cong., 2d Sess. 901 (Feb. 8, 1872) (statement of Sen. Trumbull) (civil rights legislation should be "confined exclusively to civil rights and nothing else, no political and no social rights"). On the proposition that the Fourteenth Amendment did not extend to social rights, see Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 Loy. L.A. L. Rev. 1207 (1992); supra notes 323-39 and accompanying text. On the proposition that the Fourteenth Amendment did not protect political rights, see, e.g., 2 Cong. Rec. app. 314 (May 22, 1874) (statement of Sen. Merrimon); Cong. Globe, 42d Cong., 2d Sess. 843 (Feb. 6, 1872) (statement of Sen. Carpenter); id. at 844 (statement of Sen. Sherman). Thus, Senator Carpenter opposed the jury provisions of Sumner's bill on the ground that jury service was a political right. Cong. Globe, 42d Cong., 2d Sess. 827-28 (1872).

³⁶⁶ See Cong. Globe, 42d Cong., 2d Sess. 436 (Jan. 17, 1872) (statement of Sen. Frelinghuysen). For a concise statement of my understanding of this relationship, see Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 Loy. L.A. L. Rev. 1159, 1160-61 (1992).

franchise, and why the Fifteenth and Nineteenth Amendments were necessary to extend the right to vote to blacks and to women, respectively.

This categorization of rights plays no part in current interpretations of the Fourteenth Amendment. The distinction between civil and political rights has been utterly obliterated. Rights of political participation are now routinely litigated under the Equal Protection Clause, and the right to vote is commonly said to be the most "fundamental" of our civil rights, because it is "preservative of all rights."³⁶⁷ The problem of "social rights" is handled under current law through a combination of the state action doctrine³⁶⁸ and assertions of countervailing individual rights, especially privacy and freedom of association.³⁶⁹ Nonetheless, this tripartite division of rights forms the essential framework for interpreting the Amendment as it was originally understood.

Trumbull based his opposition to the Sumner bill on the ground that education was not a civil right. This became clear during colloquies with Senator Edmunds of Vermont and Senator Morton of Indiana:

Mr. EDMUNDS. How about the right to go to a public school?

Mr. TRUMBULL. The right to go to school is not a civil right and never was.

Mr. EDMUNDS. What kind of a right is it?

Mr. TRUMBULL. It is not a right.

Mr. EDMUNDS. What is it?

Mr. TRUMBULL. It is a privilege that you may have to go to school.

....

Mr. MORTON. I ask the Senator if the right to go to school is not a civil right, what kind of a right is it, or is it any right at all?

Mr. TRUMBULL. It is not any right at all. It is a matter to be regulated by the localities.³⁷⁰

³⁶⁷ *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). For a theoretical exposition, see John Hart Ely, *Democracy and Distrust* 116-25 (1980).

³⁶⁸ See, e.g., *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

³⁶⁹ See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

³⁷⁰ *Cong. Globe*, 42d Cong., 2d Sess. 3189-90 (May 8, 1872).

The logical implication of Trumbull's position was that the federal government lacked any authority under the Fourteenth Amendment to interfere in state administration of public schools. Lot Morrill made this explicit: "in reference to all rights with regard to the matters of education, worship, amusement, recreation, entertainment, all of which enter so essentially into the private life of the people, . . . they all belong exclusively to the State, of which the Government of the United States has no right to take cognizance."³⁷¹ Ferry argued that public schools are necessarily creatures of local communities, which cannot be regulated or controlled by federal legislation.³⁷² These views were echoed by many Democrats³⁷³ and were reinforced by the *Slaughter-House* decision.³⁷⁴ As stated by Representative Durham of Kentucky, "We have no more right to say that a particular class of individuals shall have access to our public schools . . . than we have to say that a particular class of individuals shall have access to private schools. These are matters purely of local legislation or of private contract."³⁷⁵

But what did Trumbull and his allies mean by the statement that education is not a "civil" right? Neither he nor any other opponent of the Sumner bill defined precisely what they meant by the term.³⁷⁶ In the space of a single column of the *Congressional Globe*, Trumbull defined civil rights variously as "rights pertaining to the citizen as such," as "general rights that belong to mankind everywhere," and as "a common law right."³⁷⁷ Indeed, the debate is all the more difficult to decipher because the various participants seemed unaware that the term was being used in different ways. There was no pretense of precision. We must therefore reconstruct

³⁷¹ Id. at app. 5 (Jan. 25, 1872).

³⁷² Id. at 3257 (May 9, 1872).

³⁷³ E.g., 2 Cong. Rec. 453 (Jan. 6, 1874) (statement of Rep. Atkins); id. at 376 (Jan. 5, 1874) (statement of Rep. Harris); Cong. Globe, 42d Cong., 2d Sess. app. 42-43 (Feb. 8, 1872) (statement of Sen. Vickers); see also 2 Cong. Rec. 419 (Jan. 6, 1874) (statement of Rep. Herndon); id. at 405 (statement of Rep. Durham); id. at 385 (Jan. 5, 1874) (statement of Rep. Mills).

³⁷⁴ 83 U.S. (16 Wall.) 36 (1873).

³⁷⁵ 2 Cong. Rec. 405 (Jan. 6, 1874).

³⁷⁶ Cong. Globe, 42d Cong., 2d Sess. 3191 (May 8, 1872).

³⁷⁷ See Id.

this constitutional theory on the basis of mostly casual and sometimes incoherent statements.

It is useful to begin with the areas of agreement and move toward the areas of controversy. At a minimum, we may be confident that the category of civil rights comprised the rights protected by the Civil Rights Act of 1866: the rights to make and enforce contracts; to buy, lease, inherit, hold and convey property; to sue and be sued and to give evidence in court; to legal protections for the security of person and property; and to equal treatment under the criminal law.³⁷⁸ These were roughly the same rights that were protected under the Privileges and Immunities Clause of Article IV, which applied to citizens of other states.³⁷⁹ Some opponents, including Trumbull, appeared to believe that the Civil Rights Act of 1866 comprised an exhaustive list of the privileges and immunities of citizens. As Trumbull explained:

In regard to the rights that belong to the individual as man and as a freeman under the Constitution of the United States, I think we had a right to pass the civil rights bill. I thought so then, and think so now; but I think that we went to the verge of constitutional authority, went as far as we could go.³⁸⁰

This was not, however, a logically satisfying position. There is every reason to believe that the Civil Rights Act of 1866 encompassed the principal civil rights directly contemplated by the framers of the Fourteenth Amendment, but much less reason to assume that it exhausted those rights. Indeed, leading cases interpreting the Privileges and Immunities Clause of Article IV made clear that this list of rights was not exclusive. In *Corfield v. Coryell*, the lead-

³⁷⁸ Civil Rights Act of 1866, Ch. 31, § 1, 14 Stat. 27.

³⁷⁹ *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230); *Douglass v. Stephens*, 1 Del Ch. 465 (1821); *Campbell v. Morris*, 3 H. & McH. 535, 565 (Md. 1797); *Abbot v. Bayley*, 23 Mass. (6 Pick.) 89, 91-92 (1827); *State v. Medbury*, 3 R.I. 138 (1855). See generally Theodore Ulyot, *The Understanding of the Phrase "Privileges and Immunities of Citizens" in Antebellum Jurisprudence: Interpretive Essay* (unpublished manuscript, on file with the Virginia Law Review Association) (arguing that in antebellum jurisprudence, "Privileges and Immunities of citizens" was clearly understood to encompass purely personal rights only).

³⁸⁰ Cong. Globe, 42d Cong., 2d Sess. 901 (Feb. 8, 1872) (statement of Sen. Trumbull); see id. at 3189 (May 8, 1872) (statement of Sen. Trumbull); see also 2 Cong. Rec. app. 1-3 (Jan. 4, 1874) (statement of Rep. Southard, maintaining that no protection of the rights of colored people beyond the 1866 Act was required); Berger, *supra* note 13, at 22-36 (asserting that "fundamental rights" already received full protection).

ing pre-War precedent interpreting the Privileges and Immunities Clause, the court listed rights similar to those in the 1866 Act, and then stated “[t]hese, *and many others which might be mentioned*, are, strictly speaking, privileges and immunities.”³⁸¹ Thus, Lot Morrill was forced to define “privileges and immunities” as meaning “those common privileges which one community accords to another in civilized life.”³⁸² The question becomes: how do we determine what those privileges are?

At the heart of the question is a conceptual uncertainty, running throughout the debates, over whether civil rights are those protected in the actual positive law of the states, or whether the category refers to a set of rights inherent in a free society and therefore beyond the reach of hostile legislation. The most common resolution of this ambiguity was probably a merger of these conceptions: privileges and immunities were established by the positive law of the state, but only those rights deemed “fundamental” were a privilege or immunity of citizenship.³⁸³ What rights are “fundamental”? The three most common criteria seemed to be that such rights were uniform, not varying from state to state; that they were a permanent and stable part of the American legal legacy, not subject to the vicissitudes of legislative policy; and that they were legally enforceable as a matter of right, as opposed to being privileges allocated among the citizens by government officials at their discretion.³⁸⁴ The leading exemplars were common law rights. That is why the Civil Rights Act of 1866, which included the most basic common law rights, defined the uncontroversial core of “civil rights.”

³⁸¹ 6 F. Cas. 546, 551-52, No. 3230 (C.C.E.D. Pa. 1823) (emphasis added). Moreover, at the time when Congress went to the verge of its constitutional authority (1866), the Fourteenth Amendment had not been passed. Implicitly, Trumbull's position is that the Fourteenth Amendment added nothing.

³⁸² Cong. Globe, 42d Cong., 2d Sess. app. 4 (Jan. 25, 1872).

³⁸³ *Corfield*, 6 F. Cas. at 551.

³⁸⁴ See 2 Cong. Rec. 384-385 (Jan. 5, 1874) (statement of Rep. Mills) (arguing that rights under state law could not be privileges or immunities under the Fourteenth Amendment because they are not “fixed and absolute,” nor “uniform,” but “changeable” and subject to the “discretion of the state”).

Sumner stated that “all institutions created or regulated by law”³⁸⁵ are within the civil sphere, but this should not be taken literally. As Thurman asked rhetorically:

What is there, within the province of government, that is not regulated by law? The Senator is regulated by law; I am regulated by law; every man of us is regulated by law. . . . [D]oes that prove that you have the right to interfere and say, “Under the pretense of regulation we will deprive you of your liberty?”³⁸⁶

Elsewhere, Sumner explained that he referred to businesses given monopoly advantages or other “peculiar privileges and prerogatives” and that were subject to “peculiar responsibilities . . . regulated by law.”³⁸⁷ This included entities having common carrier or public accommodation responsibilities, but did not extend to such private entities as ordinary businesses or corporations, even though corporations are “created or regulated by law” in a certain sense. The distinction corresponds roughly to the notion of businesses deemed to be “affected with a public interest,” which were subject to economic regulation under the jurisprudence of the day.³⁸⁸

b. Access to Common Carriers and Public Accommodations

Trumbull, Ferry, Lot Morrill, and their Democratic allies opposed the entire civil rights bill, but opposed the common carrier and public accommodations provisions on different grounds than the public schools provision. As to the former, opponents offered two different arguments. Some, including Trumbull and Ferry, did not deny that these provisions involved civil rights, but maintained that the rights were already adequately protected under common law. Ferry denied that there was any evidence that “colored people any more than white people are by law or by custom denied the accommodations furnished by innkeepers or common carriers.”³⁸⁹ Even if there were occasional cases of exclusion, whether of black or of white, “in both instances the law as it now stands affords to

³⁸⁵ Cong. Globe, 42d Cong., 2d Sess. 382 (Jan. 15, 1872).

³⁸⁶ Id. at app. 29 (Feb. 6, 1872).

³⁸⁷ Id.

³⁸⁸ See *Munn v. Illinois*, 94 U.S. 113, 126 (1876). It is no coincidence that *Munn*, decided in 1876, shares the world view of the Congress of 1871-75.

³⁸⁹ Cong. Globe, 42d Cong., 2d Sess. 3257 (May 9, 1872).

each identically the same remedy."³⁹⁰ Similarly, Trumbull maintained that "the colored man has just the same right of action against a railroad company or a hotel-keeper that a white man has for a refusal to receive or entertain him or to transport him on the cars. The rights are the same to all."³⁹¹ Opponents conceded that federal legislation would be warranted if states were to enact statutes discriminating on the basis of race.³⁹²

In the most systematic statement of this position, Thurman reasoned that even if common law rights, such as the equal benefit of common carriage, were privileges and immunities of citizens, the Fourteenth Amendment, by its terms, applies only when a state "makes or enforces" a "law" that abridges those rights. The civil rights bill was therefore unconstitutional because it would provide federal jurisdiction and a federal remedy to any person denied access to hotels, railroads, and other covered facilities, whether or not the state in which the act occurred provided an adequate remedy for the violation.³⁹³ Thurman used the example of Louisiana, a state with a strong antidiscrimination law:

This bill says to a Louisianian, "Although your State has made a law that negro men shall have equal privileges in theaters, churches, and places of public resort with the white men in your State; although you punish any one who shall deprive them of that privilege or immunity, or refuse it to them; although your State has made no law to deprive them of any such privilege or immunity; although your courts enforce no law to deprive them of such privileges and immunities; although just the contrary is the truth; . . . yet we step in and take from your State courts the jurisdiction over this subject and take it all into the Federal courts

. . . And yet it is said that this bill is constitutional under an amendment to the Constitution which only gives you authority to act where the State has made or enforced a law that deprived a

³⁹⁰ *Id.*; see also *id.* at 892-94 (Feb. 8, 1872) (argument by Sen. Ferry that blacks and whites enjoy equal remedies under the laws of the states).

³⁹¹ *Id.* at 3190 (May 8, 1872); accord 2 Cong. Rec. 429 (Jan. 6, 1874) (statement of Rep. Buckner); Cong. Globe, 42d Cong., 2d Sess. 3192 (May 8, 1872) (statement of Sen. Trumbull).

³⁹² See, e.g., 2 Cong. Rec. 454 (Jan. 7, 1874) (statement of Rep. Atkins).

³⁹³ 2 Cong. Rec. 4085 (May 20, 1874); Cong. Globe, 42d Cong., 2d Sess. 496 (Jan. 22, 1872). Less sophisticated versions of this argument were offered by Rep. Atkins, 2 Cong. Rec. 454 (Feb. 9, 1874), and Sen. Tipton, Cong. Globe, 42d Cong., 2d Sess. 914 (Jan. 7, 1872).

citizen of his privileges or immunities, which gives you no right to act unless the State has made or enforced such a law as that!³⁹⁴

This argument anticipated the Supreme Court's reasoning in the *Civil Rights Cases*,³⁹⁵ which struck down the Act. Although often read as holding that Congress has no power to regulate private entities under Section 5 of the Fourteenth Amendment, the opinion actually held the legislation was defective because it was overbroad in that it "applie[d] equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment."³⁹⁶ The problem was not the absence of "state action" but the absence of state dereliction.

A more restrictive version of the argument was made by Senator Gordon of Georgia. To Gordon, federal intervention could not be based on the mere failure of the state to protect Fourteenth Amendment rights; rather, there had to be an actual statute that "den[ies] to one class of citizens rights which are guaranteed by the Constitution to any other class of citizens."³⁹⁷ If the state passed such a law, Gordon was willing to

admit that under the fifth section of the fourteenth amendment Congress may proceed by appropriate legislation to protect that class of citizens so denied against such discrimination. Until that law is passed, however—until by statute a State denies some rights which belongs to all citizens of the United States as citizens . . .—until this is done, I maintain that Congress has no power under the fourteenth amendment to interfere.³⁹⁸

Similar arguments had been made regarding the power of Congress to enforce the Fifteenth Amendment: unless a state denied or

³⁹⁴ Cong. Globe, 42d Cong., 2d Sess. 496 (Jan. 22, 1872); accord 2 Cong. Rec. 411 (Jan. 6, 1874) (statement of Rep. Blount).

³⁹⁵ 109 U.S. 3 (1883). For discussion of the *Civil Rights Cases*, see *infra* notes 711-24 and accompanying text.

³⁹⁶ 109 U.S. at 14.

³⁹⁷ 3 Cong. Rec. 1864 (Feb. 27, 1875).

³⁹⁸ *Id.*

abridged voting rights, there would be no ground for federal intervention.³⁹⁹

Others, including Lot Morrill, challenged the inclusion of inns, theaters, and places of public amusement in the bill on the quite different ground that these institutions are not subject to special regulation and are indistinguishable from other private businesses.⁴⁰⁰ Representative William Phelps noted that “[w]e no longer give to inn-keepers especial privileges—any monopoly in the business; we cannot therefore burden their business with any restrictions.”⁴⁰¹ Senator Boreman stated that “cemetery companies owned by private stockholders . . . control their own property as any private individual does.”⁴⁰² In Thurman’s hands, this became a broad argument for libertarian principle:

I say that it is in the interest of liberty that if any number of persons in the land shall see fit to establish a theater or a place of public amusement for a particular class, they shall have the right to do it, and you abridge and restrain their liberty if you take from them that right.⁴⁰³

Proponents countered that the bill covered only institutions whose service obligations already were regulated by the common law.⁴⁰⁴ Sumner declared to Thurman:

The Senator knows well that a hotel is a legal institution; I use the term advisedly, and the Senator is too good a lawyer not to know it. A railroad corporation is also a legal institution. So is a theater,

³⁹⁹ Cong. Globe, 41st Cong., 2d Sess. 3667 (May 20, 1870) (statement of Sen. Davis); id. at 3608 (May 19, 1870) (statement of Sen. Schurz); id. at 3481 (May 16, 1870) (statement of Sen. Vickers).

⁴⁰⁰ Cong. Globe, 42d Cong., 2d Sess. app. 4 (Jan. 25, 1872) (statement of Sen. Morrill).

⁴⁰¹ 3 Cong. Rec. 1002 (Feb. 4, 1875); accord 2 Cong. Rec. app. 363 (May 22, 1874) (statement of Sen. Hamilton); Cong. Globe, 42d Cong., 2d Sess. app. 217 (Apr. 13, 1872) (statement of Rep. McHenry); id. at app. 28 (Feb. 6, 1872) (statement of Sen. Thurman).

⁴⁰² Cong. Globe, 42d Cong., 2d Sess. 3267 (May 9, 1872).

⁴⁰³ Id. at app. 27 (Feb. 6, 1872). To similar effect, see 3 Cong. Rec. app. 156-57 (Feb. 3, 1875) (statement of Rep. Smith); 2 Cong. Rec. 4174-75 (May 22, 1874) (statement of Sen. Sargent).

⁴⁰⁴ 2 Cong. Rec. 412 (Jan. 6, 1874) (statement of Rep. Lawrence); id. at 340 (1874) (statement of Rep. Butler on Dec. 19, 1873); Cong. Globe, 42d Cong., 2d Sess. 280 (1872) (statement of Sen. Sumner on Dec. 21, 1871).

and all that my bill proposes is that those who enjoy the benefits of law shall treat those who come to them with equality.⁴⁰⁵

Their point was not that the common law courts of the various states had actually recognized the right of black Americans to service without distinction of race. In fact, the common law courts were divided on that question.⁴⁰⁶ Rather, the proponents' argument was that once the law had intervened to guarantee white citizens the legally enforceable right of access to common carriers and public accommodations without arbitrary or unreasonable distinctions,⁴⁰⁷ the principle of the Fourteenth Amendment required that the same right be extended to black citizens.⁴⁰⁸ By virtue of the Fourteenth Amendment, states no longer had the authority to treat race as a reasonable ground for separation or exclusion. Such distinctions, they said, were no proper part of the police power. Representative Elliott put the point this way:

[I]s it pretended anywhere that the evils of which we complain . . . are an exercise of the police power of the State? Is such oppression and injustice nothing but the exercise by the State of the right to make regulations for the health, comfort; and security of all her citizens? . . . Are the colored race to be assimilated to an unwholesome trade or to combustible materials, to be interdicted, to be shut up within prescribed limits?⁴⁰⁹

Proponents of the bill also denied that Congress had to wait for the states to enact discriminatory laws before it was able to inter-

⁴⁰⁵ Cong. Globe, 42d Cong., 2d Sess. 280 (1872) (statement of Sen. Sumner on Dec. 21, 1871); accord 2 Cong. Rec. app. 305 (May 22, 1874) (statement of Sen. Alcorn); id. at 427 (Jan. 6, 1874) (statement of Rep. Stowell).

⁴⁰⁶ Compare *West Chester & Phila. R.R. Co. v. Miles*, 55 Pa. 209 (1867) (allowing separation) with *Coger v. North W. Union Packet Co.*, 37 Iowa 145 (1873) (requiring desegregation). For a full discussion, see *supra* notes 155-77 and accompanying text.

⁴⁰⁷ See, e.g., *Brown v. Memphis & C. R. Co.*, 5 F. 499, 500 (C.C.W.D. Tenn. 1880) (awarding \$3000 in damages to a woman who was excluded from the ladies' car ostensibly because of her reputation as "a notorious and public courtesan").

⁴⁰⁸ Charles Lofgren infers from the repeated statements that the bill would create no new rights but only new remedies that the supporters may have intended to leave in place common law rulings permitting segregated facilities. See Lofgren, *supra* note 9, at 137. But this misconceives the way in which the common law was understood and employed by the bill's supporters. The common law to which supporters referred was the common law protection of *white citizens* from unreasonable discrimination—which they maintained was extended by virtue of the Fourteenth Amendment to black citizens as well.

⁴⁰⁹ 2 Cong. Rec. 408 (Jan. 6, 1874).

vene. The Equal Protection Clause deals with "sins of omission as well as commission," in the words of Representative Lawrence.⁴¹⁰ "[I]f a State omits or neglects to secure the enforcement of equal rights," he said, "it 'denies' the equal protection of the laws within the meaning of the fourteenth amendment."⁴¹¹ Federal remedies were needed, proponents maintained, because state remedies were so frequently inadequate—whether because they were too expensive,⁴¹² because state processes of enforcement were infected with racial prejudice,⁴¹³ because common law rights and remedies were not specific enough,⁴¹⁴ or because they had been abrogated by law or custom in the case of black citizens.⁴¹⁵ Even if there were no "positive statutes" abrogating common law rights, federal intervention was deemed justified if state remedies were not effective.⁴¹⁶

There was much discussion of whether federal intervention was necessary, with many Southerners taking the position that blacks already enjoyed equal rights in common carriers and public accommodations. Representative Lucius Q.C. Lamar, the very model of postwar Southern gentility, stated that "*throughout the length and breadth of the southern section there does not exist in law one single*

⁴¹⁰ Id. at 412, 414.

⁴¹¹ Id. at 414. Contrary to some commentators (see Heyman, *supra* note 250, at 509), this does not mean that the Supreme Court's decision in *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989), was inconsistent with the original understanding of the Fourteenth Amendment. The Court's holding that the failure of the government to protect Joshua DeShaney from his brutal father did not support an action for damages was confined to the Due Process Clause. The Court explicitly noted that "[t]he State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." Id. at 197 n.3. The point is that the right to "protection" is an equality right. Not all denials of protection are unconstitutional, just those linked to invidious discrimination. Joshua DeShaney made no allegation of discrimination.

⁴¹² 2 Cong. Rec. 4082 (May 20, 1874) (statement of Sen. Pratt).

⁴¹³ Cong. Globe, 42d Cong., 2d Sess. 3192 (Jan. 15, 1872) (statement of Sen. Sherman); id. at 383 (May 8, 1872) (statement of Sen. Sumner).

⁴¹⁴ Representative Rainey stated:

[S]o far as the common law is concerned, although I am not a lawyer, I am aware, however, that it contains remedial provisions; but they are so general in their character as frequently to lose specific application and force unless wrought into statutory enactment. Hence the necessity for this bill, which sets forth specifically the offenses and the means of redress.

3 Cong. Rec. 959 (Feb. 3, 1875).

⁴¹⁵ 3 Cong. Rec. 940 (Feb. 3, 1875) (statement of Rep. Lawrence); Cong. Globe, 42d Cong., 2d Sess. 3192 (May 8, 1872) (statement of Sen. Sherman).

⁴¹⁶ 2 Cong. Rec. 416 (Jan. 6, 1874) (statement of Rep. Walls).

trace of privilege or of discrimination against the black race. If there is," he said, "I know nothing of it."⁴¹⁷ A white representative from Virginia maintained that he had seen black men and women riding in railway cars with white passengers, without hindrance, "a dozen of times,"⁴¹⁸ yet Joseph Rainey of South Carolina, the first black man to be elected to the House of Representatives, reported his own experience of being excluded from streetcars in Richmond other than those designated for colored passengers.⁴¹⁹ John Lynch of Mississippi reported that while traveling through the "God-forsaken States of Kentucky and Tennessee" on his way to Washington he was "treated, not as an American citizen, but as a brute"—forced to occupy a "filthy smoking-car" with "drunkards, gamblers, and criminals."⁴²⁰ Much was made of the inability of Frederick Douglass—whose ability and character commanded great respect across the spectrum—to dine with his fellow commissioners on a Potomac riverboat during an official trip.⁴²¹ Legal theory and actual practice often diverged, as this exchange between Lamar and two Republicans illustrates:

Mr. HALE, of New York. Now, let me ask the gentleman whether under the laws of the State of Mississippi it is possible for a colored man to travel over the railroads or in any other public conveyances in that State with the same facilities and the same conveniences that a white man may travel?

Mr. LAMAR. I answer my friend from New York with all the emphasis that I can give, that they do travel precisely with the same facilities and with the same conveniences, and a great many more, as there are more of them, than the white people of Mississippi.

.....

Mr. McKEE. Let me say that my colleague is correct. In Mississippi, under the laws and under the constitution—republican laws and republican constitution—the colored man has the same rights that a white man has. My colleague is legally correct, but practi-

⁴¹⁷ 3 Cong. Rec. 980 (Feb. 4, 1875).

⁴¹⁸ *Id.* at 955 (Feb. 3, 1875) (statement of Rep. Whitehead).

⁴¹⁹ *Id.* at 955, 957.

⁴²⁰ *Id.* at 945.

⁴²¹ *Id.* at 979 (Feb. 4, 1875) (colloquy between Reps. Rainey and Sener).

cally my colleague is mistaken. I refer to the treatment of colored people on steamboats, in hotels, theaters, &c.⁴²²

c. Access to Common Schools

Neither of the opposition's arguments regarding common carriers and public accommodations could be applied to public schools. Even opponents of the civil rights bill recognized they could not argue that the right to nondiscrimination in education was already adequately protected under the common law of the states;⁴²³ nor, of course, could they argue that public schools were merely private businesses. Instead, they based their arguments about schools on the theory that civil rights were "fundamental rights"—a category distinct from the positive law as it exists in any particular state—and that education was not such a right.

One major strand of the argument was that public schooling cannot be deemed a fundamental right because it is subject to the vagaries of state law. Trumbull explained that the right to go to school "is not any right at all" because it "depends upon what the law of the locality is."⁴²⁴ The people are entitled only to what they are given by statute. By contrast, he explained:

The term civil rights, as I understand it, applies to the rights pertaining to the citizen as such. There may be no schools at all in the State of Indiana or the District of Columbia; and would there then be any right appertaining to the individual as a citizen to go to school?⁴²⁵

Similarly, Representative Roger Mills posed the question: "Are these fundamental rights? Are they uniform everywhere?"⁴²⁶ Specifically with reference to schools, he asked, "Is the right one thing in one State, another in another, and still different in a third? If such are the privileges and immunities of citizenship, no man can tell what they are."⁴²⁷ The implicit comparison to common law

⁴²² *Id.* at 980.

⁴²³ See *Cong. Globe*, 42d Cong., 2d Sess. 894 (Feb. 8, 1872) (argument by Sen. Kelly that remedies are available for many instances of discrimination, but "in the matter of schools it may be different").

⁴²⁴ *Id.* at 3190 (May 8, 1872).

⁴²⁵ *Id.* at 3191.

⁴²⁶ 2 *Cong. Rec.* 385 (Jan. 5, 1874).

⁴²⁷ *Id.*

rights reflects the nineteenth-century view that common law rights transcend state boundaries—that they either are inherent in the nature of things or are a product of general customs and understandings of the people, rather than being subject to the vicissitudes of the positive law of the states.⁴²⁸

Other opponents relied on the fact that the right to attend public school was largely subject to the “regulation” and discretion of school authorities. Thus, Senator Eugene Casserly pointed to the various distinctions school officials draw among their pupils, based on sex, age, and educational level as well as race, and concluded that “[n]o white parent has a right to claim for his child that he shall be educated in a particular school-house to the exclusion of all others.”⁴²⁹ Trumbull argued

that the right to go to school is not a civil right, and that the schools are regulated all over the land, and must be, for the advancement of education. We have graded schools. Boys of one class are kept in one room; of another class in another; the girls are confined to one room and the boys to another; but this is not a denial of civil rights to either.⁴³⁰

In sum, Trumbull viewed education as a “right growing out of a privilege created by legislation.”⁴³¹ A similar argument was made about jury service. Senator Morton, a strong proponent of the bill, seemed to concede that it would have no application if the local officials charged with selection of the jury failed to choose black jurors, so long as the laws of the state made no racial distinction;⁴³² again, the apparent theory was that a privilege so subject to official discretion cannot possibly be a legally enforceable right.⁴³³

⁴²⁸ *Swift v. Tyson*, 41 U.S. 1 (1842), overruled by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); see James C. Carter, *The Provinces of the Written and the Unwritten Law* 51-52 (New York, Banks & Bros 1889); William C. Chase, *The American Law School and the Rise of Administrative Government* 16 (1982); Morton J. Horwitz, *The Transformation of American Law: 1870-1960*, at 120 (1992).

⁴²⁹ *Cong. Globe*, 42d Cong., 2d Sess. 3261 (May 9, 1872).

⁴³⁰ *Id.* at 3190 (May 8, 1872).

⁴³¹ *Id.* at 3191; see also *id.* (statement of Sen. Trumbull) (calling education “a privilege that is conferred by a corporation”).

⁴³² See 3 *Cong. Rec.* 1864 (Feb. 27, 1875).

⁴³³ In light of this theory, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), was more problematic than it may appear to us today. In *Yick Wo*, the Supreme Court held that the San Francisco board of supervisors had violated the Fourteenth Amendment when it systematically denied licenses to operate wooden laundries to Chinese while granting them

The application of this theory to the issue of school segregation was perhaps most clearly elaborated by counsel for the school authorities in the 1874 California school desegregation case.⁴³⁴

The Fourteenth Amendment, while it raises the negro to the status of citizenship, confers upon the citizen no new privileges or immunities. It forbids any State to abridge by legislation any of those privileges or immunities secured to any citizen by the second section of the fourth article of the Federal Constitution. They are those great fundamental rights which belong to the citizens of every free and enlightened country, and are so defined in the decisions of all the Courts.

The right of admission to our public schools is not one of those privileges and immunities. They were unknown, as they now exist, at the time of the adoption of the Federal Constitution; that instrument is silent upon the subject of education, and our public schools are wholly the creation of our own State Constitution and State laws.

The whole system is a beneficent State institution—a grand State charity—and surely those who create the charity have the undoubted right to nominate the beneficiaries of it.⁴³⁵

Other opponents of the bill drew a distinction between rights that may be pursued at the individual's "own expense"—what we would now call "negative rights"—and rights that require the financial support of government.⁴³⁶ Although they did not explicitly draw the connection, this distinction has roots in the jurisprudence of privileges and immunities under Article IV: citizens of other states are fully entitled to the rights and protections of state law (such as tort and contract), but are not ordinarily entitled to participate in the benefits of programs funded from state taxa-

to whites, notwithstanding that the decision to grant or deny licenses was within the unfettered discretion of the board. See *id.* at 374. Doctrinally, the analysis was surely affected by the decline of the Privileges or Immunities Clause as the principal focus of the Amendment and the rise of due process jurisprudence, with its emphasis on the arbitrary exercise of discretion. In an interesting sense, therefore, the too-narrow interpretation in *Slaughter-House*, see *supra* notes 236-42 and accompanying text, paved the way for a more expansive interpretation in *Yick Wo*.

⁴³⁴ *Ward v. Flood*, 48 Cal. 36 (1874).

⁴³⁵ *Id.* at 40 (argument for defendant) (citation omitted).

⁴³⁶ E.g., Cong. Globe, 42d Cong., 2d Sess. app. at 42 (Feb. 8, 1872) (statement of Sen. Vickers). See David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. Rev. 864 (1986).

tion.⁴³⁷ Senator Vickers, a proponent of this theory, was particularly offended that black citizens would share in the school fund when “[colored people] do not pay one fiftieth part of the taxes necessary for the maintenance of your institutions of learning.”⁴³⁸

There was considerable force to the claim that public school systems in the South, which were the focus of attention in the debates, were too informal and rudimentary to support the notion that there was an established, legally enforceable right to attend public school. No comprehensive public school systems existed at all in the Southern states before the War, and progress after the War was fitful. According to Senator William Stewart, as of 1874 several states continued to lack “an efficient and adequate system of common schools whereby every child may be educated.”⁴³⁹ He thought a constitutional amendment requiring the states to “have an efficient system of common schools” would be more useful than a bill mandating desegregation.⁴⁴⁰ Public schools in the Southern states served only a fraction of the school-age population. As of 1872, only half the children of Texas attended school; Mississippi, Florida, and South Carolina did not reach fifty percent participation until 1875, after the Civil Rights Act was passed.⁴⁴¹ Other states lagged even farther behind. In Virginia, according to Representative William Stowell, the public schools remained open only five months a year, and only fifteen percent of the black population attended.⁴⁴² Moreover, there continued to be significant resistance to taxation for education. Senator Henry Cooper of Tennessee elaborated on this point:

In many of our States in the South it has always been difficult to maintain a system of common-school education at all. Many of our people, long before the war as well as since, argued that the power

⁴³⁷ See Jonathan D. Varat, *State “Citizenship” and Interstate Equality*, 48 U. Chi. L. Rev. 487, 491-92, 522-23 (1981).

⁴³⁸ Cong. Globe, 42d Cong., 2d Sess. app. at 42 (Feb. 8, 1872); accord 2 Cong. Rec. 405 (Jan. 6, 1874) (statement of Rep. Durham).

⁴³⁹ 2 Cong. Rec. 4167 (May 22, 1874).

⁴⁴⁰ *Id.*

⁴⁴¹ See Foner, *supra* note 21, at 366.

⁴⁴² 2 Cong. Rec. 426 (Jan. 6, 1874). Similarly, in Alabama official reports (which were probably exaggerated) showed that black school enrollment declined from 32% in 1870 to 24% in 1873. Bond, *supra* note 65, at 100.

did not exist in the State to tax the property of the people of the State for the education of the children.⁴⁴³

Although a public school system was established in Arkansas in 1868, tax support was so meager that the new schools had closed by 1873 except where supported by private contributions.⁴⁴⁴ In Alabama, the large majority of funds appropriated for education were diverted to other uses, and by 1872 the state Superintendent of Public Instruction reported that the system was barely operative.⁴⁴⁵ Although much of the rhetoric by Southern politicians prophesying the destruction of the public schools if desegregation were required was undoubtedly bluster, it reflected a reality that the public school systems of the South were fragile and insecure.

Moreover, the line between public free schools and privately supported charity schools was blurred. "Public" schools relied heavily on private contributions and support,⁴⁴⁶ and full tax support for Southern public education was not achieved until years after passage of the Act.⁴⁴⁷ The most common form of education in the South was the "academy"⁴⁴⁸—an independent, fee-charging school that sometimes received grants of public land or money. This type of school defies modern categories of "public" and "private."⁴⁴⁹ The prevalence of academies meant that public funds often went to schools that retained their legal right to selective admission. None of this comported with the classical conception of a "civil right."

Proponents of school desegregation legislation were not much concerned by the argument that education was subject to the vagaries of state political action. Their understanding of civil rights

⁴⁴³ 2 Cong. Rec. 4155 (May 22, 1874); accord Bond, *supra* note 65, at 101.

⁴⁴⁴ Thomas S. Staples, *Reconstruction in Arkansas: 1862-1874*, at 315, 326 (1923).

⁴⁴⁵ See Bond, *supra* note 65, at 98-99.

⁴⁴⁶ Much of the financial support for education in the South, especially for black children, came from private sources. See Foner, *supra* note 21, at 98-99. The George Peabody Educational Fund was a particularly important source of educational funding throughout the South. See Staples, *supra* note 444, at 321; Frank & Munro, *supra* note 9, at 466.

⁴⁴⁷ See Kaestle, *supra* note 79, at 117.

⁴⁴⁸ *Id.* at 193. By 1850, more academies were operating in the South than in either New England or the Middle Atlantic region. *Id.*

⁴⁴⁹ *Id.* at 119; see also *id.* at 203 (discussing the distribution of state funds to private academies in antebellum North Carolina). For a detailed description of antebellum academies in Georgia, see Dorothy Orr, *A History of Education in Georgia 19-49* (1950).

was based not so much on the proposition that certain rights were stable, uniform and fundamental as on the proposition that the states must extend to their black citizens the "*same rights* that are secured by law to white people."⁴⁵⁰ The measure of civil rights was thus determined not by transjurisdictional criteria of fundamentality, but by the rights accorded under positive law to the most favored class of citizens. Senator Morton explained that the civil rights bill "does not say that schools shall be kept at all, but it contemplates this: that where there are free schools kept at public expense, . . . in such cases there shall be an equal right to participate in the benefit of those schools created by common taxation."⁴⁵¹ The states are not required to establish schools, agreed Senator Edmunds, but may not discriminate if they choose to do so:

[W]hen the law sets up a common school, which is the creature of the law, there cannot be equality of protection and equality of right when the law of the State . . . declares that a man of one color of hair or of skin may send his children, and the man of another color of hair may not send his.⁴⁵²

To the argument that the right to an education was subject to various regulations and limitations, the proponents responded that the Constitution places only one restriction on the power of the states to regulate education: that they may not discriminate on the basis of race. Other forms of regulation were of no constitutional concern. Senator Edmunds, for example, said that it had always been "[p]erfectly consistent" with the understanding of "fundamental privileges" that the states could attach "certain qualifications" such as sex, age, learning, or experience.⁴⁵³ The declarations of the Constitution, he argued, "only say that these common rights . . . shall not be invaded on the pretense that a man is of a particu-

⁴⁵⁰ Cong. Globe, 42d Cong., 2d Sess. 3193 (May 8, 1872) (statement of Sen. Sherman) (emphasis added); accord 3 Cong. Rec. 1793 (Feb. 26, 1875) (statement of Sen. Boutwell); 2 Cong. Rec. 426 (Jan. 6, 1874) (statement of Rep. Stowell) (arguing that black citizens are entitled to "the same rights everywhere in our broad land" as those accorded to white citizens).

⁴⁵¹ Cong. Globe, 42d Cong., 2d Sess. 3191 (May 8, 1872).

⁴⁵² Cong. Globe, 42d Cong., 2d Sess. app. at 26 (Feb. 6, 1872).

⁴⁵³ See 3 Cong. Rec. 1870 (Feb. 27, 1875).

lar race or a particular religion."⁴⁵⁴ In a reference to the common carrier and public accommodations provisions, but which was equally applicable to the schools provision, Frelinghuysen noted that the proprietor's "discretion as to the particular accommodation to be given to the guest, the traveler, and the visitor is quite wide."⁴⁵⁵ "But," he said, "the law demands that the accommodation shall be good and suitable, and this bill adds to that requirement the condition that no person shall, in the regulation of these employments, be discriminated against merely because he is an American or an Irishman, a German or a colored man."⁴⁵⁶

Finally, to the argument that civil rights do not include entitlement to benefits funded by the state, proponents countered that the tax-supported character of the schools is a strong additional reason to insist upon equality of treatment within them. "[W]here schools are maintained and supported by money collected by taxation upon everybody," Morton averred, "there is an equal right to participate in those schools."⁴⁵⁷ Indeed, he said, if school authorities draw distinctions on the basis of color, "I say that is a fraud upon those who pay the taxes."⁴⁵⁸ "All contribute to the taxes for [support of the schools]; all are benefited by the education given to the rising generation; and therefore all are entitled to equal privileges in the public schools," Sherman agreed.⁴⁵⁹

Even some opponents of the bill repudiated the argument that education is not a civil right, preferring to rest on the separate-but-equal argument. "One of the civil rights of the colored man undoubtedly is the right to be educated out of moneys raised by taxation," stated Representative Robert Vance of North Carolina.⁴⁶⁰ Senator Merrimon said that he "admit[ted] . . . with all its force" the proposition that "if the State law excludes the colored

⁴⁵⁴ *Id.* Representative Lynch made a similar point in the House debates. See *id.* at 943 (Feb. 3, 1875).

⁴⁵⁵ 2 Cong. Rec. 3452 (Apr. 29, 1874).

⁴⁵⁶ *Id.*

⁴⁵⁷ Cong. Globe, 42d Cong., 2d sess. 3191 (May 8, 1872).

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.* at 844 (Feb. 6, 1872); accord 2 Cong. Rec. 412 (Jan. 6, 1874) (statement of Rep. Lawrence).

⁴⁶⁰ 2 Cong. Rec. 555 (Jan. 10, 1874).

children from the schools entirely, that is a violation of the fourteenth amendment."⁴⁶¹

3. *Concern That Desegregation Would Imperil Public Education in the South*

Almost as common as the constitutional arguments was the claim that desegregation would imperil or destroy the fledgling public school systems of the Southern states. A universal system of free public education was a relatively recent development even in most of the Northern states,⁴⁶² and it was virtually nonexistent in the South prior to the Civil War.⁴⁶³ The creation of common schools was one of the most important endeavors of the Reconstruction governments of the South.⁴⁶⁴ But a lack of facilities, resources, and teachers, aggravated by the uncooperative attitude of many of the Southern people, greatly impeded this effort. The Freedmen's Bureau and various private philanthropic organizations concentrated on forming schools for the newly emancipated freedmen, who had no opportunity of education under the slavery regime. Although open to white children, these schools were almost invariably attended solely by black children. Efforts to establish a comprehensive, state-financed system for all children were somewhat haphazard. Opponents of the civil rights bills warned that desegregation would be fatal to these efforts.

The stock rhetoric of the opponents was that the bill would "destroy" public education.⁴⁶⁵ Senator Thurman, for example, reminded the Republicans that if there were to be public schools in the Southern states, "those schools must be set up and maintained by the State Legislatures and paid for out of the property of the

⁴⁶¹ Id. app. at 359 (May 21, 1874).

⁴⁶² See Kaestle, *supra* note 79, at 62-63, 104-35, 182-92 (summarizing the origins of public education in the antebellum North and Midwest).

⁴⁶³ See id. at 192-216; see also 2 Cong. Rec. 456 (Jan. 7, 1874) (statement of Rep. Butler) (recounting the history of public education in the South).

⁴⁶⁴ See Foner, *supra* note 21, at 365-66.

⁴⁶⁵ The comments to this effect were so numerous that it would be pointless to cite more than a small sampling. See, e.g., 2 Cong. Rec. app. at 318 (May 22, 1874) (statement of Sen. Merrimon); 2 Cong. Rec. 4155 (May 22, 1874) (statement of Sen. Cooper); id. at 4145 (May 22, 1874) (statement of Sen. Stockton); id. at 421 (Jan. 6, 1874) (statement of Rep. Herndon); id. at 411 (Jan. 6, 1874) (statement of Rep. Blount); id. at 385 (Jan. 5, 1874) (statement of Rep. Mills); Cong. Globe, 42d Cong., 2d Sess. 3262 (May 9, 1872) (statement of Sen. Alcorn); id. app. at 11 (Jan. 30, 1872) (statement of Sen. Saulsbury).

white people of those States."⁴⁶⁶ The result of a desegregation law, he warned, "will be that schools will not be established; the taxes will not be laid; the laws for the common-school system will be repealed or rendered nugatory; and the consequence will be that both the negro children and the poor white children too will go without education."⁴⁶⁷ Representative Mills of Texas predicted that if the desegregation bill were passed, the common schools would be "broken up in all the Southern States, and private schools established," which would leave the "children of the colored people" to "grow up in ignorance and vice."⁴⁶⁸ Representative Durham of Kentucky, after reminding his audience that Kentucky had not ratified the Fourteenth Amendment and bragging of the State's "liberality" in providing "a good system of common schools, which is supported by a direct tax upon the property of the white people of that State," opined:

Should this bill pass, and the children of freedmen demand admission into these schools, I believe the system in Kentucky will be so injured as to become worthless, and the thousands of children who thus receive a good common-school education, and who are unable to pay in the private schools, will go uneducated. Poor as they are, they will not accept of an education upon such degrading terms.⁴⁶⁹

Supporters of school desegregation responded in various ways to these arguments. Some interpreted the warnings as threats, and stood them down. General Butler, for example, said:

Again, we are told that if we do pass this bill we shall break up the common-school system of the South. I assume this is intended as a threat. If so, to that I answer, as Napoleon did, "France never negotiates under a threat." . . . "Break up the common-school system of the South!" Why, sir, until we sent the carpet-baggers down there you had not in fact a common-school system in the South. [Laughter.]⁴⁷⁰

⁴⁶⁶ 2 Cong. Rec. 4089 (May 20, 1874).

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.* at 385 (Jan. 5, 1874). Consequently, Mills warned, "[t]he great evil this bill has in store for the black man is found in the destruction of the common schools of the South." *Id.*

⁴⁶⁹ *Id.* at 406 (Jan. 6, 1874).

⁴⁷⁰ *Id.* at 456 (Jan. 7, 1874). For a similar, if less colorful reaction, see *id.* at 426-27 (Jan. 6, 1874) (statement of Rep. Stowell).

Some—in particular Republicans from Southern states—stoutly denied that desegregation would have such dire consequences. Senator Henry Pease, who had served for five years as Superintendent of Education in Mississippi, stated that “none of the difficulties that have been portrayed will obtain in the South.”⁴⁷¹ He said that the people had so come to understand the importance of public education that “there is not a State south of Mason and Dixon’s line that will abolish its school system.”⁴⁷² Still others argued that considerations of “expediency” were irrelevant to Congress’s responsibility to enforce the Constitution. “Let justice be done though the common schools and the very heavens fall,” declared Senator Howe of Wisconsin, from a safe distance.⁴⁷³ “It is always expedient to do right,” agreed Representative Lawrence of Ohio. “Equality of civil and political rights . . . is simple justice. The fourteenth amendment was designed to secure this equality of rights; and we have no discretion to say that we will not enforce its provisions.”⁴⁷⁴ School desegregation “may cause temporary strife,” Representative Williams suggested, “but better this than that growing prejudice and growing hate should rend and distract this country ever again.”⁴⁷⁵ Senator Pratt said to “[p]ass this bill and all

⁴⁷¹ *Id.* at 4153 (May 22, 1874).

⁴⁷² *Id.*; see also 3 Cong. Rec. 960 (Feb. 3, 1875) (statement of Rep. Rainey) (referring to “satisfactory results” in the states where school desegregation had been inaugurated); *id.* at 945 (Feb. 3, 1875) (statement of Rep. Lynch) (referring to experience in Southern states with desegregated education clauses in their constitutions); 2 Cong. Rec. app. at 478-79 (June 16, 1874) (statement of Rep. Darrall) (discussing the success of desegregation in Louisiana); 2 Cong. Rec. 565 (Jan. 10, 1874) (statement of Rep. Cain) (citing experience with integrated public schools in Massachusetts, Rhode Island, and New York, and with the University of South Carolina); Cong. Globe, 42d Cong., 2d Sess. 3193 (May 8, 1872) (statement of Sen. Sherman) (describing experience with integrated schools in Ohio).

⁴⁷³ 2 Cong. Rec. 4151 (May 22, 1874); see also 3 Cong. Rec. 1005 (Feb. 4, 1875) (statement of Rep. Garfield) (stating “in the long run it is safest for a nation, a political party, or an individual man to dare to do right, and let consequences take care of themselves”).

⁴⁷⁴ 2 Cong. Rec. 414 (Jan. 6, 1874). Rep. Monroe echoed this sentiment:

If we fail to secure equal protection under the laws, we fail wholly; and it is the duty of Congress, whatever else it may or may not do . . . that it shall leave no doubt in the mind of any human being in the land as to the question whether equal protection of the laws shall be extended to all classes of citizens.

Id.

⁴⁷⁵ 3 Cong. Rec. 1002 (Feb. 4, 1875).

opposition will cease in a few months, when it is known that the question is settled"⁴⁷⁶

The predictions of catastrophe nonetheless affected some members of Congress who were generally sympathetic to civil rights. Representative Ellis H. Roberts of New York, for example, could sound almost Sumneresque in his support of equality under both the recent Amendment and the Declaration of Independence. But during the final deliberations in the House he attempted to persuade his fellow Republicans to make peace with the idea of segregated education, citing threats that "if we do insist upon mixed schools, then in certain States of the South schools will be abandoned altogether."⁴⁷⁷ Even General Butler, in his final speech on the subject, when defeat was in the air, expressed concern that "there is such a degree of prejudice in the South that I am afraid that the public-school system, which has never yet obtained any special hold in the South, will be broken up"⁴⁷⁸

4. *Hostility to Enforcement of the Fourteenth Amendment*

For the most part, opposition to school desegregation in the debates of 1871-75 was framed—whether sincerely or not—in terms of either the practical effect on education or the theory that separate education is not unequal or unconstitutional. But some speeches betrayed a hostility to the very ideal of equality under the Fourteenth Amendment. Representative William Robbins of North Carolina boldly stated that it was "time to recur to the doctrine in which is bound up the salvation of this country—the doctrine that this is the white man's land and ought to be a white man's government."⁴⁷⁹ He regretted that it was "impossible to

⁴⁷⁶ 2 Cong. Rec. 4083 (May 20, 1874).

⁴⁷⁷ 3 Cong. Rec. 981 (Feb. 4, 1875). Roberts advocated a policy of "equal privileges," as opposed to mandatory integration of public schools, so that "in certain localities they can have the same schools for blacks and whites if so desired" without risking the backlash threatened by opponents of desegregation. *Id.*

⁴⁷⁸ 3 Cong. Rec. 1005 (Feb. 4, 1875).

⁴⁷⁹ 2 Cong. Rec. 900 (Jan. 24, 1874); see also *id.* at 419 (Jan. 6, 1874) (statement of Rep. Herndon) (criticizing the Fourteenth Amendment for "trench[ing] upon the reserved rights of the independent sovereign States" and commenting that the loss of state power "has been a loss to liberty itself"); Cong. Globe, 42d Cong., 2d Sess. 3251 (May 9, 1872) (statement of Sen. Blair) (criticizing the Fifteenth Amendment for conferring the vote "upon a mass of ignorant, uneducated, semi-barbarous people").

undo what has been done” in furtherance of racial equality—presumably a reference to the Reconstruction Amendments and legislation enforcing them—and was adamantly opposed to doing more. Senator Eli Saulsbury of Delaware questioned whether the Fourteenth Amendment had any “legal or binding force in law,”⁴⁸⁰ and declared:

I am placed under the most binding obligation to maintain for my race that superiority to which it is entitled by the decrees of God himself, and here in the council of my country I proclaim that no act of mine shall assist to drag it down and place it on an equality with an inferior race.⁴⁸¹

He called support for the bill “treason to the white race.”⁴⁸²

Some Southern opponents purported to be speaking for their black as well as their white constituents,⁴⁸³ but others frankly spoke in the name of the white population of their states, with thinly veiled threats of violence or even genocide. Senator Saulsbury predicted “hatred and animosity” between the races, if not “public disorder and conflict,” if the civil rights bill were to pass.⁴⁸⁴ A Democratic congressman from Kentucky made a speech in which he asked the Republican supporters of the bill “in behalf of the white children of my district” not to destroy their schools. Passage of the desegregation bill would disturb the “quiet” that then existed between the two races, he stated, “perhaps ending in a war of the races; and when that occurs, the black race in this country will be exterminated.”⁴⁸⁵ Senator Blair intermixed advocacy

⁴⁸⁰ Cong. Globe, 42d Cong., 2d Sess. app. at 9 (Jan. 30, 1872). This criticism was a reference to the irregularities in the ratification process. For a recent discussion of those irregularities, see Bruce Ackerman, *We the People: Foundations* 44-46 (1991). Ackerman observes that “[t]he Reconstruction amendments—especially the Fourteenth—would never have been ratified if the Republicans had followed the rules laid down by Article Five of the original Constitution. The Republicans were entirely aware of this fact, as were their conservative antagonists.” *Id.* at 44-45.

⁴⁸¹ Cong. Globe, 42d Cong., 2d Sess. app. at 9 (Jan. 30, 1872).

⁴⁸² *Id.*

⁴⁸³ See, e.g., 2 Cong. Rec. app. at 316 (May 22, 1874) (statement of Sen. Merrimon); 2 Cong. Rec. at 555 (Jan. 10, 1874) (statement of Rep. Vance); *id.* at 381 (Jan. 5, 1874) (statement of Rep. Stephens); Cong. Globe, 42d Cong., 2d Sess. 3262 (May 9, 1872) (statement of Sen. Alcorn).

⁴⁸⁴ Cong. Globe, 42d Cong., 2d Sess. app. at 11 (Jan. 30, 1872).

⁴⁸⁵ 2 Cong. Rec. 406 (Jan. 6, 1874) (statement of Rep. Durham).

against the bill with statements in favor of removing blacks from American society and transporting them to the tropics.⁴⁸⁶

Republican supporters of the bill were quick to claim that the entire opposition was motivated by such sentiments and to question the credibility of constitutional arguments made by opponents of the Fourteenth Amendment. Senator Morton stated derisively that Blair's "reactionary" and "antediluvian" views were representative of his political party.⁴⁸⁷ Senator Pratt commented: "I regret to say that the argument [against the bill] begins and ends in prejudice—a prejudice as unreasonable as it is unjust . . ." ⁴⁸⁸ Senator Pease said that these arguments "might have been expected" from "a party which has opposed every measure looking to the protection and elevation of a certain class of American citizens."⁴⁸⁹ Senator Edmunds dismissed the constitutional arguments of Senator Thurman—the leading Democratic opponent of the bill in the Senate—with the gibe that

nobody would doubt what is the attitude of my friend from Ohio upon the constitutionality of this provision. Nobody can doubt what his attitude would have been on the civil rights bill [of 1866] had he been here. Perhaps nobody doubts what his attitude is as to the constitutionality of the fourteenth amendment itself.⁴⁹⁰

Representative Stowell of Virginia commented on a resolution by his state's legislature opposing the bill: "[I]t looks very much as if the democratic Legislature of Virginia was willing to recognize the fourteenth amendment to the Constitution of the United States if Congress would only prevent it from being carried into execution"⁴⁹¹

It is impossible to tell what proportion of the opposition to the school desegregation bill was based on a hostility to the idea of legal equality altogether. Republican supporters suggested it was large. They are a biased source; but they also were in a position to

⁴⁸⁶ See Cong. Globe, 42d Cong., 2d Sess. 3251-52 (May 9, 1872).

⁴⁸⁷ Id. at 3253. Blair's comments also elicited strong retorts from Senators Wilson, id., and Flanagan, id. at 3255-56.

⁴⁸⁸ 2 Cong. Rec. 4082 (May 20, 1874).

⁴⁸⁹ Id. at 4153 (May 22, 1874); see also id. at 409 (Jan. 6, 1874) (statement of Rep. Elliott) (denouncing the "vulgar insinuations" and "illogical and forced conclusions" of the opposition and stating that "[r]eason and argument are worse than wasted" on them).

⁴⁹⁰ Cong. Globe, 42d Cong., 2d Sess. 731 (Jan. 31, 1872).

⁴⁹¹ 2 Cong. Rec. 426 (Jan. 6, 1874).

know. Whether large or small, this element of the opposition should be disregarded when attempting to discern the original meaning of the Fourteenth Amendment. That some leading citizens opposed the Amendment and all that it stood for does not tell us anything about what the Amendment *meant*. Indeed, the presence of this body of opinion shows that the size of the vote against the civil rights bill, minority though it was, overstates the strength of the position that segregated schools were deemed, in good faith, to be consistent with the Fourteenth Amendment.

III. VOTES ON THE DESEGREGATION MEASURE

The previous Part recounted the constitutional (and other) theories of the proponents and opponents of what would become the Civil Rights Act of 1875.⁴⁹² Even without more, this history would suffice to show that a substantial number of the leading supporters of the Fourteenth Amendment believed that segregated education was unconstitutional. This Part will recount the progress of the bill through Congress and the many votes on the measure. It provides the basis for evaluating the prevalence of the opinion that segregation is unconstitutional.

When analyzing the votes, I will sometimes use partisan affiliation as a proxy for support or opposition to the Fourteenth Amendment. Support for the Fourteenth Amendment in 1866 was almost exclusively a Republican phenomenon. In the House of Representatives, the Amendment carried by a vote of 120-32.⁴⁹³ Every Democrat, and only one Republican, voted against it. In the Senate, the Amendment carried by a vote of 33-11.⁴⁹⁴ Republicans supplied 32 of the 33 votes. In the absence of contrary evidence, I will therefore assume that Republicans were supporters, and Democrats opponents, of the Amendment.

A. *Attachment of the Civil Rights Bill as a Rider to Amnesty*

Sumner's initial proposal would "secure equal rights in railroads, steamboats, public conveyances, hotels, licensed theaters, houses of public entertainment, common schools, and institutions of learning

⁴⁹² 18 Stat. 335 (1875).

⁴⁹³ Cong. Globe, 39th Cong., 1st Sess. 3149 (June 13, 1866).

⁴⁹⁴ Id. at 3042 (June 8, 1866).

authorized by law, church institutions, and cemetery associations incorporated by national or State authority; also on juries in courts, national and State."⁴⁹⁵ The bill clearly took a sweeping view of the authority of Congress to forbid discrimination in private institutions, even including churches. Apparently, Sumner's understanding of "state action" encompassed any association incorporated under law, and the provision pertaining to jury service may have suggested application to political (in addition to civil) rights. In these respects, Sumner went well beyond the prevailing understanding of the reach of the Amendment.

In the course of the deliberations, supporters of the bill persuaded or forced Sumner to narrow its coverage in several important respects. In Sumner's original proposal, private schools were covered if they enjoyed the benefits of incorporation; but on Sumner's own motion (made at the suggestion of Senator Roscoe Conkling), this feature of the bill was struck, leaving within the ambit of the bill only those schools that were supported by "general taxation" or "authorized by law."⁴⁹⁶ Later in the debate, he accepted a similar amendment as applied to cemeteries and benevolent institutions, limiting coverage to those "of a public character."⁴⁹⁷ Application of the Act to churches came in for particular criticism on religious freedom grounds,⁴⁹⁸ but Sumner defended it, with support from Senator Sherman of Ohio.⁴⁹⁹ Senators Freling-

⁴⁹⁵ Cong. Globe, 41st Cong., 2d Sess. 3434 (May 13, 1870) (statement of Sen. Sumner).

⁴⁹⁶ Cong. Globe, 42d Cong., 2d Sess. 3267 (May 9, 1872) (statement of Sen. Sumner).

⁴⁹⁷ *Id.* (statement of Sen. Boreman).

⁴⁹⁸ See *id.* at 897-98 (Feb. 8, 1872) (statement of Sen. Corbett); *id.* at 897 (Feb. 8, 1872) (statement of Sen. Anthony); *id.* at 847-48 (Feb. 6, 1872) (statement of Sen. Frelinghuysen); *id.* at 759 (Feb. 1, 1872) (statement of Sen. Carpenter); *id.* app. at 10 (Jan. 30, 1872) (statement of Sen. Saulsbury); *id.* app. at 5 (Jan. 25, 1872) (statement of Sen. Lot Morrill).

⁴⁹⁹ See *id.* at 823-26 (Feb. 5, 1872) (statement of Sen. Sumner) ("Here is nothing of religion—it is the political law, the law of justice, the law of equal rights."); see also *id.* at 896 (Feb. 8, 1872) (statement of Sen. Sumner); *id.* at 843 (Feb. 6, 1872) (statement of Sen. Sherman) (saying that it is "dividing hairs" to extend coverage to railroads and inns but not to churches, and that "[a]ny church association that would exclude a man because of his color from worshipping God within its walls is a heathen church; it is not a Christian church"). Sherman later voted to drop the reference to churches in deference to the arguments of colleagues and to strengthen support for the remainder of the bill. *Id.* at 897 (Feb. 8, 1872).

huysen,⁵⁰⁰ Morton⁵⁰¹ and Carpenter⁵⁰² argued that application of the civil rights bill to a church that sought to exclude persons of a different race would violate the First Amendment. This argument is particularly interesting in light of the Supreme Court's 1990 holding that the First Amendment, as applied to the states through the Fourteenth, does not protect churches from neutral laws of general applicability inconsistent with the tenets of their faith.⁵⁰³ Churches eventually were eliminated from the bill.⁵⁰⁴

As discussed above, the Chairman of the Senate Judiciary Committee, Lyman Trumbull of Illinois, opposed Sumner's proposal.⁵⁰⁵ Under his leadership in both the Second and the Third Sessions of the Forty-first Congress, the Judiciary Committee reported adversely on Sumner's bill,⁵⁰⁶ apparently unanimously,⁵⁰⁷ and it died. It would be a mistake to assume, however, that Trumbull's constitutional reservations necessarily were shared by the rest of the Committee. Two members of the Committee, Conkling and Edmunds, later stated that the bill had been rejected "chiefly on the ground that the civil rights bill [of 1866] was adequate to accomplish the protection which the citizen was entitled to"—a position they soon became convinced was wrong.⁵⁰⁸

⁵⁰⁰ *Id.* at 847-48 (Feb. 6, 1872); *id.* at 896 (Feb. 8, 1872).

⁵⁰¹ *Id.* at 898 (Feb. 8, 1872).

⁵⁰² *Id.* at 759 (Feb. 1, 1872).

⁵⁰³ See *Employment Div. v. Smith*, 494 U.S. 872, 876-82 (1990); see also Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. Rev. 391, 416-31 (1987) (arguing that churches are not entitled to absolute exemption from antidiscrimination laws). The 1875 Act debates support the argument in Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106 (1994), that the framers of the Fourteenth Amendment understood free exercise as a substantive liberty rather than merely a protection from discrimination or prosecution.

⁵⁰⁴ *Cong. Globe*, 42d Cong., 2d Sess. 899 (Feb. 8, 1872). The vote was 29-24. *Id.* Much of the opposition to this change came from opponents of the entire measure, who hoped to defeat it by making the bill as "obnoxious" as they could. See, e.g., *id.* at 896 (statement of Sen. Trumbull); *id.* at 897 (statement of Sen. Thurman).

⁵⁰⁵ See *supra* text accompanying notes 317-77.

⁵⁰⁶ *Cong. Globe*, 41st Cong., 2d Sess. 5314 (July 7, 1870); *Cong. Globe*, 41st Cong., 3d Sess. 1263 (Feb. 15, 1871).

⁵⁰⁷ *Cong. Globe*, 42d Cong., 2d Sess. 730 (Jan. 31, 1872) (statement of Sen. Lot Morrill).

⁵⁰⁸ *Id.* at 731 (statement of Sen. Edmunds). Senator Thurman, a Democratic member of the Committee, challenged their account and stated that his opposition had been based on constitutional grounds. *Id.*

Whatever the grounds of its opposition, the Committee's action forced Sumner to seek an alternative procedural vehicle. Accordingly, Sumner proposed his civil rights bill as a rider to a popular "amnesty" bill, lifting political and civil disabilities from former officers of the United States or of the states who had engaged in rebellion against the Union. Under Section 3 of the Fourteenth Amendment, various persons were excluded from public office if they had previously violated their oath to support the Constitution by backing the Confederate rebellion, but Congress was permitted to lift this disability by a two-thirds vote.⁵⁰⁹ It was to such a bill that Sumner attached his civil rights measure. The advantage of this strategy, in addition to bypassing Trumbull's committee, was that it would place Sumner's Democratic opponents in the embarrassing position of either voting *for* Sumner's civil rights bill or *against* the amnesty measure. The disadvantage was that legislation containing the amnesty provision required a two-thirds vote from both houses of Congress; thus, a mere one-third of either house, adamantly opposed to desegregation, could defeat the measure.

It must be noted, moreover, that this linkage of the civil rights bill and the amnesty bill complicates using the deliberations as a source of information about the understood meaning of the Fourteenth Amendment. It has been suggested that some opponents of amnesty supported Sumner's proposal as a clever strategy for defeating the otherwise popular amnesty bill, without necessarily sharing Sumner's views on segregation. Historian Alfred Kelly attributes the "extraordinary popularity" of Sumner's proposal among the Senate Republicans to the fact that "they now saw in Sumner's rider a delightful weapon to deal with th[e] menace [of the amnesty bill]."⁵¹⁰ However, this conjecture appears to be incorrect. More likely, the votes on the rider *understated* the depth of support for desegregation; several senators expressed their support for Sumner's position, but opposed the rider because it was an impediment to amnesty, which they also supported. Kelly claims that Senators Morton, Conkling, Edmonds, Nye and Chandler were "'suddenly converted to Mr. Sumner's way of thinking,

⁵⁰⁹ U.S. Const. amend. XIV, § 3.

⁵¹⁰ Kelly, *supra* note 21, at 547.

because it is the only way amnesty can be defeated without appearing to oppose the President.’⁵¹¹ But with the exception of Nye, who lost his Senate seat in 1873, each of these men voted or spoke in favor of desegregation after these strategic considerations had passed.⁵¹² Indeed, not a single senator who voted in favor of Sumner’s rider voted against Sumner’s later freestanding desegregation legislation. By contrast, at least four senators opposed the rider despite their support for desegregation, because of the impact on amnesty,⁵¹³ and at least one senator who was opposed to amnesty voted *for* the combined bill as a result of the rider.⁵¹⁴ Moreover, when it became evident that the rider *would* have the effect of blocking the amnesty bill and that neither measure would pass, Sumner’s Republican supporters deserted him and voted for amnesty.⁵¹⁵ This course of events casts serious doubt on Kelly’s thesis.

The first test of senatorial support for Sumner’s rider came in December 1871. Opponents challenged Sumner’s motion to attach the civil rights bill as a rider to the amnesty bill on the (not implausible) ground that amnesty bills, which were a special creation of Section 3 of the Fourteenth Amendment, were not ordinary legislation and thus could not be combined with extraneous legal provi-

⁵¹¹ Id. at 547 n.43 (quoting N.Y. Trib., Jan. 24, 1872).

⁵¹² See 2 Cong. Rec. app. at 358-61 (May 21, 1874) (statement of Sen. Morton); 2 Cong. Rec. 4176 (May 22, 1874) (reporting votes by Sens. Conkling and Edmunds in favor of a freestanding civil rights bill, with Sen. Chandler paired in favor of the bill).

⁵¹³ These were Senators Sawyer, Robertson, Fenton, and Cragin. See Cong. Globe, 42d Cong., 2d Sess. 272-73 (1872) (Dec. 21, 1871) (statement of Sen. Sawyer that he supported the principles of Sumner’s bill but would vote against the amendment because it would “be absolutely fatal to the amnesty bill”); id. at 918 (Feb. 9, 1872) (statement of Sen. Robertson that “I am still ready and willing to vote for the Senator’s proposition as a separate measure, but not to attach it to this bill”); id. at 3263 (May 9, 1872) (statement of Sen. Fenton to similar effect); id. at 3196 (May 8, 1872) (statement of Sen. Cragin explaining that he voted for the civil rights rider initially “hoping that both measures might be passed at the same time,” but failing that, “being in favor of both these measures, I go for the one that is most likely to pass and become a law, and then, when the proper occasion arises, I shall go for the other”); see also id. at 3251 (May 9, 1872) (statement of Sen. Blair that both senators from South Carolina, plus others, would vote for the bill as a separate measure but not as an amendment to the amnesty bill).

⁵¹⁴ See id. at 3734 (May 21, 1872) (statement of Sen. Hamlin).

⁵¹⁵ See *infra* text accompanying notes 543-59.

sions.⁵¹⁶ This point of order was rejected by a vote of 28-26.⁵¹⁷ At least one strong supporter of Sumner's bill voted in favor of the point of order on parliamentary grounds.⁵¹⁸ Immediately thereafter, however, Sumner's amendment was rejected by a vote of 29-30.⁵¹⁹ Of those senators who had voted in favor of the Fourteenth Amendment, Sumner's proposal carried a majority of 9-3; of those who had voted against the Amendment, Sumner's proposal lost by a vote of 2-0.⁵²⁰

Sumner reintroduced his civil rights rider to the amnesty legislation later the same day, the last day before the Christmas recess. When the Senate reconvened in January 1872, Sumner's proposal received detailed consideration over several weeks of extended debate. This time, the proposal carried, though by the slimmest of margins. On February 9, 1872, the Senate divided evenly on the proposal, by a vote of 28-28, and Vice President Schuyler Colfax cast the deciding vote in favor, stating that he was "[v]oting upon this amendment as a whole, without concurrence with all the features contained in it."⁵²¹ Colfax had been Speaker of the House when the Fourteenth Amendment was adopted, and he was well known for his support of Negro suffrage.⁵²² Supporters of the Fourteenth Amendment voted for Sumner's rider by a margin of 10-1 (not counting Colfax); the exception was Trumbull.⁵²³ None of the opponents of the Amendment in the Thirty-ninth Congress

⁵¹⁶ See Cong. Globe, 42d Cong., 2d Sess. 263 (1872) (Dec. 21, 1871) (statement of Sen. Thurman); *id.* app. at 1 (Jan. 25, 1872) (statement of Sen. Lot Morrill).

⁵¹⁷ Cong. Globe, 42d Cong., 2d Sess. 274 (1872) (Dec. 21, 1871).

⁵¹⁸ *Id.* at 3183 (May 8, 1872) (subsequent statement of Sen. Hamlin).

⁵¹⁹ *Id.* at 274 (Dec. 21, 1871).

⁵²⁰ Compare Cong. Globe, 39th Cong., 1st Sess. 3042 (June 8, 1866) (reporting the Senate vote on passage of the Fourteenth Amendment) with Cong. Globe, 42d Cong., 2d Sess. 274 (1872) (Dec. 21, 1871) (reporting the Senate vote on the civil rights bill).

⁵²¹ Cong. Globe, 42d Cong., 2d Sess. 919 (Feb. 9, 1872). Interestingly, the Vice President's vote ran contrary to the policy of the Administration. President Grant favored the amnesty bill and opposed the Sumner rider. Kelly, *supra* note 21, at 547 & n.44.

⁵²² 4 Dictionary of American Biography 297-98 (Allen Johnson & Dumas Malone, eds., 1943).

⁵²³ Compare Cong. Globe, 39th Cong., 1st Sess. 3042 (June 8, 1866) (reporting the Senate vote on passage of the Fourteenth Amendment) with Cong. Globe, 42d Cong., 2d Sess. 919 (Feb. 9, 1872) (reporting the Senate vote on the civil rights bill).

remained in the Senate. Republicans supported the measure by a margin of 28-16; all twelve Democrats voted against.⁵²⁴

As amended, the amnesty bill lost the support of some of its most ardent advocates, especially among the Democrats. The measure attained 33 "ayes" and 19 "nays," two votes short of the necessary two-thirds.⁵²⁵ All but one of the negative votes came from senators who had opposed Sumner's rider.⁵²⁶

Three months later, in May 1872, the debate recurred, with similar arguments and an identical result. This time, Sumner proposed his civil rights bill as a *substitute*—rather than a rider—to the House-passed amnesty bill. Late in the debate, moderate Republican Orris Ferry of Connecticut, an opponent of school desegregation, recoupled amnesty and the civil rights bill by amending Sumner's amendment to include the first section of the original amnesty measure as an additional section.⁵²⁷ This motion was adopted, 38-14, with some supporters of school desegregation joining the affirmative vote.⁵²⁸ The bulk of the debate, however, took place while Sumner's civil rights bill was decoupled from the amnesty bill. The complicating factors present in the February vote therefore do not plague us here, and the almost identical outcome further confirms that the votes were dictated by the merits of the civil rights bill rather than by the politics of amnesty.

The debates in May 1872 presented senators with the opportunity to vote on proposals embodying both of the constitutional theories of the opposition—that education is not a civil right and is therefore not protected by the Amendment, and that segregation does not offend the principle of equality. Orris Ferry's proposed amendment to delete the clause in Sumner's proposal pertaining to

⁵²⁴ All partisan affiliations in this Article are derived from Congressional Quarterly, Guide to U.S. Elections (2d ed. 1985) and Congressional Quarterly, Guide to Congress (4th ed. 1991).

⁵²⁵ Cong. Globe, 42d Cong., 2d Sess. 928-29 (Feb. 9, 1872).

⁵²⁶ Compare *id.* at 919 (Feb. 9, 1872) (reporting the Senate vote on the desegregation amendment) with *id.* at 928-29 (Feb. 9, 1872) (reporting the Senate vote on passage of the amnesty bill). Only Senator Wright voted in favor of the desegregation amendment, yet subsequently voted against the amnesty bill.

⁵²⁷ See Cong. Globe, 42d Cong., 2d Sess. 3262 (May 9, 1872). This move casts further doubt on the hypothesis that the support for coupling the two measures came from opponents of amnesty. See *supra* notes 510-15 and accompanying text.

⁵²⁸ Cong. Globe, 42d Cong., 2d Sess. 3263 (May 9, 1872). The remainder of the amnesty bill was subsequently added by amendment. *Id.*

common schools reflected the constitutional theory that the Fourteenth Amendment did not affect local control over education.⁵²⁹ The motion lost, 25-26.⁵³⁰ The second constitutional theory of the opposition was reflected in the amendment to the Sumner bill proposed by Francis Blair of Missouri, who suggested adding the following proviso: "*Provided, however*, That the people of every city, county, or State shall decide for themselves, at an election to be held for that purpose, the question of mixed or separate schools for the white or black people."⁵³¹ This proviso suggests that segregation is not inconsistent with the equality of rights demanded by the Amendment. Blair's motion also lost, by a vote of 23-30.⁵³² These votes may suggest that support for the former constitutional theory was stronger than that for the latter—a supposition ultimately borne out by the final shape of the 1875 Act.

Of the eleven senators who had voted in the Thirty-ninth Congress in favor of the Fourteenth Amendment, ten voted against the Ferry and Blair amendments and in favor of Sumner's bill, and only one—Trumbull—voted the other way.⁵³³ The rejection of these amendments shows that a majority of the Senate—and an even larger majority of Fourteenth Amendment supporters—agreed with Sumner that segregated schooling is inconsistent with the constitutional demand of equality.

Having survived hostile amendment, the Sumner bill underwent a complicated series of votes, ultimately leading to the same division as in February. First, as noted above, the Senate adopted a motion to recouple amnesty and civil rights by attaching the amnesty bill as an amendment to Sumner's amendment.⁵³⁴ Then,

⁵²⁹ See *id.* at 3256.

⁵³⁰ *Id.* at 3258.

⁵³¹ *Id.*

⁵³² *Id.* at 3262. The Senate also rejected an amendment proposed by Senator Carpenter to delete the jury provisions from the bill, by a vote of 16-33. *Id.* at 3263.

⁵³³ Compare Cong. Globe, 39th Cong., 1st Sess. 3042 (June 8, 1866) (reporting the Senate vote on passage of the Fourteenth Amendment) with Cong. Globe, 42d Cong., 2d Sess. 3258 (May 9, 1872) (reporting the Senate vote on the Ferry amendment) and *id.* at 3262 (reporting the Senate vote on the Blair amendment). The members who supported the Fourteenth Amendment and opposed the Ferry and Blair amendments were Anthony, Chandler, Cragin, Edmunds, Justin Morrill of Vermont (who had voted for the Amendment as a member of the House of Representatives), Pomeroy, Ramsey, Sherman, Sumner and Wilson.

⁵³⁴ See Cong. Globe, 42d Cong., 2d Sess. 3262-63 (May 9, 1872).

on a motion by Trumbull to delete the entire substance of Sumner's rider (which would restore the bill to its original form as solely an amnesty measure), the Senate voted 29-29, and the Vice President cast the deciding vote in the negative.⁵³⁵ The stronger showing of opposition here (as compared to the Ferry and Blair amendments) is attributable to the votes of those like Carpenter, who supported Sumner on school desegregation but not on juries,⁵³⁶ and of those like Cragin, Sawyer, Robertson and Fenton, who supported Sumner on the merits but did not want to endanger amnesty.⁵³⁷ Had they voted in favor of the bill, it would have carried by a much wider margin.

The Sumner amendment as amended (that is, a motion to replace the amnesty bill by the civil rights bill supplemented by the amnesty bill) then failed, surprisingly, by a single vote, 27-28.⁵³⁸ That left the original House-passed amnesty bill on the floor. Sumner promptly reopened the issue by moving to amend the bill by addition of the civil rights bill.⁵³⁹ Although in substance (though not in form) this was the identical question on which he had just lost, this time the outcome was reversed.⁵⁴⁰ The Senate divided evenly, 28-28, and the Vice President broke the tie by voting in the affirmative.⁵⁴¹ So once again the Sumner bill was attached as a rider to the amnesty bill—precisely the same procedural posture as in February. But, as in February, the combined bill failed to obtain the necessary two-thirds majority. This time the vote was 32-22.⁵⁴²

⁵³⁵ *Id.* at 3264-65.

⁵³⁶ *Id.* at 3196 (May 8, 1872) (statement of Sen. Carpenter).

⁵³⁷ See *supra* note 513 and accompanying text. Senator Scott also voted against both the Blair amendment, *Cong. Globe*, 42d Cong., 2d Sess. 3262 (May 9, 1872), and the Sumner amendment, *id.* at 3264 (May 9, 1872), but he did not explain these apparently inconsistent votes. Perhaps he too was influenced by the political context of amnesty.

⁵³⁸ *Cong. Globe*, 42d Cong., 2d Sess. 3268 (May 9, 1872).

⁵³⁹ *Id.*

⁵⁴⁰ The change is attributable to Senator Wright, who voted "nay" the first time and "aye" the second. *Id.* Wright had voted in support of Sumner and his rider the previous February, *id.* at 919 (Feb. 9, 1872), and he rejected the Ferry and Blair amendments. *Id.* at 3258, 3262 (May 9, 1872). Most likely Wright's initial vote against Sumner's bill was a mistake. Senator Lewis of Tennessee, who had been absent for the first vote, appeared and voted "nay." *Id.* at 3268.

⁵⁴¹ *Id.* at 3268.

⁵⁴² *Id.* at 3270.

Both sides were stymied by the two-thirds requirement. A majority of the Senate (counting the Vice President) insisted on supporting legislation based on the premise that school segregation violates the Fourteenth Amendment. Between one-third and one-half were adamantly opposed to it. The effect was to defeat both amnesty and the civil rights bill, even though both measures commanded majority support. As Senator Edmunds explained to a weary Senate in the early hours of the morning after an all-night debate: “[T]his subject of civil rights and of amnesty . . . has been before the Senate three or four times, and both bills finally failed because gentlemen who were in favor of each separately would vote against both together.”⁵⁴³ The Republicans were under intense pressure to enact the amnesty measure, which was a leading campaign issue in the 1872 elections, especially in the South. The Democrats engaged in a filibuster to prevent consideration of the civil rights bill.⁵⁴⁴ It looked as if neither measure would pass the Senate before the summer recess, or in time for the fall campaign.

The impasse was broken on the morning of May 22, while Sumner was absent from the chamber. Edmunds, speaking for the Republicans, announced that they had decided to separate the two measures,⁵⁴⁵ in exchange for which the Democrats would agree to a vote on a watered-down civil rights measure, introduced by Carpenter, without further dilatory tactics.⁵⁴⁶ The Carpenter bill prohibited inns, places of amusement for which a public license was required, and common carriers from making “any distinction as to admission or accommodation therein, of any citizen of the United States, because of race, color, or previous condition of servi-

⁵⁴³ *Id.* at 3729 (May 21, 1872) (The actual date of Senator Edmunds’ speech was May 22, but because the Senate did not adjourn, the Congressional Globe continued to report the debate as occurring on the legislative day May 21.); see also *id.* at 3740 (statement of Sen. Sawyer) (noting that “the moment [Sumner] links his civil rights proposition with the amnesty proposition, they are both defeated”); *id.* at 3260 (May 9, 1872) (statement of Sen. Logan addressed to Sen. Sumner) (“For several months this [civil rights] bill has lain upon your table. There has not been a time that it could not have been passed by a majority of this Senate if you would take it up alone . . .”).

⁵⁴⁴ See *id.* at 3730-31 (May 21, 1872) (colloquy between Sen. Casserly and Sen. Conkling concerning the civil rights filibuster).

⁵⁴⁵ *Id.* at 3729.

⁵⁴⁶ See *id.* at 3734 (statements of Sens. Blair, Carpenter, and Davis).

tude."⁵⁴⁷ It deleted references to schools and juries, the two most controversial features of Sumner's legislation.⁵⁴⁸ After debate, the Carpenter bill was substituted for the Sumner bill by a vote of 22-20.⁵⁴⁹

Some supporters of Sumner's original bill protested the compromise, and came close to defeating the Carpenter substitute. Senator Spencer said he considered it "emasculating the bill entirely" and hoped "that every genuine friend of civil rights will vote against it."⁵⁵⁰ Senator Frelinghuysen commented that "the opinion of the Senate has been expressed over and over again in favor of retaining the provisions in reference to public schools," and that the omission "very much impairs the effect of the bill."⁵⁵¹ Senator Clayton predicted that if the substitute were adopted, "this vexed question will be still before the country, a source of trouble in future legislative bodies."⁵⁵² Other supporters of Sumner's bill argued that the Carpenter substitute, while not all that they hoped for, nonetheless "secured a considerable share of the benefits we hoped to obtain by the passage of [Sumner's] own bill."⁵⁵³ Sumner later attributed his loss to the fact that the attendance in the Senate was sparse.⁵⁵⁴ Others said "it was all we could get at this session of Congress."⁵⁵⁵ In any event, Carpenter's modified civil rights bill passed by a vote of 28-14.⁵⁵⁶

A controlling group of Sumner's supporters on the desegregation rider, including Edmonds, Carpenter, Hamlin, Wilson, and Conkling, thus abandoned Sumner's strategy; but they continued

⁵⁴⁷ Id. at 3730, 3734-35 (statements of Sen. Carpenter). A motion to delete references to places of public amusement was defeated, 14-29. Id. at 3735.

⁵⁴⁸ See id. at 3737-38 (statement of Sen. Sumner) (protesting the deletion of public schools and juries, which rendered the substitute "an emasculated civil rights bill").

⁵⁴⁹ Id. at 3735.

⁵⁵⁰ Id.

⁵⁵¹ Id.

⁵⁵² Id.

⁵⁵³ Id. at 3740 (statement of Sen. Sawyer); accord id. at 3738 (statement of Sen. Conkling).

⁵⁵⁴ See id. at 3738, 3739 (statements of Sen. Sumner) (urging that his motion to reconsider the Carpenter substitute be postponed for decision by the "full Senate").

⁵⁵⁵ Id. at 3739 (statement of Sen. Sawyer); accord id. (statement of Sen. Anthony).

⁵⁵⁶ Id. at 3736.

to profess support for his ultimate objective.⁵⁵⁷ When Sumner arrived on the Senate floor later that morning, he attempted to rally the Republicans to his original strategy, and once more offered his civil rights bill as a rider to the amnesty bill. This time he was voted down, 13-29,⁵⁵⁸ and the amnesty bill passed almost unanimously (with only Sumner and Nye voting against).⁵⁵⁹

Events in the House of Representatives turned this compromise into a total defeat for the civil rights advocates. Although the amnesty bill easily cleared the House, Carpenter's civil rights bill was bottled up. A two-thirds majority was required to suspend the rules to take up the bill on the floor of the House. On May 28, a vote to consider the bill carried a majority of 114-83, a comfortable majority but well short of the necessary two-thirds.⁵⁶⁰ In two votes taken on June 7, the bill again obtained a majority but not two-thirds.⁵⁶¹ The Carpenter bill never again saw the light of day.

B. Desegregation Efforts in the House, 1872

While the amnesty rider effort occupied the attention of the Senate, the opponents of school segregation in the House of Representatives attempted to enact a civil rights bill similar to the Sumner measure as freestanding legislation. The bill, H.R. 1647, was introduced by Representative William Frye, Republican from Maine, on February 19, 1872.⁵⁶² Applicable to inns, common carriers, theaters and places of public amusement, common schools and other public institutions of learning supported by moneys derived from general taxation or authorized by law, and incorporated cemeteries and benevolent institutions, the bill guaranteed to every citizen "the full and equal enjoyment of any accommodation,

⁵⁵⁷ Several of these senators made speeches emphasizing that their decision to separate the civil rights bill from the amnesty measure did not suggest any lack of commitment to the civil rights bill on their part. See, e.g., *id.* at 3730 (statements of Sen. Edmunds and Sen. Hamlin); *id.* at 3732 (statement of Sen. Wilson); *id.* at 3738 (statement of Sen. Conkling); *id.* at 3739-40 (statement of Sen. Sawyer).

⁵⁵⁸ *Id.* at 3737-38.

⁵⁵⁹ The vote was 38-2. *Id.* at 3738.

⁵⁶⁰ *Id.* at 3932 (May 28, 1872).

⁵⁶¹ *Id.* at 4322 (June 7, 1872). The first vote, on an amended version of the bill containing a maximum penalty for violations and no minimum penalty, was 86-73; the second vote, on an amended version reducing the maximum penalty, was 83-73. *Id.*

⁵⁶² Cong. Globe, 42d Cong., 2d Sess. 1116 (Feb. 19, 1872).

advantage, facility, or privilege" furnished by the covered entities.⁵⁶³ The bill specifically provided that private schools, cemeteries, and institutions of learning maintained by voluntary contributions could remain segregated, but that no new such institutions could be created.⁵⁶⁴ It also forbade racial discrimination in jury service.⁵⁶⁵

From the sparse debate on the bill,⁵⁶⁶ we can tell that it was understood to require desegregation of the covered institutions. Representative H.D. McHenry, of Kentucky, stated that the bill was "the same" as that presented in the Senate by Sumner,⁵⁶⁷ and—as was shown above—the Sumner bill was understood to require desegregation. McHenry, a strident opponent of the bill, described the bill as "giv[ing] the negro the right . . . to eat at the same table with the most favored guest,"⁵⁶⁸ and "forc[ing] [the white] child to sit on the same seat with the negro, and to be raised up in fellowship with him."⁵⁶⁹ Representative Harper of North Carolina, another opponent, described the bill as saying to the white people, "'You must ride in the same car, eat at the same table, and lodge in the same room with a negro'"⁵⁷⁰ It is obvious that separate but equal accommodations were not thought permissible under the bill.

The bill was scheduled for consideration during the Monday "morning hour," when the rules of the House precluded debate or amendment. Thus, the opinion of the members must be divined from a series of procedural votes rather than from statements on the floor or more definitive votes on the merits. The Democratic strategy was to prevent an up-or-down vote. Representative Hooper, one of the principal sponsors, complained that the bill "would be acted on at once if gentlemen on the other side would

⁵⁶³ *Id.*

⁵⁶⁴ See *id.*

⁵⁶⁵ *Id.*

⁵⁶⁶ The bill was not debated directly, but several representatives made comments on it during time devoted to general remarks. See, e.g., *id.* at 1116-17 (statements of Representatives Dawes and Cox).

⁵⁶⁷ *Id.* app. at 217 (Apr. 13, 1872).

⁵⁶⁸ *Id.*

⁵⁶⁹ *Id.* at 218.

⁵⁷⁰ *Id.* at 372 (May 4, 1872).

not filibuster.”⁵⁷¹ On February 19, 1872, the first test of support was on a motion to reject the bill, which failed by a vote of 89-116.⁵⁷² There was a perfect congruence between support for the Fourteenth Amendment and support for the bill on this vote. All eleven members of the House who had voted in favor of the Fourteenth Amendment voted in favor of the bill; the three who had voted against the Amendment opposed it.⁵⁷³ Similarly, the breakdown was almost entirely on party lines. Only three votes in favor of the bill (out of 116) came from Democrats and only three votes against (out of 89) came from Republicans.

The next test, March 25, 1872, was on a motion by Representative Robert Elliott, a black Republican lawyer from South Carolina, to suspend the rules and take up consideration of the bill. This would require a two-thirds majority. Elliott’s motion won the votes of 98 members, with 80 opposed, far short of the necessary two-thirds.⁵⁷⁴ On April 1, opponents attempted to kill the measure by tabling it, but the effort failed, 73-99.⁵⁷⁵ On April 8, proponents moved an additional step toward passage by successfully moving for engrossment and third reading. This motion passed by a vote of 100-78.⁵⁷⁶ At this point, opponents of the bill became alarmed. In a speech delivered April 13, 1872, Representative McHenry interpreted the previous vote as “a test vote” on the degree of support for the bill and stated, “I presume in a short time it will be passed by the same vote which ordered its third reading.”⁵⁷⁷ He also warned that “[t]his measure was adopted in the Senate as an amendment to the amnesty bill at this session, and it is a well-ascertained fact that if we pass it here it will pass that body and become a law.”⁵⁷⁸

⁵⁷¹ Cong. Globe, 42d Cong., 2d Sess. 2441 (Apr. 15, 1872).

⁵⁷² *Id.* at 1117 (Feb. 19, 1872).

⁵⁷³ Compare Cong. Globe, 39th Cong., 1st Sess. 3149 (June 13, 1866) (reporting the House vote on passage of the Fourteenth Amendment) with Cong. Globe, 42d Cong., 2d Sess. 1117 (Feb. 19, 1872) (reporting the House vote on the motion to reject the civil rights bill).

⁵⁷⁴ Cong. Globe, 42d Cong., 2d Sess. 1956 (Mar. 25, 1872).

⁵⁷⁵ *Id.* at 2074 (Apr. 1, 1872).

⁵⁷⁶ *Id.* at 2270 (Apr. 8, 1872).

⁵⁷⁷ *Id.* app. at 217 (Apr. 13, 1872).

⁵⁷⁸ *Id.*

On April 15, opponents began a strategy of filibustering the bill by offering a series of motions to table the bill or to adjourn, and demanding roll call votes.⁵⁷⁹ This tactic was sufficient to block action during the limited time available during the “morning hour.” Their apparent purpose was to force the Republican majority to remove the bill from the morning hour and consider it under a rule that would allow amendment and debate, a course which Republican strategists rejected.⁵⁸⁰ The Republicans could summon a clear majority in support of the bill, but not the two-thirds necessary to suspend the rules. Eventually, they gave up in frustration and devoted their energies to a different vehicle for achieving their objective.

C. *Renewed Attempts to Pass the Bill, 1873-74*

In December 1873, Senator Charles Sumner and the flamboyant former Union General Benjamin F. Butler, now a Representative from Massachusetts and chairman of the House Judiciary Committee, introduced civil rights bills in their respective chambers.⁵⁸¹ The House bill ultimately would be enacted, in modified form, as the Civil Rights Act of 1875. Both bills required desegregation of common schools, as well as of common carriers, inns, theaters, cemeteries, and places of public amusement, and guaranteed the right of jury service without discrimination on the basis of race.⁵⁸² The regulation of privately owned facilities such as inns and coin-

⁵⁷⁹ See Cong. Globe, 42d Cong., 2d Sess. 2441 (Apr. 15, 1872).

⁵⁸⁰ See *id.* (statement of Rep. Eldredge).

⁵⁸¹ 2 Cong. Rec. 2 (Dec. 2, 1873) (Senate); *id.* at 318 (Dec. 18, 1873) (House). Representative Frank Morey, a Louisiana Republican, also introduced a bill, H.R. 473, which was identical to Sumner's. See *id.* at 97 (Dec. 8, 1873). The bill was referred to the Judiciary Committee, *id.* at 98, which—not surprisingly—voted out the chairman's bill rather than Morey's.

⁵⁸² Sumner's bill, S. 1, provided, *inter alia*:

That no citizen of the United States shall, by reason of race, color, or previous condition of servitude, be excepted or excluded from the full and equal enjoyment of any accommodation, advantage, facility, or privilege furnished by innkeepers; by common carriers, whether on land or water; by licensed owners, managers, or lessees of theaters or other places of public amusement; by trustees, commissioners, superintendents, teachers, and other officers of common schools and public institutions of learning, the same being supported by moneys derived from general taxation or authorized by law; also of cemetery associations and benevolent associations supported or authorized in the same way: *Provided*, That private schools, cemeteries, and institutions of learning established exclusively for white or

mon carriers, which would later be its constitutional downfall in the *Civil Rights Cases*,⁵⁸³ was the least controversial aspect of the bill. The jury provisions generated the most serious qualms among constitutionally scrupulous members generally sympathetic to the civil rights cause.⁵⁸⁴ But it was the schools provision that generated the most intense opposition and dominated the debates, and only the schools and cemetery provisions that ultimately failed to be enacted.

The Sumner bill was referred to the Judiciary Committee for a thorough examination of its constitutionality, in light of the recently decided *Slaughter-House Cases*.⁵⁸⁵ Sumner expressed some concern that the Judiciary Committee would kill the bill, as it

colored persons, and maintained respectively by voluntary contributions, shall remain according to the terms of the original establishment.

Id. at 945 (Jan. 27, 1874). In addition, Section 4 of the Sumner bill prohibited racial discrimination in jury service. Id. Butler's bill, H.R. 795, provided, *inter alia*:

That whoever, being a corporation or natural person, and owner, or in charge of any public inn; or of any place of public amusement or entertainment for which a license from any legal authority is required; or of any line of stage-coaches, railroad, or other means of public carriage of passengers or freight; or of any cemetery, or other benevolent institution, or any public school supported, in whole or in part, at public expense or by endowment for public use, shall make any distinction as to admission or accommodation therein, of any citizen of the United States, because of race, color, or previous condition of servitude, shall, on conviction thereof, be fined not less than one hundred nor more than five thousand dollars for each offense; and the person or corporation so offending shall be liable to the citizens thereby injured, in damages to be recovered in an action of debt.

Id. at 378 (Jan. 5, 1874) (quoted by Rep. Stephens).

⁵⁸³ 109 U.S. 3 (1883).

⁵⁸⁴ See, e.g., 2 Cong. Rec. 948 (Jan. 27, 1874) (colloquy between Sen. Sumner and Sen. Edmunds regarding jury provision). This debate recalled Senator Carpenter's earlier position in favor of school desegregation but opposed (on constitutional grounds) to the jury provisions. See Cong. Globe, 42d Cong., 2d Sess. 3196 (May 8, 1872). The problem was that the Privileges or Immunities Clause protected "civil" rights but not "political" or "social" rights. Jury service was most commonly understood as a political right, and thus as not covered by the Fourteenth Amendment, but supporters could make a plausible argument that the jury provision was an indirect means of protecting the "civil" right of parties to a lawsuit to have their case tried by a jury that was selected without discrimination on the basis of their race. See Cong. Globe, 42d Cong., 2d Sess. 848 (Feb. 6, 1872) (statement of Sen. Frelinghuysen) ("I do not understand that it is the right of a man to be a juror, but that it is the right of a large class that their whole class shall not be excluded from the jurybox."); see also 3 Cong. Rec. 1794 (Feb. 26, 1875) (statement of Sen. Morton) (arguing that racial discrimination in jury service denies equal protection of the laws).

⁵⁸⁵ 83 U.S. (16 Wall.) 36 (1873); see 2 Cong. Rec. 946 (Jan. 27, 1874) (statement of Sen. Ferry); id. (statement of Sen. Edmunds); id. at 947 (statement of Sen. Stewart).

had in earlier Congresses under former chairman Lyman Trumbull, but the new chairman, George Edmunds, assured Sumner that that was not his intention, and Sumner assented to the referral.⁵⁸⁶

The Butler bill was taken up by the House and debated for three weeks. The House debate was extraordinarily partisan and sectional. Fourteen congressmen spoke in favor of the bill. All fourteen were Republicans, two of whom (Lawrence and Poland) had voted in favor of the Fourteenth Amendment. Sixteen congressmen spoke against the bill. All sixteen were Democrats; fourteen were from the South and none had supported the Fourteenth Amendment. Butler commented scathingly on the lack of Northern support for the opposition:

[T]he only argument which has been introduced here [is] the argument to prejudice. . . . To show how deep that prejudice is in the South, and that it is not shared by the North, I call the attention of the House that there has yet, in these two days of fruitless debate, been no man from the North who calls himself a democrat who has risen to oppose this bill or make a speech against its provisions.⁵⁸⁷

When Butler asked if he was correct, only one Northern Democrat admitted to opposition to the bill.⁵⁸⁸

The principal speaker against the bill was Alexander H. Stephens of Georgia, the Vice President of the Confederate States of America, now eligible to hold office because of the amnesty bill passed by the previous session of Congress. Stephens was considered by many to have been the most eloquent defender of slavery in the later years of the antebellum period. In his famous "Corner-Stone" speech at Savannah, Georgia in March 1861, Stephens had declared that the new Confederate government was based on "the great truth that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and normal condition." ⁵⁸⁹ After the War, Stephens urged acquiescence in the abolition of slavery and good will toward the freedmen, but he opposed both the Fourteenth and Fifteenth Amendments.⁵⁹⁰ The

⁵⁸⁶ 2 Cong. Rec. 945-49 (Jan. 27, 1874) (colloquy between Sen. Sumner and Sen. Edmunds).

⁵⁸⁷ *Id.* at 457 (Jan. 7, 1874).

⁵⁸⁸ See *id.* (statement of Rep. DeWitt).

⁵⁸⁹ 17 Dictionary of American Biography 573 (Dumas Malone, ed., 1935).

⁵⁹⁰ See *id.* at 574.

symbolism of his leadership in the debate was powerful, for it associated opposition to the civil rights bill with the heritage of slavery, the Confederacy, and opposition to the Reconstruction Amendments. His actual constitutional argument was primarily a plea for a very narrow construction of the Section 5 power, arguing that a more expansive construction "would entirely upset the whole fabric of the Government, the maintenance of which in its integrity was the avowed object of the war."⁵⁹¹

In one of the most compelling moments in the entire debate, Robert Elliott, a black lawyer from South Carolina, rose to respond to Stephens. The descendant of slaves faced the former leader of the slaveholders. Elliott began by stating that he shared "in the feeling of high personal regard for [Stephens] which pervades this House," referring to Stephens' "years, his ability, and his long experience in public affairs." But, he said, "in this discussion I cannot and I will not forget that the welfare and rights of my whole race in this country are involved." Thus, Elliott did not "shrink from saying that it is not from [Stephens] that the American House of Representatives should take lessons in matters touching human rights or the joint relations of the State and national governments."⁵⁹² He continued:

[Stephens] now offers this Government, which he has done his utmost to destroy, a very poor return for its magnanimous treatment, to come here and seek to continue, by the assertion of doctrines obnoxious to the true principles of our Government, the burdens and oppressions which rest upon five millions of his countrymen who never failed to lift their earnest prayers for the success of this Government when the gentleman was seeking to break up the Union of these States and to blot the American Republic from the galaxy of nations.⁵⁹³

The *Congressional Record* reports that Elliott's speech was greeted with loud applause.⁵⁹⁴

The transcript of the debate leaves the distinct impression that opposition to the bill was not based on a genuine interest in faithful enforcement of the Fourteenth Amendment but was a rearguard

⁵⁹¹ 2 Cong. Rec. 380 (Jan. 5, 1874).

⁵⁹² Id. at 409 (Jan. 6, 1874).

⁵⁹³ Id. at 409-10.

⁵⁹⁴ Id. at 410.

action by Southern conservatives who had supported slavery, opposed Reconstruction, and now were opposing desegregation on much the same ground. One particularly egregious example bears mention. John Harris of Virginia stated that "there is not one gentleman upon this floor who can honestly say he really believes that the colored man is created his equal." He was interrupted from the floor by Alonzo Ransier, a black congressman from South Carolina, who stated, "I can," to which Harris retorted: "Of course you can; but I am speaking to the white men of the House; and, Mr. Speaker, I do not wish to be interrupted again by him."⁵⁹⁵ Shortly thereafter, Harris responded to the argument that Southern sentiments against desegregation were a product of "prejudice":

Mr. HARRIS, of Virginia. . . . Admit that it is prejudice, yet the fact exists, and you, as members of Congress and legislators, are bound to respect that prejudice. It was born in the children of the South; born in our ancestors, and born in your ancestors in Massachusetts—that the colored man was inferior to the white.

Mr. RANSIER. I deny that.

Mr. HARRIS, of Virginia. I do not allow you to interrupt me. Sit down; I am talking to white men; I am talking to gentlemen.⁵⁹⁶

Republicans capitalized on Harris' breach of decorum by implying that it was typical of the "spirit that still animates" the Democratic Party.⁵⁹⁷ Representative Elliott responded directly to Representative Harris' "diatribe," stating:

[Harris] so far transcended the limits of decency and propriety as to announce upon this floor that his remarks were addressed to white men alone[.] I shall have no word of reply. Let him feel that a negro was not only too magnanimous to smite him in his weakness, but was even charitable enough to grant him the mercy of his silence. [Laughter and applause on the floor and in the galleries.]⁵⁹⁸

The House debate was ultimately inconclusive. On January 7, 1874, Butler withdrew the bill to the Judiciary Committee to con-

⁵⁹⁵ Id. at 376 (Jan. 5, 1874) (colloquy between Rep. Harris and Rep. Ransier).

⁵⁹⁶ Id. at 377 (colloquy between Rep. Harris and Rep. Ransier).

⁵⁹⁷ Id. at 567 (Jan. 10, 1874) (statement of Rep. Mellish); accord id. at 426 (Jan. 6, 1874) (statement of Rep. Stowell).

⁵⁹⁸ Id. at 410 (Jan. 6, 1874).

sider various amendments that had been offered on the floor.⁵⁹⁹ When it was reported back, it had been stripped of its school desegregation provision.⁶⁰⁰ Historian Alfred Kelly attributes Butler's withdrawal of the motion from the floor to pressure from Barnas Sears, an officer of the Peabody Education Fund, which was a principal source of school funding for black and white children in the Southern states, and which threatened to cut off funding if the schools were desegregated.⁶⁰¹ Although this may be true, Butler's statements to the House at the time of recommitment betray no change of heart on the schools issue or anything else. Butler delivered a fiery speech in full-throated support of the measure, which was interrupted so many times by laughter and applause from the spectators that the Speaker had to threaten to clear the galleries.⁶⁰² His only specific reference to the schools question was the sarcastic statement, with regard to an amendment to allow separate but equal schools, that he wished to "consider whether upon the whole it is just to the negro children to put them into mixed

⁵⁹⁹ *Id.* at 458 (Jan. 7, 1874). Many of the amendments were directed to the segregation issue, and they confirmed that the bill was understood to outlaw segregated facilities. For example, Rep. Eldredge proposed the following amendment: "That nothing in this act shall be so construed as to prevent any person or corporation from making any separate arrangement or provision for the accommodation, convenience, or comfort of the white citizens of the United States." *Id.* at 339 (Dec. 19, 1873). Similarly, Rep. Beck proposed:

That nothing herein contained shall be so construed as to require hotel-keepers to put whites and blacks into the same rooms, or beds or feed them at the same table, nor to require that whites and blacks shall be put into the same rooms or classes at school, or the same boxes or seats at theaters, or the same berths on steamboats or other vessels, or the same lots in cemeteries.

Id. at 405 (Jan. 6, 1874). Rep. Durham, a Democrat from Kentucky, also proposed an amendment, which, if adopted, would have authorized the segregation of schools:

[S]hould the trustees or other persons having control over the free or common schools in their respective districts cause to be taught a separate school in said district for the negro and mulatto children therein for the same length of time the other free or common school is taught, then said negroes or mulattoes shall have no right under this bill to admission to or accommodation in schools wherein white children are taught.

Id. at 406. See also *id.* at 407 (amendment by Rep. Lowndes) (providing "[t]hat where separate schools are provided for white and colored children, the children of each race shall have admission only to the schools for that race").

⁶⁰⁰ See *infra* notes 666-69 and accompanying text.

⁶⁰¹ Kelly, *supra* note 21, at 553-54; see also Frank & Munro, *supra* note 9, at 466 (concluding that the threat to withdraw school funding "materially contributed to the change in the bill").

⁶⁰² See 2 Cong. Rec. 458 (Jan. 7, 1874).

schools, where, being in the same classes with the white children, they may be kept back by their white *confrères*.”⁶⁰³ These would not seem to be the remarks of a man who had been persuaded to abandon support for school desegregation.

D. Passage by the Senate, 1874

Action on the civil rights bill moved back to the Senate. On April 29, 1874, the Judiciary Committee reported favorably on a revised version of Sumner’s bill.⁶⁰⁴ In the meantime, Sumner himself had died, so leadership in support of the measure passed to Judiciary Committee member (and future Secretary of State) Frederick Frelinghuysen of New Jersey. Section 1 of the bill as reported from committee was as follows:

That all persons within the jurisdiction of the United States 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; *and also of common schools and public institutions of learning or benevolence supported, in whole or in part, by general taxation; and of cemeteries so supported,* 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.⁶⁰⁵

Section 4 guaranteed the right of every qualified citizen to serve on juries without regard to race, and other sections of the bill specified enforcement and penalties.⁶⁰⁶ This proposal—minus the italicized portion respecting schools and cemeteries—ultimately became the Civil Rights Act of 1875.

Because the Judiciary Committee draft contained language ultimately enacted into law, we must pause to consider whether it required access to the covered facilities on a desegregated basis, or merely on a separate-but-equal basis. In the years following enactment, several lower federal courts interpreted the Act to permit separate but equal facilities, albeit without reference to (and likely

⁶⁰³ *Id.* at 457.

⁶⁰⁴ 2 Cong. Rec. 3450-51 (Apr. 29, 1874).

⁶⁰⁵ *Id.* at 3451 (Apr. 29, 1874) (emphasis added).

⁶⁰⁶ *Id.*

without access to) the legislative history.⁶⁰⁷ Furthermore, historians have expressed doubt about the Act's intended meaning.⁶⁰⁸

Frelinghuysen explained that his bill "followed the language of the original bill as introduced by Mr. Sumner," changed only "in the manner in which it is presented."⁶⁰⁹ This would, of course, mean that the bill forbade segregation of the covered facilities, because this was the clear import of Sumner's bill. But in fact the committee had subtly altered Sumner's language to reflect the revisionist equal protection rationale for the bill, as a response to the *Slaughter-House* decision.⁶¹⁰ Whereas the Sumner bill had begun with the words "no citizen of the United States shall," the Frelinghuysen bill applied to "all persons within the jurisdiction of the United States."⁶¹¹ This revision reflected the doctrinal shift from the Privileges or Immunities Clause to the Equal Protection Clause. Moreover, in shifting from a negative proscription ("no citizen of the United States shall") to an affirmative protection ("all persons within the jurisdiction of the United States shall"), the committee had to drop the word "any" that had appeared in Sumner's text. Where Sumner's bill had provided that no citizen shall be "excepted or excluded from the full and equal enjoyment of any accommodation, advantage, facility, or privilege furnished

⁶⁰⁷ See, e.g., Charge to Grand Jury—The Civil Rights Act, 30 F. Cas. 999, 1001 (C.C.W.D.N.C. 1875) (No. 18,258); *United States v. Dodge*, 25 F. Cas. 882, 883 (W.D. Tex. 1877) (No. 14,976); see also *Gray v. Cincinnati S. Ry. Co.*, 11 F. 683, 685-86 (C.C.S.D. Ohio 1882) (noting in dictum that the obligation to provide equal accommodations may sanction segregation).

⁶⁰⁸ See, e.g., Lofgren, *supra* note 9, at 137 ("As adopted, the equal accommodations section [of the 1875 Act] may have guaranteed more than simply a right of access to equally good facilities, enforceable in federal court, but this interpretation was ensured neither by its language nor by its legislative history."). Herbert Hovenkamp has stated:

The Civil War Amendments and the Civil Rights Act of 1875 were designed to give blacks "equal" access to certain institutions and facilities—but in 1875 *equal* access did not mean *integrated* access. . . . In fact, the outcome in *Plessy v. Ferguson* would have been the same even if the Civil Rights Act of 1875 had been upheld by the Supreme Court.

Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 *Duke L.J.* 624, 642-43. Neither Lofgren nor Hovenkamp analyzed the legislative history in any detail, and they did not present any evidence in support of their reading of the Act that is not analyzed in this Article.

⁶⁰⁹ 2 Cong. Rec. 4169 (May 22, 1874). Sumner's bill is quoted in full at *supra* note 582.

⁶¹⁰ 83 U.S. (16 Wall.) 36 (1873).

⁶¹¹ Compare 2 Cong. Rec. 945 (Jan. 27, 1874) (Sumner bill) with *id.* at 3451 (Apr. 29, 1874) (Frelinghuysen bill).

by . . . superintendents, teachers, and other officers of common schools,” the revised bill provided that all persons “shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of . . . common schools.”⁶¹² The right to equal accommodation in *any* school is not necessarily the same as the right to equal accommodation in the *schools*. The change thus introduced an ambiguity that had not been present in the Sumner bill. In light of Frelinghuysen’s explanation, the ambiguity was apparently both unnoticed and unintended, but it nonetheless generated questions.

George Boutwell of Massachusetts, a dedicated proponent of racially integrated schools and former member of the Joint Committee on Reconstruction, perceived that omission of the word “any” could obscure the meaning of the bill:

[T]here are Senators who say, and there are persons outside who will say, . . . that if a school-house is set up on one side of a street for black children and another on the opposite side set up for white children and they are compelled respectively to go to the schools established, and it turns out that the appropriation made for each school is equal to the appropriation made for the other, that the teachers are of equal capacity, that the same branches are taught, then equal facilities are furnished, which is the expression employed by the committee.⁶¹³

He therefore moved to amend the bill to refer to “*every* common school and public institution of learning or benevolence.”⁶¹⁴ Boutwell explained that his amendment was purely for purposes of clarification: “I only wish to say that this amendment is designed to make clearer than the text of the bill seems to do what I suppose is the intention of the committee, and the intention of the Senate”⁶¹⁵

Others did not see the ambiguity, and suspected that Boutwell’s intention was to require the states to *compel* attendance at racially

⁶¹² Compare *id.* at 945 (Jan. 27, 1874) (Sumner bill) (emphasis added) with *id.* at 3451 (Apr. 29, 1874) (Frelinghuysen bill).

⁶¹³ *Id.* at 4168 (May 22, 1874).

⁶¹⁴ *Id.* at 4167 (emphasis added).

⁶¹⁵ *Id.*

integrated schools.⁶¹⁶ Frelinghuysen insisted that under the bill as reported by the committee "a colored child has a right to go to a white school, or a white child to go to a colored school,"⁶¹⁷ and thus that Boutwell's amendment was unnecessary. He pointed out that Boutwell's amendment, in addition to being unnecessary, would literally mean that "all persons shall be entitled to the accommodations of *every* common school," which would make no sense, because no child could attend more than one school at a time.⁶¹⁸ He also reminded the Senate (inaccurately) that the language had been taken from Sumner's legislation, which should have assured them that it could not reasonably be interpreted to allow separate but equal schools. The principal spokesman for the opposition, Senator Allen Thurman, former Chief Justice of the Ohio Supreme Court, similarly interpreted the bill as requiring desegregation. "I know that the first section of the bill may to a careless reader seem ambiguous," he commented, "but I do not think there is one member of the majority of the Judiciary Committee who will not say, if the question is put directly to him, that the meaning of the section is that there shall be mixed schools."⁶¹⁹ A number of other congressmen in both houses likewise commented that though the text was ambiguous the intent was clear.⁶²⁰ An

⁶¹⁶ See *id.* at 4168 (statement of Sen. Stewart) (stating that Boutwell's amendment would "require the children of colored people and white people to go to the same school, whether they desire it or not"); *id.* (colloquy between Sen. Frelinghuysen and Sen. Boutwell).

⁶¹⁷ 2 Cong. Rec. 4168 (May 22, 1874); accord *id.* (statement of Sen. Frelinghuysen) (stating that "the bill as it stands . . . does give any person a right to *any* of these schools") (emphasis added).

⁶¹⁸ *Id.* (emphasis added). Frelinghuysen also pointed out that other language in Boutwell's amendment would make the bill applicable to private schools that received any form of state "endowment" in the future. He stated that "I do not think we ought to put it in the power of a State by making an endowment to an institution to change it from a private to a public institution." *Id.* This position accords with the Supreme Court's later holdings that the mere receipt of governmental financial assistance by a private institution does not render its actions "state action" for purposes of the Fourteenth Amendment. See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830, 839-43 (1982). But cf. *Norwood v. Harrison*, 413 U.S. 455, 463-68 (1973) (striking down state provision of textbooks to racially discriminatory private schools in context of state-encouraged movement to abandon public schools).

⁶¹⁹ 2 Cong. Rec. 4088 (May 20, 1874).

⁶²⁰ See, e.g., 3 Cong. Rec. 981 (Feb. 4, 1875) (statement of Rep. Ellis Roberts) (stating that he "understand[s] the Senate bill to insist upon the same schools for the colored children as for the white children"); 2 Cong. Rec. 4158 (May 22, 1874) (statement of Sen.

identical ambiguity in a law prohibiting discrimination by a railroad had been interpreted by a unanimous Supreme Court the previous year as forbidding segregation.⁶²¹ Boutwell's amendment was defeated by a vote of 5-42.⁶²²

Subsequent debate further confirms that the bill was understood to require not just equality of facilities but desegregation, for that was the predominant focus of the senators' remarks. Far more than in earlier debates, opponents pressed the argument that separate facilities of equal quality would suffice to satisfy the dictates of the Constitution.⁶²³ Perhaps the clearest statement of this argument was by Augustus Merrimon, a North Carolina Democrat, who reasoned:

[T]he State Legislature cannot pass a law providing that white children should be educated and that colored children should not be, because that would deny the equal protection of the laws. But when it affords the same provision, the same measure, the same character for the colored race that it afforded for the white race, there is no more discrimination against one race than there is against the other; and therefore it is competent for the Legislature to do it, there being no restriction on such a power in the Constitution of the United States.⁶²⁴

On the proponents' side, Edinunds denounced a proposed amendment that would authorize separate facilities: "If there is anything in the bill," he said, "it is exactly contrary to that. If there is anything in the fourteenth amendment it is exactly opposite to that."⁶²⁵

To be sure, Republican supporters of the bill not infrequently denied that it would bring about "mixed schools," which has led some historians to question whether these speakers understood it

Saulsbury) (stating that, despite Boutwell's comments, he interprets the bill as prohibiting separate schools); *id.* at 4154 (statement of Sen. Cooper) (noting that the text of the bill is ambiguous but that the intent is clear).

⁶²¹ *Railroad Co. v. Brown*, 84 U.S. (17 Wall.) 445, 452-53 (1873). For fuller discussion of the case, see *infra* text accompanying notes 792-805.

⁶²² 2 Cong. Rec. 4169 (May 22, 1874).

⁶²³ See, e.g., *id.* at 4144 (statement of Sen. Stockton); *id.* at 4154-55 (statement of Sen. Cooper); *id.* at 4158 (statement of Sen. Saulsbury); *id.* at 4167 (statement of Sen. Stewart); *id.* app. at 321 (statement of Sen. Bogy); *id.* at 368 (statement of Sen. Hamilton); *id.* at 359, 360 (May 21, 1874) (statements of Sen. Merrimon).

⁶²⁴ 2 Cong. Rec. app. at 359 (May 21, 1874).

⁶²⁵ 2 Cong. Rec. 4171 (May 22, 1874).

to require desegregation.⁶²⁶ In context, however, these comments had an entirely different meaning. Supporters of the bill were divided into two camps, which we might call (using modern terminology) “desegregationists” and “integrationists.” Desegregationists, the larger group, maintained that all children should have the right to attend any public school without discrimination on the basis of their race, but that individuals of both races could (and probably would) choose to attend separate schools. Frelinghuysen explained that “[w]hen in a school district there are two schools, and the white children choose to go to one and the colored to the other, there is nothing in this bill that prevents their doing so.”⁶²⁷ He predicted that “this voluntary division into separate schools would often be the solution of difficulty in communities where there still lingers a prejudice against a colored boy.”⁶²⁸ Separate schools, however, would be confined to those localities in which a large number of black children resided, and where sentiment in favor of separation was strong enough among both races to make it practical.⁶²⁹

The issue of principle, according to the desegregationists, was equality of rights before the law rather than the actual pedagogical or moral consequences of mixed schooling. Senator Ednunds called desegregated schools “a matter of inherent right, unless you adopt the slave doctrine that color and race are reasons for distinction among citizens.”⁶³⁰ Representative John Lynch, a black Republican from Mississippi, put the point in this way:

The colored people in asking the passage of this bill just as it passed the Senate do not thereby admit that their children can be

⁶²⁶ See Lofgren, *supra* note 9, at 137.

⁶²⁷ 2 Cong. Rec. 3452 (Apr. 29, 1874).

⁶²⁸ *Id.*; accord *id.* at 4082 (May 20, 1874) (statement of Sen. Pratt) (“Where the colored people are numerous enough to have separate schools of their own, they would probably prefer their children should be educated by themselves, and there is nothing in this bill which prohibits this.”). Similarly, Sen. Alcorn stated:

Every child in [Mississippi] has the benefit of a common-school education, we have no prohibition declared. You have a right to send your child to any school you choose. That is the citizen’s right; but it is simply a right that the colored people exercise by sending their children to the colored school; it is a right that the white people enjoy by sending their children to the white school.

Id. app. at 305 (May 22, 1874).

⁶²⁹ See 2 Cong. Rec. 4082 (May 20, 1874) (statement of Sen. Pratt).

⁶³⁰ Cong. Globe, 42d Cong., 2d Sess. 3260 (May 9, 1872).

better educated in white than in colored schools; nor that white teachers because they are white are better qualified to teach than colored ones. But they recognize the fact that the distinction when made and tolerated by law is an unjust and odious proscription; that you make their color a ground of objection, and consequently a crime. This is what we most earnestly protest against. Let us confer upon all citizens, then, the rights to which they are entitled under the Constitution; and then if they choose to have their children educated in separate schools, as they do in my own State, then both races will be satisfied, because they will know that the separation is their own voluntary act and not legislative compulsion.⁶³¹

In an earlier debate, Senator Hiram Revels, a black Republican from Mississippi, predicted that black children would be “very slow” about actually attending white schools. But, he said, laws requiring racial separation “increase that prejudice which is now fearfully great against them. . . . I repeat, let no encouragement be given to a prejudice against those who have done nothing to justify it.”⁶³²

A much smaller group, led by Senator Boutwell of Massachusetts, stressed that the goal should be actual integration:

To say . . . that equal facilities shall be given in different schools, is to rob your system of public instruction of that quality by which our people, without regard to race or color, shall be assimilated in ideas, personal, political, and public, so that when they arrive at the period of manhood they shall act together upon public questions with ideas formed under the same influences and directed to the same general results⁶³³

He explained that the “theory of human equality cannot be taught in families,” but that “in the public school, where children of all classes and conditions are brought together, this doctrine of human equality can be taught, and it is the chief means of securing the perpetuity of republican institutions.”⁶³⁴

Both camps clearly agreed, however, that the bill would and should give all schoolchildren a legally enforceable remedy if they

⁶³¹ 3 Cong. Rec. 945 (Feb. 3, 1875).

⁶³² Cong. Globe, 41st Cong., 3d Sess. 1059 (Feb. 8, 1871).

⁶³³ 2 Cong. Rec. 4116 (May 21, 1874).

⁶³⁴ *Id.*

were excluded from any school on the basis of race—the very issue that would later reach the Supreme Court in *Brown v. Board of Education*.⁶³⁵ Senator Timothy Howe of Wisconsin, for example, disputed Boutwell's contention that the public schools should be used to "unteach this [racial] prejudice" and insisted that voluntary separation of the races was both likely and desirable.⁶³⁶ At the same time, however, he stressed that the choice must be left to "individuals and not the superintendent of schools" and that the "law" should not be allowed to "say that they shall not be educated together."⁶³⁷

The difference between these camps has a modern analogue in controversies that arose in the decades after *Brown*. In the fields of higher education and noncompulsory educational activities, the Supreme Court has held that there is no constitutional obligation to require actual integration, provided the facilities are equal and open to students of all races and the state maintains no policies that perpetuate segregation.⁶³⁸ But in the context of primary and secondary education, the Court has held that voluntary choice programs are constitutionally inadequate and that previously segregated school districts must take affirmative steps to integrate their student bodies, by race-conscious student assignment and transportation if necessary.⁶³⁹ The latter position goes farther than even Boutwell thought he could go:

⁶³⁵ 347 U.S. 483 (1954).

⁶³⁶ 2 Cong. Rec. 4151 (May 22, 1874).

⁶³⁷ *Id.*

⁶³⁸ See *United States v. Fordice*, 112 S. Ct. 2727 (1992) (higher education); *Bazemore v. Friday*, 478 U.S. 385 (1986) (extracurricular activities). In *Fordice*, the Court recognized that merely because "an institution is predominantly white or black does not in itself make out a constitutional violation," but held that "[b]ecause the former *de jure* segregated system of public universities in Mississippi impeded the free choice of prospective students, the State in dismantling that system must take the necessary steps to ensure that this choice now is truly free." *Fordice*, 112 S. Ct. at 2743; see also *id.* at 2744 (Thomas, J., concurring) (stating that the Court's decision "portends neither the destruction of historically black colleges nor the severing of those institutions from their distinctive histories and traditions").

⁶³⁹ See *Green v. County Sch. Bd.*, 391 U.S. 430, 437-42 (1968); see also *Freeman v. Pitts*, 112 S. Ct. 1430, 1443 (1992) (citing *Green* for the proposition that former *de jure* segregated school districts must enact affirmative desegregation measures designed to create "a unitary system in which racial discrimination would be eliminated root and branch").

Mr. FRELINGHUYSEN. I wish to ask the Senator from Massachusetts a question. I ask whether he proposes by his amendment to compel colored children to go to white schools?

Mr. BOUTWELL. That I cannot do; but I will do everything which the Constitution authorizes to be done—to see to it that the children are trained together for purpose of life, and education is the fitting for it.

Mr. FRELINGHUYSEN. You do not propose to compel them?

Mr. BOUTWELL. I do not contemplate that. I cannot do that.⁶⁴⁰

When supporters of the bill denied that it would necessarily require “mixed schools,” then, they did not mean that it would countenance *de jure* segregation. They meant only that genuine freedom-of-choice plans would be permissible and that compulsory integration was unnecessary.

The choice between desegregation and separate but equal was squarely presented. Again amendments were proposed that reflected each of the two principal constitutional claims of the opposition: that education is not a protected civil right and that segregated schools are “equal.” Senator Aaron Sargent, a Republican from California, proposed to amend the bill to provide:

That nothing herein contained shall be construed to prohibit any State or school district from providing separate schools for persons of different sex or color, where such separate schools are equal in all respects to others of the same grade established by such authority, and supported by an equal *pro rata* expenditure of school funds.⁶⁴¹

The amendment failed by a vote of 21-26.⁶⁴² All the negative votes were from Republicans. Of the senators who had voted for the Fourteenth Amendment in the Thirty-ninth Congress, eight voted against the amendment and two voted in favor.⁶⁴³ One of the two exceptions, William Stewart of Nevada, later voted for the bill.

⁶⁴⁰ 2 Cong. Rec. 4168 (May 22, 1874).

⁶⁴¹ *Id.* at 4167.

⁶⁴² *Id.*

⁶⁴³ Compare Cong. Globe, 39th Cong., 1st Sess. 3042 (June 8, 1866) (reporting the Senate vote on passage of the Fourteenth Amendment) with 2 Cong. Rec. 4167 (May 22, 1874) (reporting the Senate vote on the Sargent amendment).

John Gordon, Democrat from Georgia, suggested striking the entire school clause, but this motion was defeated, 14-30.⁶⁴⁴ Another amendment, to exclude already established schools, garnered only 11 votes.⁶⁴⁵ Sargent then proposed another version of his separate-but-equal amendment, in somewhat more ambiguous language.⁶⁴⁶ This time he lost, 16-28.⁶⁴⁷ A motion to delete the jury clause was also defeated, 15-28.⁶⁴⁸

The meaning of the bill having been clarified, its constitutionality thoroughly debated, and attempts to amend it to allow separate but equal school laws defeated, the civil rights act came up for a final vote on May 22, 1874. It passed by a margin of 29-16.⁶⁴⁹ Only four members of the Senate who had voted for the Fourteenth Amendment as members of the Thirty-ninth Congress were present for the vote; all four voted in favor of the bill.⁶⁵⁰ It carried among the Republican senators by a margin of 23-3. Senators Boreman, Carpenter, and Lewis were the only Republicans to vote against.⁶⁵¹

E. Failure in the House, 1874

The Senate bill now went to the House, where under House rules it could not be reported by the Judiciary Committee that session without a motion to suspend the rules, which required a two-thirds majority. House support for the bill must therefore be measured by the results of a series of procedural votes. Three times General Butler moved to suspend the rules to allow the Committee to consider and report the bill. On May 25, just three days after the bill had passed the Senate, he garnered 152 votes, with 85 vot-

⁶⁴⁴ 2 Cong. Rec. 4170 (May 22, 1874).

⁶⁴⁵ *Id.* at 4171.

⁶⁴⁶ *Id.* Sargent's amendment would have guaranteed each schoolchild the right to the equal benefit and enjoyment "of the common-school system." *Id.* (statement of Sen. Sargent). This proposal was immediately recognized as "authoriz[ing] States on account of color to deny the right to . . . go to a particular common school." *Id.* (statement of Sen. Edmunds).

⁶⁴⁷ *Id.* at 4175.

⁶⁴⁸ *Id.*

⁶⁴⁹ *Id.* at 4176.

⁶⁵⁰ Compare Cong. Globe, 39th Cong., 1st Sess. 3042 (June 8, 1866) (reporting the Senate vote on passage of the Fourteenth Amendment) with 2 Cong. Rec. 4176 (May 22, 1874) (reporting the Senate vote on passage of the civil rights act).

⁶⁵¹ 2 Cong. Rec. 4176 (May 22, 1874).

ing “nay.”⁶⁵² That is a very substantial majority, but less than two-thirds. One week later, on June 1, he tried again. This time, he reported that he had been “instructed by the Committee on the Judiciary to allow a motion in the House to strike out the school clause of that bill.”⁶⁵³ Upon questioning, however, he refused to agree to support striking out the clause, but only to allow a vote.⁶⁵⁴ Apparently, the Democrats were not confident that they could prevail on such a vote without an agreement in advance, so they did not accept Butler’s offer and instead attempted to run out the clock by a series of procedural votes. The key vote that day was on a motion to adjourn, which failed by a margin of 72-141.⁶⁵⁵ If this vote was a proxy for the merits, as it appears to have been,⁶⁵⁶ the shift of a single vote would have produced Butler’s necessary two-thirds, and the Sumner bill would have been assured of passage. As a Southern Republican opponent of the bill commented later: “The majority of this House, yea nearly two-thirds, in June last solemnly voted that they would not only take up but they would pass the civil-rights bill as it came from the Senate.”⁶⁵⁷ But Butler could not capitalize on this support that day; the time came for recess and the House moved on to other business.⁶⁵⁸ He tried again on June 8, this time summoning a margin of 138-88, far short of the necessary two-thirds.⁶⁵⁹ On June 18, Butler announced that he had concluded that the bill could not get the necessary two-thirds, a conclusion that was disputed by his political ally, George Hoar.⁶⁶⁰ Butler then asked for unanimous consent to refer the bill to the Committee on the understanding that it would not be reported out in that session.⁶⁶¹

⁶⁵² *Id.* at 4242-43 (May 25, 1874).

⁶⁵³ *Id.* at 4439 (June 1, 1874).

⁶⁵⁴ *Id.* Alfred Kelly’s claim that Butler “promised the House to strike out the mixed school clause” is not accurate. See Kelly, *supra* note 21, at 555 n.97.

⁶⁵⁵ 2 Cong. Rec. 4439 (June 1, 1874).

⁶⁵⁶ With only six exceptions (which split evenly in the two directions), every negative vote on the motion to adjourn supported Butler’s position on the motions to suspend the rules, and every affirmative vote opposed.

⁶⁵⁷ 3 Cong. Rec. 978 (Feb. 4, 1875) (statement of Rep. Sener).

⁶⁵⁸ 2 Cong. Rec. 4439 (June 1, 1874).

⁶⁵⁹ *Id.* at 4691 (June 8, 1874).

⁶⁶⁰ *Id.* at 5162-63 (June 18, 1874).

⁶⁶¹ *Id.*

*F. The Elections of 1874, Deletion of the Schools Provision,
and Passage of the Act*

The events of May and June represented the high point of support for school desegregation legislation. The congressional elections of November 1874 were a disaster for the Republican Party, which lost eighty-nine seats in the House.⁶⁶² Even General Butler lost his seat in the landslide. From holding less than a third of the House seats in the Forty-third Congress, the Democrats achieved a majority of sixty seats in the Forty-fourth.⁶⁶³ Civil rights was the principal issue in the campaign, though corruption and recession played a major role.⁶⁶⁴ When the lameduck Forty-third Congress convened in December, the leadership of the civil rights bill was demoralized. Democrats claimed a mandate against the bill.⁶⁶⁵ The House Judiciary Committee broke into internal dissent, requiring more than 20 votes to reach a conclusion about the bill.⁶⁶⁶ Eventually, the committee reported a bill that required desegregation of inns, common carriers, and other public accommodations, but permitted "separate schools and institutions giving equal educational advantages in all respects for different classes of persons entitled to attend such schools."⁶⁶⁷ Even that was denounced by Democrats as "defiance of the clear, distinct, and overwhelming verdict of the people at the elections."⁶⁶⁸ While lameduck Republicans continued to support the measure, those who would have to face the voters again in 1876 deserted the cause in droves. Republican Simeon Chittenden, of New York, frankly admitted that he was going to vote against the bill despite its "justice" and its "conformity . . . with the late constitutional amendments" because "I do

⁶⁶² See Gillette, *supra* note 18, at 246.

⁶⁶³ See *id.*

⁶⁶⁴ For a detailed account of the election, see *id.* at 211-58.

⁶⁶⁵ See, e.g., 3 Cong. Rec. app. at 17 (Feb. 4, 1875) (statement of Rep. A. White); 3 Cong. Rec. 1001 (Feb. 4, 1875) (statement of Rep. Phelps); *id.* at 949 (Feb. 3, 1875) (statement of Rep. Finck); *id.* at 951 (statement of Rep. Storm); *id.* at 952 (statement of Rep. Whitehead); accord *id.* at 978-79 (statement of Rep. Sener). But see *id.* at 1005 (Feb. 4, 1875) (statement of Rep. Garfield) ("The recent disasters of the republican party have not sprung from any of the brave acts done in the effort to do justice to the negro.").

⁶⁶⁶ Kelly, *supra* note 21, at 558 n.113.

⁶⁶⁷ 3 Cong. Rec. 939 (Feb. 3, 1875).

⁶⁶⁸ *Id.* at 949 (Feb. 3, 1875) (statement of Rep. Finck).

not want to go down with my party quite so deep as the bill will sink it if it becomes the law."⁶⁶⁹

Deliberations on the civil rights bill began on Wednesday, January 27, 1875. Opponents of the bill embarked on a ferocious filibuster, with repeated roll call votes on various motions to adjourn, all of them soundly defeated only to be made again.⁶⁷⁰ The House remained in continuous session until Friday morning, and marshals were dispatched to summon weary members from their homes to maintain a quorum. Eventually, after some 48 hours of monotonous parliamentary maneuvering, proponents of the bill gave up and the House adjourned.⁶⁷¹

The time had come to change the rules. On January 23, the Republican caucus had proposed a rule that henceforth, a majority vote would suffice to suspend the rules to bring business to the floor. Members of the majority party thought it intolerable that a minority of one-third plus one could tie up legislative business indefinitely. The civil rights filibuster clinched support for the change. After heated and tumultuous debate, and compromise revision to guarantee the minority reasonable time for legislative deliberation, the rules were amended to empower a majority to act.⁶⁷² The abolition of the filibuster in the House remains the most enduring legacy of the struggle over the 1875 Act.

On February 3, the House took up the bill under the revised rules. As reported by the Judiciary Committee, the bill applied to schools, but expressly permitted the schools to be separate but equal. Other facilities covered by the Act would be desegregated. By prearrangement, the Judiciary Committee permitted votes to be taken on three amendments to the bill.⁶⁷³ The first, by Representative Cessna of Pennsylvania, would restore the language of the Senate bill and thus forbid segregated schools.⁶⁷⁴ The second, by

⁶⁶⁹ *Id.* at 982 (Feb. 4, 1875).

⁶⁷⁰ See *id.* at 785-829 (Jan. 27, 1875).

⁶⁷¹ *Id.* at 829.

⁶⁷² The rules change debate is described in Gillette, *supra* note 18, at 266-69.

⁶⁷³ See 3 Cong. Rec. 938 (Feb. 3, 1875) (statement of Rep. Butler) (explaining that this procedure had been adopted "in order that all shades of republican opinion may be voted upon").

⁶⁷⁴ See *id.* (statement of Rep. Cessna). The Cessna substitute, according to its author, "is not only substantially, but it is without any alteration, the bill as finally passed by the Senate." *Id.*

Representative White of Alabama, would permit separate accommodations in all the facilities and institutions covered by the Act.⁶⁷⁵ The third, by Representative Kellogg of Connecticut, would strike out the entire schools provision but leave the public accommodation provisions intact.⁶⁷⁶

There ensued two days of acrimonious debate, during which John Y. Brown of Kentucky was censured⁶⁷⁷ for his description of General Butler as

one who is outlawed in his own home from respectable society; whose name is synonymous with falsehood; who is the champion, and has been on all occasions, of fraud; who is the apologist of thieves; who is such a prodigy of vice and meannesses that to describe him would sicken imagination and exhaust invective.⁶⁷⁸

That set the tone.

When time came to vote, Kellogg's amendment striking the school clause passed, 128-48.⁶⁷⁹ White's amendment allowing separate but equal facilities for all the institutions covered by the Act

⁶⁷⁵ See *id.* at 939. The White substitute followed the language of the Senate bill, including "common schools and public institutions of learning or benevolence supported in whole or in part by general taxation," but added a proviso:

Provided, That nothing in this act shall be construed to require mixed accommodations, (by sitting together,) facilities, and privileges at inns, in public conveyances on land or water, theaters, or other places of public amusement, for persons of different race or color, nor to prohibit separate accommodations, facilities, and privileges at inns, in public conveyances on land or water, theaters, or other places of public amusement; such separate accommodations, facilities, and privileges being equal in equipment and kind for persons of every race and color, regardless of any previous condition of servitude: *And provided further*, That nothing in this act shall be construed to require mixed common schools and public institutions of learning and benevolence for persons of different race or color, nor to prohibit separate common schools for different races or colors, provided the facilities, duration of term, and equipments of such common schools and public institutions for both races in the town, city, school district, or other topographical division shall be equal in facilities and equipments for both races for the purposes for which such institutions are established.

Id.

⁶⁷⁶ See *id.*

⁶⁷⁷ *Id.* at 992 (Feb. 4, 1875).

⁶⁷⁸ *Id.* at 985. Brown also stated that "[i]f I wished to describe all that was pusillanimous in war, inhuman in peace, forbidden in morals, and infamous in politics, I should call it 'Butlerism.'" *Id.*

⁶⁷⁹ *Id.* at 1010.

failed, 91-114.⁶⁸⁰ Cessna's motion to restore the school desegregation provision by adopting the language of the Senate bill then failed, 114-148.⁶⁸¹ All 114 members who voted for the Cessna amendment were Republicans. Fear of political fallout seems to be the reason for the decline in Republican support, as compared to the previous year. Among lame duck Republicans, who would not have to face the voters again, the Cessna amendment carried by a margin of 73-10. Among those who had been reelected the amendment failed by a margin of 41-53. This defeat was the first time a significant number of Republicans failed to support school desegregation in the House. All of the Democrats voted "nay." The final bill, shorn of the schools provision, then passed the House by a vote of 162-99.⁶⁸² Again, all affirmative votes were from Republicans.

These votes require explanation. Advocates of school desegregation realized that they no longer had the votes to pass their desired legislation, even by a simple majority. They were thus faced with a choice between a civil rights bill with an explicit authorization for separate but equal schools and a bill that did not apply to schools whatsoever. With some exceptions, they concluded that a separate-but-equal provision was worse than no provision at all. Many supporters of school desegregation therefore

⁶⁸⁰ Id.

⁶⁸¹ Id. at 1010-11.

⁶⁸² Id. at 1011. Historian Charles Lofgren speculates that the 1875 Act passed the House of Representatives only because "many House Republicans found themselves lame ducks after the autumn election of 1874, and hence unencumbered by worries about constituents who cared little for civil rights." Lofgren, *supra* note 9, at 137. This interpretation is not borne out by the facts. The Act won the support not only of almost all the lame duck Republicans, but of 48 out of 60 (80%) of the Republicans who had been reelected. (A larger number of reelected Republicans abandoned school desegregation, the most controversial feature of the bill, by voting against the Cessna amendment; but they voted for the final Act.) More to the point, every lame duck Republican who voted in favor of the 1875 Act, without a single exception, had voted the previous May to suspend the rules to take up and pass the bill. Compare 2 Cong. Rec. 4242-43 (May 25, 1874) (reporting the House vote on the motion to suspend the rules) with 3 Cong. Rec. 1011 (Feb. 4, 1875) (reporting the House vote on passage of the Civil Rights Act of 1875). Lofgren does not explain why, if they were trying to avoid offending their constituents, large majorities of the House Republicans voted over and over again to bring the measure to the floor *before the election*. Contrary to Lofgren, the 1874 elections diminished support for the bill among Republicans who had been reelected; it did not increase support among the lame ducks.

voted in favor of the Kellogg amendment, as well as the Cessna amendment.⁶⁸³ Kellogg, who had supported school desegregation in each of the previous efforts, stated that he offered his motion because the separate-but-equal provision was "worse than nothing."⁶⁸⁴ "As the bill is now drawn," he explained, "we recognize a distinction in color which we ought not to recognize by any legislation of the Congress of the United States."⁶⁸⁵ James Monroe, an Ohio Republican, explained that he preferred the Senate bill but would vote for the Kellogg amendment because the committee bill "introduces formally into the statute law a discrimination between different classes of citizens in regard to their privileges as citizens."⁶⁸⁶ This he regarded as "a dangerous precedent": "[I]f we once establish a discrimination of this kind we know not where it will end."⁶⁸⁷ Richard Cain, a black Republican from South Carolina, stated: "If the school clause is objectionable to our friends, and they think they cannot sustain it, then let it be struck out entirely. We want no invidious discrimination in the laws of this country."⁶⁸⁸ Julius Burrows, a Michigan Republican, made a passionate plea for restoring the Sumner bill—for what he called "free schools." But he stated that "[i]f you cannot legislate free schools, I prefer that the bill should be altogether silent upon the question until other times and other men can do the subject justice."⁶⁸⁹ If the separate-but-equal compromise were enacted, he predicted, "its pernicious influence would be felt in every State and Territory."⁶⁹⁰ Butler agreed.⁶⁹¹ Even at the end, then, when the Repub-

⁶⁸³ One hundred-fourteen members supported the Cessna amendment, 3 Cong. Rec. 1011 (Feb. 4, 1875), and only 48 opposed the Kellogg amendment. *Id.* at 1010. Even assuming none of the opponents of the Kellogg amendment were opponents of desegregation (which is unlikely), a majority of the desegregation faction supported Kellogg's motion. It is necessary to rely on inference here, because the yeas and nays on Kellogg's motion were not recorded.

⁶⁸⁴ *Id.* at 981.

⁶⁸⁵ *Id.* at 997. Kellogg also expressed concern that desegregation would "destroy the schools in many of the Southern States." *Id.*

⁶⁸⁶ *Id.*

⁶⁸⁷ *Id.*

⁶⁸⁸ *Id.* at 981.

⁶⁸⁹ *Id.* at 1000.

⁶⁹⁰ *Id.*

⁶⁹¹ *Id.* at 1006 (statement of Rep. Butler) (stating that "I should very much rather have all relating to schools struck out than have even the committee's provision for mixed schools").

licans no longer had the votes to enact a school desegregation bill, they refused to admit the legitimacy of the separate-but-equal principle, and they were able to block it from enactment.

Four members of the House who had voted against the Fourteenth Amendment in 1866 remained; and all four voted against the Civil Rights Act,⁶⁹² as well as against including school desegregation in the final bill.⁶⁹³ Fourteen members of the House who had voted in favor of the Fourteenth Amendment (in one case as a Senator) remained. Ten voted in favor of including school desegregation in the bill and in favor of the bill.⁶⁹⁴ The other four (one of whom had forgotten how he voted and now declared himself to have “oppose[d] the fourteenth amendment by my vote and by my voice”⁶⁹⁵) voted against including school desegregation but in favor of the final bill.⁶⁹⁶ Three of these four had voted in favor of school desegregation before the election,⁶⁹⁷ but they had abandoned the cause.

⁶⁹² Compare Cong. Globe, 39th Cong., 1st Sess. 3149 (June 13, 1866) (reporting the House vote on passage of the Fourteenth Amendment) with 3 Cong. Rec. 1011 (Feb. 4, 1875) (reporting the House vote on passage of the civil rights bill). Representatives Eldredge, Finck, Niblack and Randall opposed both measures.

⁶⁹³ 3 Cong. Rec. 1011 (Feb. 4, 1875). This statement is based on their votes on the Cessna amendment. Unfortunately, the yeas and nays on the Kellogg amendment were not recorded.

⁶⁹⁴ Compare Cong. Globe, 39th Cong., 1st Sess. 3149 (June 13, 1866) (reporting the House vote on passage of the Fourteenth Amendment) with 3 Cong. Rec. 1011 (Feb. 4, 1875) (reporting the House vote on the Cessna amendment to require school desegregation) and *id.* (reporting the House vote on passage of the civil rights bill). Representatives Dawes, Garfield, Hooper, Kasson, Kelley, Lawrence, Myers, O'Neill, Orth and Sawyer supported all three measures.

⁶⁹⁵ 3 Cong. Rec. 979 (Feb. 4, 1875) (statement of Rep. Hale). This was Robert S. Hale of New York. In actuality, while Hale spoke against the Amendment, he was absent for the first vote approving the Amendment, see Cong. Globe, 39th Cong., 1st Sess. 2545 (May 10, 1866), and voted in favor on the second vote. See *id.* at 3149 (June 13, 1866). Because Hale made a point of associating his vote against the bill with his recollected opposition to the Amendment, his vote might more accurately be deemed the vote of an opponent.

⁶⁹⁶ Compare 3 Cong. Rec. 1011 (Feb. 4, 1875) (reporting the House vote on the Cessna amendment to require school desegregation) with *id.* (reporting the House vote on passage of the civil rights bill). Representatives Bundy, Poland and Scofield opposed school desegregation but supported the final bill.

⁶⁹⁷ All three had voted to suspend the rules to take up the Senate civil rights bill. See 2 Cong. Rec. 4242 (May 25, 1874). On June 1, Poland and Bundy voted against the motion to adjourn; Scofield was not present. *Id.* at 4439. Poland and Scofield voted against rejecting the Frye bill; Bundy was not a member of the House at that time.

Support for the Kellogg amendment did not mean that desegregation proponents had lost faith in their constitutional position, only that they had concluded that litigation would be a more promising avenue for achieving those principles. Representative Monroe reported that he had consulted upon this subject with "influential colored gentlemen who are recognized as representative men of their people," as well as with Republicans "known as men of radical opinions."⁶⁹⁸ According to these informants, Monroe told the House that:

[Blacks] would rather have their people take their chances under the Constitution and its amendments; that they would rather fall back upon the original principles of constitutional law and take refuge under their shadow than to begin with this poor attempt to confer upon them the privileges of education connected with this discrimination.⁶⁹⁹

On this point Monroe was questioned by a fellow supporter of the bill:

Mr. MERRIAM. Does the gentleman from Ohio [Mr. Monroe] wish the country to understand that in his opinion it would be more satisfactory to the colored people of the South to have freedom of the theaters and of the cemeteries rather than freedom of schools?

Mr. MONROE. They think their chances for good schools will be better under the Constitution with the protection of the courts than under a bill containing such provisions as this.⁷⁰⁰

The House bill returned to the Senate, where the political will of the previous desegregation majority had similarly dissipated with the election. No attempt was made to restore the schools clause, and the bill passed the Senate without amendment on February 27, 1875, one month before the Democratic majority would take over.⁷⁰¹ President Grant signed the bill on March 1.⁷⁰²

⁶⁹⁸ 3 Cong. Rec. 997 (Feb. 4, 1875).

⁶⁹⁹ *Id.*

⁷⁰⁰ *Id.* at 998.

⁷⁰¹ *Id.* at 1870 (Feb. 27, 1875).

⁷⁰² Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875).

G. Epilogue: Judicial Invalidation (1883) and Congressional Failure (1884)

Between 1875 and 1877, blacks in both the North and the South attempted to avail themselves of the protections of the bill, but resistance was strong.⁷⁰³ Some proprietors closed down their facilities in protest, some converted from being licensed public accommodations to being private clubs or boardinghouses, and many more simply refused to comply, often enforcing their will with violence against the would-be black patrons.⁷⁰⁴ Tennessee went so far as to pass a statute in 1875 abrogating the common law duty of innkeepers, common carriers, and proprietors of public amusements to serve all persons, making their management's control over who would use the services as "perfect and complete" as that "of any private person over his private house, carriage, or private theatre, or places of amusement for his family."⁷⁰⁵ This reflected the legislature's correct understanding that the constitutional basis for the public accommodation and common carrier provisions of the Civil Rights Act was the failure of states to accord the same rights to black citizens as they did to whites. If Tennessee did not enforce common carrier rights for the benefit of whites, there was no constitutional basis for application of the 1875 Act in that state.

Some black plaintiffs obtained legal redress for exclusion from segregated facilities.⁷⁰⁶ More often their efforts were frustrated. For many months, the Department of Justice failed to provide copies of the law to U.S. Attorneys and others in the field, leaving

⁷⁰³ For a detailed account of the enforcement experience under the Act, see John Hope Franklin, *The Enforcement of the Civil Rights Act of 1875*, 6 *Prologue* 225 (1974); see also Gillette, *supra* note 18, at 276-78 (detailing the futility of enforcement efforts under the 1875 Act).

⁷⁰⁴ See Franklin, *supra* note 703, at 226-27; see also Gillette, *supra* note 18, at 276-77 (reciting Southern efforts to circumvent the Act).

⁷⁰⁵ Act of Mar. 24, 1875, ch. 130, § 1, 1875 *Tenn. Acts* 216, 216-17. This statute was held unconstitutional as applied to interstate travel in *Brown v. Memphis & C. Ry. Co.*, 5 F. 499, 501 (C.C.W.D. Tenn. 1880).

⁷⁰⁶ See, e.g., *Gray v. Cincinnati S. Ry. Co.*, 11 F. 683, 686 (C.C.S.D. Ohio 1882) (charging jury that defendant railroad company was liable under the Civil Rights Act if it denied plaintiff seating in the ladies' car because of her color); *United States v. Newcomer*, 27 F. Cas. 127, 128 (E.D. Pa. 1876) (No. 15,868) (charging jury that a hotel keeper who had denied a traveler lodging because of his color violated the Civil Rights Act); see also Franklin, *supra* note 703, at 229-34 (reviewing the history of the 1875 Act in the lower courts).

them ignorant of its content. Even after supplying the text of the Act, the Department refused to provide interpretive guidance.⁷⁰⁷ The true import of the law, as reflected in its legislative history, was therefore obscured. Many lower federal courts interpreted the Act narrowly, either ruling that various facilities (such as barber shops, saloons, or ice cream parlors) were not covered⁷⁰⁸ or that separate but equal facilities were sufficient.⁷⁰⁹ And most of all, enforcement of the Act was plagued by doubts about its constitutionality. Lower courts were sharply divided on the question. After 1877, the lower courts decided few cases under the Act; presumably they were awaiting a decision by the Supreme Court on the fundamental question of whether the Act was constitutional.⁷¹⁰

The first of the *Civil Rights Cases*,⁷¹¹ in which the Supreme Court ruled on the constitutionality of the Act, involved a Kansas innkeeper who was prosecuted by the U.S. Attorney under the Act for refusing to serve a black woman supper at the table of the inn.⁷¹² The constitutionality of the Civil Rights Act was squarely raised as a defense, and the case reached the Supreme Court in 1876, just eighteen months after enactment of the Act. But the Supreme Court dithered for seven years before rendering a decision—waiting until October 1883. We do not know the reason for the delay. We can, however, surmise that the delay made a difference, for in the meantime the Compromise of 1877 had occurred and the national commitment to civil rights enforcement had come to an end.

After the disastrous Republican losses in the congressional elections of 1874, Republican Presidential candidate Rutherford B. Hayes apparently lost to New York Democrat Samuel Tilden in the

⁷⁰⁷ See Franklin, *supra* note 703, at 228-29 (calling the Department "remarkably derelict"); see also Gillette, *supra* note 18, at 277-78 (claiming that the federal government "showed little interest" in enforcing the Act).

⁷⁰⁸ See Franklin, *supra* note 703, at 230 & n.34 (barber shops); *id.* at 232 & n.42 (saloons); *id.* at 232 & n.43 (ice cream parlors).

⁷⁰⁹ See, e.g., *Charge to Grand Jury—The Civil Rights Act*, 30 F. Cas. 999, 1001 (C.C.W.D.N.C. 1875) (No. 18,258); *United States v. Dodge*, 25 F. Cas. 882, 883 (W.D. Tex. 1877) (No. 14,976); see also *Gray*, 11 F. at 685-86 (noting in dictum that the obligation to provide equal accommodations may sanction separate-but-equal segregation).

⁷¹⁰ See Franklin, *supra* note 703, at 233.

⁷¹¹ 109 U.S. 3 (1883).

⁷¹² See Franklin, *supra* note 703, at 233.

election of 1876. Hayes was able to scrape together the appearance of victory only by electoral fraud in the Republican-controlled states of Florida, Louisiana, and South Carolina.⁷¹³ This precipitated a political and constitutional crisis. Democrats held a majority in the House of Representatives and had sufficient votes to delay the official counting of electoral votes by filibuster and repeated dilatory motions. If the votes could not be counted by March 4, Hayes could not take office and the country would be thrown into constitutional turmoil. Republicans and moderate Southern Democrats (many of them former Whigs) struck a bargain in which Republicans could proceed with the count and Hayes could take office, but only if federal enforcement of the Reconstruction Amendments ceased and control over their own affairs (including the civil rights of their black citizens) were returned to the electoral majorities of the Southern states. The Republicans also agreed to fund major public works projects in the South and to appoint Democrats to federal offices in place of the carpetbaggers and scalawags who had previously been the backbone of the white Republican Party in the South. Thus ended Reconstruction, in a tawdry deal to steal an election.⁷¹⁴ And with the end of Reconstruction came a sea-change in public, intellectual, governmental and legal opinion. Support and protection for the rights of black citizens passed away and were replaced by the regime of Jim Crow.⁷¹⁵ So deep and enduring was this change that no official interpretation of the Reconstruction Amendments or enforcement legislation by legislative, executive, or judicial bodies after 1876 can be assumed to be unaffected by it.

Thus, the legal and intellectual climate had changed dramatically between passage of the Act in 1875 and decision of the *Civil Rights Cases* in 1883. By the time of oral argument, five cases raising the identical constitutional issue were on the Court's docket. Each involved exclusion from various facilities (inns, theaters, and rail-

⁷¹³ Historian C. Vann Woodward concludes: "The consensus of recent historical scholarship is that Hayes was probably entitled to the electoral votes of South Carolina and Louisiana, that Tilden was entitled to the four votes of Florida, and that Tilden was therefore elected by a vote of 188 to 181." C. Vann Woodward, *Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction* 19 (1951).

⁷¹⁴ For an account of the Compromise of 1877, see Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 *Const. Commentary* 115, 127-29 (1994).

⁷¹⁵ See *id.* at 130-33.

roads); in none of them were the separate accommodations "equal." In an opinion by Justice Joseph P. Bradley, the Court held the Civil Rights Act of 1875 unconstitutional in every feature except the jury provision, which was not at issue.⁷¹⁶ The Fourteenth Amendment, according to the Court, does not apply directly to the discriminatory acts of private persons; the Constitution is not "violated until the denial of the right has some State sanction or authority."⁷¹⁷ This does not mean—as is often thought—that Congress lacks the power under the Fourteenth Amendment to protect against discrimination at the hands of private parties. It means, rather, that Congress lacks the power to protect against discrimination at the hands of private parties *if the laws of the state provide equal protection for all persons without regard to race.*

Thus, the vice of the 1875 Act, according to the Court, was that it was overbroad: "It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment."⁷¹⁸ If the law had been confined to those cases in which state law did not provide redress, it would have been constitutional. "Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them," the Court noted, in an exposition of the common law not dissimilar to that of Charles Sumner.⁷¹⁹ "If the laws themselves make any unjust discrimination," the Court continued, "Congress has full power to afford a remedy under [the Fourteenth] amendment . . ."⁷²⁰ But if states do their duty, the Court held, the federal government has no power under the Fourteenth Amendment to interfere. This, it will be recalled, tracks arguments made by Senator Allen Thurman during the debates.⁷²¹

⁷¹⁶ The Civil Rights Cases, 109 U.S. 3, 24-25 (1883).

⁷¹⁷ Id. at 24.

⁷¹⁸ Id. at 14.

⁷¹⁹ Id. at 25.

⁷²⁰ Id.

⁷²¹ See *supra* text accompanying notes 393-95.

Under current approaches to constitutional adjudication, the *Civil Rights Cases* would not be decided the same way (even assuming the validity of the Court's substantive analysis of the "state action" issue). In a facial challenge to the constitutionality of an act of Congress, the statute must be sustained if it is susceptible to constitutional application in a significant number of cases.⁷²² In an "as applied" challenge, a statute cannot be invalidated on the basis of possible defects unless those defects are present in the case itself.⁷²³ The problem with the Civil Rights Act of 1875, according to the Court, was that it exceeded federal power as applied to states with just and equal laws, though it would be constitutional as applied in states that fail to provide equal protection to black citizens with respect to the common law right of common carriage in covered institutions. Under the modern approach, the Act would thus be sustained on the facial challenge (because it is constitutional in some applications). In an "as applied" challenge, the Court would examine whether, in each of the five cases brought to it, the states in question in fact provided effective legal redress for violations of the rights of black patrons. In all likelihood, that inquiry would reveal that the Act was constitutional as applied.

Had Sumner been a more cautious draftsman, the 1875 Act could easily have been written to avoid the constitutional problem without losing any of its force.⁷²⁴ But by the time the Act was invalidated in 1883, the political will to protect civil rights had evaporated, and an avoidable error in drafting left the problem unaddressed for over 80 years.

The year after the *Civil Rights Cases* were decided, the issue of segregation came before Congress again. During debates over the proposed Interstate Commerce Act, the first comprehensive federal regulatory statute governing a major industry (railroads), James E. O'Hara, a black congressman from North Carolina, proposed an amendment as follows:

And any person or persons having purchased a ticket to be conveyed from one State to another, or paid the required fare, shall

⁷²² See *United States v. Salerno*, 481 U.S. 739, 745 (1987).

⁷²³ See *Bowen v. Kendrick*, 487 U.S. 589, 612 (1988).

⁷²⁴ For example, as a predicate to federal jurisdiction, the plaintiff could have been required to allege and prove that state law did not provide equal legal redress to black and white patrons.

receive the same treatment and be afforded equal facilities and accommodations as are furnished all other persons holding tickets of the same class without discrimination.⁷²⁵

Both supporters and opponents interpreted the last two words of the amendment (“without discrimination”) as forbidding segregation, and they assumed that without these words the railroads would be permitted to maintain separate but equal accommodations.⁷²⁶ The proposal was adopted on one day by a vote of 134-97,⁷²⁷ but the result was reversed the next day by a vote of 137-127.⁷²⁸

The episode shows both a continuity and a break from the experience of ten years before. As in 1871-75, members of Congress understood the concept of racial “discrimination” to encompass segregation as well as exclusion or inequality of facilities. Thus, at the level of understanding of legal ideas and terminology, the discriminatory character of segregation was still accepted. But this time, unlike in 1871-75, the political forces favoring segregation outnumbered those opposing it. By 1884, a majority of the House of Representatives was willing to admit that segregation constituted “discrimination”—but vote for it nonetheless.

H. Analysis

Congress debated the constitutionality of school segregation and ultimately decided not to interfere. If Congress’s failure to enact

⁷²⁵ 16 Cong. Rec. 296-97 (Dec. 16, 1884).

⁷²⁶ A congressman from Georgia moved to amend the motion to allow railroads to provide “separate accommodations for white and colored persons,” saying that there is no “good reason . . . why either the colored man or the white man should object” to a rule permitting separate but equal accommodations. *Id.* at 316 (Dec. 17, 1884) (statement of Rep. Crisp). A supporter of this motion, Representative Herbert, commented that if it were adopted, the provision “will mean exactly what it would have meant if the words ‘without discrimination’ in the concluding part of that amendment had been omitted.” *Id.* Herbert maintained that “the words ‘without discrimination’ were inserted carefully for the purpose of compelling certain gentlemen on this side to vote against the bill . . .” *Id.* “We have no objection,” he continued, “to declaring that all men shall have equal facilities and equal accommodations; but we do object to any law that compels a common carrier to put all classes of people in the same cars . . .” *Id.* at 316-17. See also *id.* at 319 (statement of Rep. Brumm) (repeating that the only ground of objection was to the phrase “without discrimination”).

⁷²⁷ *Id.* at 297 (Dec. 16, 1884).

⁷²⁸ *Id.* at 320 (Dec. 17, 1884).

legislation were dispositive—as it would be if Congress had exclusive authority to interpret and enforce the Amendment—that would be the end of the matter. But if instead we assume that the courts must interpret the Amendment in light of its most probable understood meaning at the time it was enacted, and if we treat the opinions of the congressmen as evidence of the opinions of informed people of the day, what should we make of this debate? That is, viewing this episode not as an act of *lawmaking* but as evidence of contemporaneous *interpretation*, what do we learn about the meaning that people at that time attached to the words of the Fourteenth Amendment?

As an initial matter, it is clear beyond peradventure that a very substantial portion of the Congress, including leading framers of the Amendment, subscribed to the view that school segregation violates the Fourteenth Amendment. At a minimum, therefore, the scholarly consensus must be corrected to admit that this interpretation is within the legitimate range of interpretations of the Amendment on originalist grounds.⁷²⁹ But is it possible to say more: that this interpretation was the prevailing, or preponderant, view, and thus the best understanding of the original meaning? This question can be addressed from two perspectives. First, what were the specific intentions and understandings of the framing generation regarding the issue of public school segregation? Second, and more important, what was their understanding of the relevant constitutional issues—the permissibility of segregation and the status of education as a civil right?

1. Specific Intentions Regarding School Segregation

This is what we know: (1) on ten recorded votes in the Senate and eight recorded votes in the House between 1871 and 1875, a majority (but always less than two-thirds) voted for legislation premised on the unconstitutionality of school segregation; (2) efforts to approve separate-but-equal requirements for education were invariably defeated; and (3) there was a high correlation between votes on the Fourteenth Amendment and votes in favor of school

⁷²⁹ H. Jefferson Powell makes the point in his *Rules for Originalists*, 73 Va. L. Rev. 659, 690 (1987), that history sometimes reveals a “range of ‘original understandings’” rather than a single answer.

desegregation. The following chart summarizes every vote during this period that was in favor of school desegregation or opposed to separate-but-equal.⁷³⁰ Defeats for the forces supporting school desegregation are printed in italics:

VOTES ON CIVIL RIGHTS BILL, INCLUDING
SCHOOL DESEGREGATION PROVISION

<u>Date</u>	<u>House or Senate</u>	<u>Description of vote</u>	<u>Outcome+</u>
12/21/71	<i>Senate</i>	<i>To attach CRA as rider to amnesty</i>	29-30
2/9/72	Senate	To attach CRA as rider to amnesty	28-28*
2/19/72	House	To reject H.R. 1647	116-89
3/25/72	House	To suspend the rules	98-80
4/1/72	House	To table H.R. 1647	99-73
4/8/72	House	To engross and for third reading	100-78
5/9/72	Senate	To delete school provision from amnesty rider	26-25
5/9/72	Senate	To delete CRA from amendment to amnesty	29-29*
5/9/72	<i>Senate</i>	<i>To attach CRA as rider to amnesty</i>	27-28
5/9/72	Senate	To attach CRA as rider to amnesty	28-28*
5/22/72	<i>Senate</i>	<i>To delete schools & juries from rider</i>	22-20
5/22/72	<i>Senate</i>	<i>To reconsider prior vote</i>	29-13
5/22/74	Senate	To delete school provision from CRA	30-14
5/22/74	Senate	To exclude already-established schools	†-11
5/22/74	Senate	To enact CRA	29-16
5/25/74	House	To suspend the rules	152-85
6/1/74	House	To adjourn	141-72
6/8/74	House	To suspend the rules	138-88
2/4/75	<i>House</i>	<i>To restore Senate language on schools</i>	114-148

+ To facilitate comparison, outcomes are reported in terms of support for the school desegregation bill, regardless of the form of the vote. For example, the Feb. 19, 1872 motion to reject H.R. 1647 was defeated by a vote of 89-116. This is reported in the table as a vote of 116-89 in favor of the bill.

* Tie broken by vote of the Vice President in favor of the bill (or against rejecting the bill).

† Opposition to the motion was so overwhelming that the Chair did not count "nay" votes.

This chart shows that the civil rights bill, containing a school desegregation provision, commanded a majority in both houses every time there was a vote, whether on the merits or on a procedural test—except when it was caught up in the politics of amnesty (December 21, 1871 and May 22, 1872)—until after the election of 1874. Margins of victory were as high as 29-16 in the Senate and 141-72 in the House. Opponents and proponents alike noted that

⁷³⁰ The chart does not include votes on repetitive dilatory motions in the House, of which there were close to a hundred during the course of deliberations over the Act, see *supra* text accompanying notes 579-80, 670-71, nor a vote on a point of order in the Senate that may have been resolved on its own merits, see *supra* text accompanying notes 516-17.

majorities favored the bill and attributed its failure to procedural obstacles, including supermajority vote requirements and filibuster tactics.⁷³¹

Significantly, these numbers aggregate the votes of proponents *and* opponents of the Fourteenth Amendment. As has been seen, opposition to the civil rights bill came not just from those (like Trumbull and Lot Morrill) who believed it went beyond the dictates of the new Amendment, but even more so from Democrats who had opposed the Amendment in 1866 and now sought to block all serious efforts to enforce it.⁷³² If the question is what the Amendment was thought to *mean*, then it is essentially irrelevant that a large group of senators and representatives continued to be unreconciled to it. Thus, although evidence that opponents of the Amendment thought that it would require school desegregation might be significant, their opposition to school desegregation is not.

The following chart shows that there was a high correlation between votes on the Fourteenth Amendment and votes on school desegregation:

⁷³¹ E.g., 2 Cong. Rec. app. at 477 (June 16, 1874) (statement of Rep. Darrall) (attributing the failure of the bill to parliamentary maneuvering); 2 Cong. Rec. 4083 (May 20, 1874) (statement of Sen. Thurman) ("I know that [the civil rights bill] is to pass this body . . ."); id. at 383 (Jan. 5, 1874) (statement of Rep. Mills) ("It is, therefore, with no hope of success that we interpose our opposition[to the bill]."); Cong. Globe, 42d Cong., 2d Sess. 3735 (May 21, 1872) (statement of Sen. Frelinghuysen) ("[T]he opinion of the Senate has been expressed over and over again in favor of retaining the provisions in reference to public schools."); id. at 3260 (May 9, 1872) (statement of Sen. Logan) ("There has not been a time that [Sumner's civil rights bill] could not have been passed by a majority of this Senate if you would take it up alone . . ."); id. at 3251 (May 9, 1872) (statement of Sen. Blair) ("[J]udging from the votes which have been taken in the Senate, it is easy to perceive that there is a majority in this body for the measure proposed by the Senator from Massachusetts."); id. app. at 217 (Apr. 13, 1872) (statement of Rep. McHenry, an opponent, predicting that "in a short time [the civil rights bill] will be passed by the same vote which ordered its third reading" and saying that its prospective passage in the Senate is "a well-ascertained fact").

⁷³² See *supra* notes 479-91 and accompanying text.

 VOTES BY 14th AMENDMENT SUPPORTERS AND OPPONENTS ON CIVIL RIGHTS BILL, INCLUDING SCHOOL DESEGREGATION PROVISION

Date	House or Senate	Description of vote	14th A. Supporters+	14th A. Opponents
<i>12/21/71</i>	<i>Senate</i>	<i>To attach CRA as rider</i>	9-3	0-1
2/9/72	Senate	To attach CRA as rider	10-1	0-0
2/19/72	House	To reject H.R. 1647	13-0	0-4
3/25/72	House	To suspend the rules	12-0	0-5
4/1/72	House	To table H.R. 1647	8-0	0-5
4/8/72	House	To engross	*	*
5/9/72	Senate	To delete school provision	10-1	0-0
5/9/72	Senate	To delete CRA	9-1	0-0
5/9/72	<i>Senate</i>	<i>To attach CRA as rider</i>	7-2	0-0
5/9/72	Senate	To attach CRA as rider	7-2	0-0
5/22/72	<i>Senate</i>	<i>To delete schools & juries</i>	6-0	0-0
5/22/72	<i>Senate</i>	<i>To reconsider prior vote</i>	5-0	0-0
5/22/74	Senate	To delete school provision	4-0	0-0
5/22/74	Senate	To enact CRA	4-0	0-0
5/25/74	House	To suspend the rules	13-0	0-3
6/1/74	House	To adjourn	11-0	0-2
6/8/74	House	To suspend the rules	11-0	0-4
2/4/75	<i>House</i>	<i>To restore Senate language</i>	10-3	0-4

+ To facilitate comparison, outcomes are reported in terms of support for the school desegregation bill, regardless of the form of the vote. For example, the Feb. 19, 1872 motion to reject H.R. 1647 was opposed by all thirteen supporters of the Fourteenth Amendment, and supported by the four opponents of the Amendment. This is reported in the table as a vote of 13-0 in favor of the bill and 0-4 in opposition, respectively.

* No roll call vote.

Defeats for the forces supporting school desegregation are printed in italics.

In the House of Representatives, until after the elections of 1874, there was a perfect correlation between votes on the Fourteenth Amendment and votes on school desegregation: every representative who had voted in favor of the Amendment in the Thirty-ninth Congress voted in favor of Butler's school desegregation bill, and every representative who had voted against the Amendment voted against it. (After the electoral debacle of 1874, some supporters voted to jettison the schools provision.) In the Senate, only Lyman Trumbull broke this uniform pattern. Except when the bill was caught up in the controversy over amnesty, every senator except Trumbull who had voted for the Amendment now voted for school desegregation. That is highly suggestive.

It might be said that the sample of those who voted on the Fourteenth Amendment in the Thirty-ninth Congress and also on the school desegregation bill is too small to support an inference regarding the meaning of the Amendment. One way to supple-

ment this information is by examining the partisan breakdown on the bill, remembering that the Amendment was supported almost unanimously by Republicans and opposed almost unanimously by Democrats. Party affiliation can serve as a proxy for support or opposition to the principles of the Amendment.⁷³³ The following chart summarizes the partisan breakdown on the key votes in the Senate and House during the three main periods of legislative activity on the bill: in 1872, 1874, and during the lameduck session in early 1875. In order to correct for the four Republican senators (Cragin, Fenton, Robertson, and Sawyer) who supported the desegregation bill on the merits but opposed coupling it with the amnesty measure,⁷³⁴ and for Senator Carpenter, who supported the desegregation provisions of the bill (later changing his mind, after *Slaughter-House*) but thought the jury provision unconstitutional,⁷³⁵ the last column realigns their votes according to their views on the merits.⁷³⁶ There are no countervailing adjustments, because no senator can be found who voted for the rider without sharing Sumner's view on the merits.⁷³⁷ There is no test of support for school desegregation in the Senate in 1875 because the bill, as it came back to the Senate, did not apply to schools and there were no amendments. Democrats at all times voted unanimously against the bill, so only Republican votes are analyzed.

The results are as follows:

REPUBLICAN SUPPORT FOR SCHOOL DESEGREGATION LEGISLATION, 1872, 1874, 1875			
	Total vote	Actual Repub. breakdown	Adjusted Repub. breakdown
1872			
Senate	28-28	28-16	31-13 (70%)
House	116-89	113-3	113-3 (97%)
1874			
Senate	29-16	28-3	28-3 (90%)
House (May 25)	152-85	152-10	152-10 (94%)
House (June 1)	141-72	141-10	141-10 (93%)
1875			
House	114-148	114-63	114-63 (64%)

⁷³³ See *supra* text accompanying notes 493-94.

⁷³⁴ See *supra* note 513 and accompanying text.

⁷³⁵ See *supra* note 536 and accompanying text.

⁷³⁶ This does not result in the switching of four votes, because Senators Sawyer and Robertson were absent on May 9 and Cragin and Fenton voted in favor of the rider on February 9 (though Cragin voted against the rider on May 9). Effectively, two votes against the rider, each time, came from supporters on the merits. Carpenter makes three.

⁷³⁷ See *supra* text accompanying notes 511-13.

This chart shows that school desegregation legislation consistently won the support of at least 70%—and more often in excess of 90%—of the Republicans until the elections of 1874, when civil rights became a campaign issue for the Democrats. Even then, the bill carried the allegiance of 64% of the Republican congressmen. It can therefore be said that the predominant understanding of the Fourteenth Amendment among Republicans—the party that supported the Amendment—was that it authorized legislation outlawing school segregation.

Moreover, we must not forget that the Court in *Brown v. Board of Education* was faced with two interpretative choices: desegregation or separate but equal. We have assumed that the proper question is whether the original understanding supports the position of the plaintiffs in *Brown*. But what of the converse question: does the original understanding support the position of the *defendants* in *Brown*? Which interpretation of the Amendment was shared most widely? Every effort to adopt a separate-but-equal standard was defeated. Senator Blair's attempt in May 1872 lost by a vote of 23-30. Of the twelve Fourteenth Amendment supporters, ten opposed the separate-but-equal proposal (the exceptions being Trumbull and Sprague).⁷³⁸ Senator Sargent's attempt in May 1874 lost by a vote of 21-26. Again, two of the ten surviving Fourteenth Amendment supporters (Stewart and Allison) voted for the separate-but-equal proposal.⁷³⁹ Sargent's second attempt failed, 16-28.⁷⁴⁰ Even after the 1874 elections, when it was evident that school desegregation legislation would not be passed, a separate-but-equal proposal offered by Representative White of Alabama lost 91-114.⁷⁴¹ Supporters of the civil rights bill preferred to trust to the courts rather than accept separate-but-equal laws. These results can be summarized in tabular form as follows:

⁷³⁸ Compare Cong. Globe, 39th Cong., 1st Sess. 3042 (June 8, 1866) (reporting the Senate vote on passage of the Fourteenth Amendment) with Cong. Globe, 42d Cong., 2d Sess. 3262 (May 9, 1872) (reporting the Senate vote on the Blair amendment).

⁷³⁹ Compare Cong. Globe, 39th Cong., 1st Sess. 3042 (June 8, 1866) (reporting the Senate vote on passage of the Fourteenth Amendment) with 2 Cong. Rec. 4167 (May 22, 1874) (reporting the Senate vote on the Sargent amendment).

⁷⁴⁰ 2 Cong. Rec. 4175 (May 22, 1874).

⁷⁴¹ 3 Cong. Rec. 1010 (Feb. 4, 1875).

 VOTES ON MOTIONS TO ALLOW SEPARATE-BUT-EQUAL FACILITIES

<u>Date</u>	<u>House or Senate</u>	<u>Description of vote</u>	<u>Outcome</u>	<u>14th A. Supporters</u>
5/9/72	Senate	To allow segregated schools: local option	23-30	2-10
5/22/74	Senate	To allow separate schools if equal	21-26	2-8
5/22/74	Senate	To make deseg. language ambiguous	16-28	1-8
2/4/75	House	To allow separate-but-equal facilities	91-114	*

* The *Congressional Record* does not report the votes of individual representatives on this motion.

This is powerful evidence that separate but equal facilities were not understood at the time to comport with the equalitarian principles of the new Amendment.

This conclusion is confirmed when we look to the partisan breakdown, as the following chart shows:

 PARTISAN SPLIT ON MOTIONS TO ALLOW SEPARATE-BUT-EQUAL FACILITIES

<u>Date</u>	<u>House or Senate</u>	<u>Total vote</u>	<u>Democrats</u>	<u>Republicans</u>
5/9/72	Senate	23-30	14-0	9-30 (77%)
5/22/74	Senate	21-26	14-0	7-26 (79%)
5/22/74	Senate	16-28	13-0	3-28 (90%)
2/4/75	House	91-114	*	*

* No roll call vote recorded.

Significantly, Republican opposition to segregation never fell below 77%. It should be noted, too, that much of the opposition to desegregation legislation was predicated on the theory that "social rights" and "social equality" are not fitting subjects for regulation—a position that, logically, extends to statutes *mandating*, as well as statutes *prohibiting*, segregation. Thus, the actual degree of support for state-mandated segregation laws was rather small.

In short, there are ambiguities; there was confusion and disagreement. But the weight of the evidence supports the proposition that segregation was understood in the years prior to the end of Reconstruction to be unconstitutional, especially by those who had supported the Fourteenth Amendment. In his study of the 1875 Act, *De Facto and De Jure School Segregation: Some Reflected Light on the Fourteenth Amendment from the Civil Rights Act of*

1875,⁷⁴² Alfred Avins presented a very different analysis of these votes. He argued strenuously against the result in *Brown*, basing his conclusion on the fact that the desegregation forces "never obtained a two-thirds vote in either House, which would have been necessary to embody it in a constitutional amendment."⁷⁴³ But Avins asked and answered the wrong question. If the question were, "did opponents of school segregation have the votes to pass a constitutional amendment specifically directed to that end?" Avins might well have a point. Such an amendment almost certainly would not have garnered the two-thirds support in both houses needed for submission to the states. The Sumner bill never did. But that is not the question. The Fourteenth Amendment meant many different things. Its application to school desegregation was only one of them, and not necessarily the most important. (The constitutionality of the Civil Rights Act of 1866, and hence the unlawfulness of the Black Codes, was foremost on the framers' minds.) It is perfectly possible that Congress proposed and the states ratified an amendment that accomplished many popular objectives, even though it was understood to have potential consequences that Congress and the states would not independently enact (at least not by two-thirds). To use an analogy from recent times, polls regularly showed strong majority support for the proposed Equal Rights Amendment,⁷⁴⁴ even though it might well have led to drafting women into military combat,⁷⁴⁵ which an overwhelming majority of the population opposed.⁷⁴⁶ The real question is not whether two-thirds of Congress supported school desegregation, but whether the Amendment, which was passed by the necessary two-thirds vote, was understood to outlaw public school segregation. That seems to be the case.

⁷⁴² *Supra* note 7.

⁷⁴³ Avins, *supra* note 7, at 245.

⁷⁴⁴ In May 1982, polls indicated that support for the ERA stood at 63%-34%, a high point. Washington News, UPI, May 7, 1982, available in LEXIS, News Library, UPI File.

⁷⁴⁵ In hearings on the impact of the proposed amendment, most witnesses testified that it would eliminate sex-based criteria for military service. See *The Impact of the Equal Rights Amendment: Hearings on S.J. Res. 10 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 1st and 2d Sess. 254-439 (1984)*.

⁷⁴⁶ See Jane J. Mansbridge, *Why We Lost The ERA* 64-65, 81 (1986) (reporting that surveys indicated that only 22 percent of the public thought that women should be drafted into combat).

2. *Constitutional Principles*

It is widely agreed among originalists that the intentions or understandings of the framers regarding a specific issue, while informative, are not ultimately authoritative, for it is their understanding of the constitutional principles embodied in the constitutional provision—not their analysis of a particular legal phenomenon—that is controlling. To determine those principles, we must divide the question of school segregation into two: (1) is separation by race inconsistent with the requirement of equality, and (2) does the equality requirement of the Fourteenth Amendment apply to public education? There were many who answered “yes” or “no” to both questions, but there were some who divided their answers. Indeed, the collective judgment of the Congress in 1875 seemed to be “yes” to the first question and “no” to the second.

The Senate answered “yes” to both questions on a number of occasions, most clearly in May 1874, when it passed Sumner’s bill by a vote of 29-16. Votes in the House of Representatives, however, determined the ultimate shape of the legislation. On that fateful day in February 1875, after years of deliberation, the House of Representatives reached three decisions about the civil rights bill. First, by a vote of 162-99, it outlawed segregation in inns, public conveyances on land or water, theaters, and other places of public amusement. The language employed to achieve this end was the proposition that “all persons” have the right to “the full and equal enjoyment” of the accommodations, advantages, facilities, and privileges provided by the covered services “subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color.”⁷⁴⁷ This vote reflected both a normative-constitutional judgment that segregation is/ought to be unconstitutional, which was contested, and a verbal-interpretive judgment that segregation is a denial of the “full and equal enjoyment” of the covered facilities (and not an instance of conditions “applicable alike” to all citizens). The latter judgment was not contested: opponents as well as proponents of the Act understood that it proscribed segregation. Interestingly, this interpretive judgment survived for another decade, to the debate over the proposed

⁷⁴⁷ See 3 Cong. Rec. 939 (Feb. 3, 1875).

Interstate Commerce Act, when the term "without discrimination" was again understood by all sides to outlaw segregation; by this time, however, the normative-constitutional judgment had switched.

Second, the House voted, 114-91, to reject an amendment that would have allowed "separate common schools for different races or colors," as well as "separate accommodations, facilities, and privileges" in common carriers and public accommodations, so long as the separate facilities were "equal in facilities and equipments for both races."⁷⁴⁸ This confirms and extends the normative-constitutional judgment already noted. Not only did Congress vote in favor of legislation demanding "full and equal enjoyment" of the covered facilities, but it voted against the alternative, which would have permitted separate facilities so long as they were "equal" in material respects. Further, Congress made clear that the objection to formal recognition of the separate-but-equal principle extended to schools.

Third, the House voted, 128-48, to eliminate common schools and cemeteries from coverage of the bill. As explained above, this reflected a combination of a political and a normative-constitutional judgment: first, that a majority would not extend the principle of desegregation to public education, and second, that it was preferable that the law be silent than that it countenance the principle of separate but equal.⁷⁴⁹ If school segregation is consistent with the original understanding as reflected in this history, therefore, it must be because of the special status of schools. It is not because segregation was deemed to be a form of equality.

There are two possible interpretations of Congress's ultimate decision to pass a desegregation bill that did not apply to schools. First, it might be understood as nothing more than an unprincipled accommodation to popular sentiment. This was the opinion of many congressmen of both parties. For example, Representative John B. Storm, Democrat from Pennsylvania, observed that if one believed "that in order to enjoy his equal rights with the white man the colored man must enjoy those rights in the same railroad car, in the same theater, and at the same table in the hotel or public inn,"

⁷⁴⁸ See *supra* notes 675, 680 and accompanying text.

⁷⁴⁹ See *supra* text accompanying notes 683-91.

as the final version of the Act provided, "I should certainly insist upon his enjoying the right to an education in the same school-room with the white children. I regard the right to an education the most sacred one which the colored man can enjoy," he continued, "and yet gentlemen on the other side who expect to pass this bill intend . . . to strike out the provision with regard to schools. If they are consistent I cannot see how they can do this . . ." ⁷⁵⁰ Representative Ellis Roberts, Republican from New York, stated: "For one, sir, I am not willing to legislate that colored men shall have their rights in the theater and to refuse to legislate that they shall have their rights in the schools." ⁷⁵¹ Under this interpretation, the 1875 Act shows that segregation was understood to be inconsistent with the Fourteenth Amendment, but that Congress flinched when it came to applying that principle to the controversial area of public education. This interpretation provides no principled support for the defendants in *Brown*.

A second interpretation of Congress's actions is that education might not have been thought to be a civil right. This position was championed in the Senate by Lyman Trumbull, whose credentials as a supporter of the goals of the Fourteenth Amendment were impeccable, and gained the backing of respectable Northern Republicans Lot Morrill and Orris Ferry. Moreover, it explains the shape of the final Act as it emerged from the House in 1875: forbidding segregation in common carriers and public accommodations, but leaving the issue of schools to the states. Sumner and his allies articulated powerful legal responses to this position, to be sure, and defeated it in a number of tests of strength in nonfinal votes in the House and Senate, but they did not prevail in the end.

But taking this to be an authoritative reading of the original understanding, it does not follow that public education could not be deemed a civil right as of 1954, for the original understanding of the legal concept, "civil right," introduces a degree of contingency. The Fourteenth Amendment did not create new rights, but only extended the established privileges and immunities of the most favored class of citizens to all citizens, without discrimination on the basis of race. If white children had no firmly established,

⁷⁵⁰ 3 Cong. Rec. 951 (Feb. 3, 1875).

⁷⁵¹ *Id.* at 980 (Feb. 4, 1875).

legally enforceable right to a public education, then denial of a similar right to black children was not an inequality. If even a substantial number of states lacked a legally enforceable right to education, this undermined the claim that public education was a "civil right" or a "privilege or immunity of citizenship." Not all positive law rights in each state were civil rights for purposes of the Fourteenth Amendment; according to many, that status was reserved for rights that were sufficiently widespread and entrenched that they had come to be understood as privileges and immunities of citizenship. As has been noted, there was a substantial basis for uncertainty about the legal status of public education as late as the 1870s.⁷⁵² Education was then at a time of transition, and it was far from clear that any child had a legally enforceable "right" to it, at least in most states. By the turn of the century, however, this uncertainty had been resolved. Every state in the Union had established a universal system of compulsory education funded by public taxation.⁷⁵³ The right to publicly funded education was embedded in the constitutions of the states, and the common school had attained its modern role as the principal institution for the inculcation of American ideals of citizenship—a role envisioned, perhaps prematurely, by proponents of the Sumner bill. It had become unthinkable that any state would abolish its schools—as unthinkable as it was, in 1871-75, that any state would abrogate the common law rights of its white citizens. By the turn of the century—and certainly by the time of the *Brown* decision in 1954—there could be little doubt that schools satisfied the criteria even the opponents of the 1875 Act understood for the existence of civil rights. The right to education had become stable, uniform, and legally enforceable.

Far from confirming the conventional wisdom that school segregation was tolerated or even approved by the generation that framed and ratified the Fourteenth Amendment, the history of the Civil Rights Act of 1875 in fact refutes it. The Act constitutes an official declaration by the body entrusted with enforcement of the Amendment that segregation is a form of inequality. Moreover, a

⁷⁵² See *supra* text accompanying notes 439-49.

⁷⁵³ See John C. Eastman, *When Did Education Become a Civil Right? A Working Hypothesis* (January 31, 1994) (unpublished manuscript, on file with the Virginia Law Review Association).

large majority of the party that supported the Amendment—perhaps three-fourths—was willing to apply that principle to public schools. That application was defeated, but the constitutional principle that explains the ultimate resolution of the segregation question in the 1875 Act—requiring desegregation of common carriers but not of public schools—was based on the rudimentary character of public education at that point in history. Applying the legal understanding of civil rights that prevailed in 1875 to the institution of public education as it existed by the turn of the century, one can conclude only that the principle of equality in civil rights leads directly to the decision in *Brown v. Board of Education*.

3. *Caveats*

Although the deliberations over the 1875 Act provide the best evidence of what the Fourteenth Amendment was understood to mean on the question of segregation, there are certain inherent limitations in the argument. To prove that a majority of the members of Congress between 1871 and 1875 supported legislation premised on the unconstitutionality of school segregation does not conclusively prove that this was the predominant understanding of those who drafted and ratified the Amendment in the period 1866 to 1868. In this Subsection I will address the three most troubling potential pitfalls in the analysis, and ask how probable it is that they affect the ultimate conclusion.⁷⁵⁴

a. *Changes in Popular Opinion*

My argument depends on a continuity in opinion during the nine-year period from the proposal of the Fourteenth Amendment through the passage of the Civil Rights Act of 1875. There is much to support a claim of such continuity: the Reconstruction period is ordinarily understood by historians as a distinct political era in which a particular political faction, with a particular political and constitutional agenda, dominated the federal government and pursued a consistent and coherent program. Many of the leaders of the movement to adopt the Fourteenth Amendment went on to lead the movement for the Civil Rights Act of 1875. The support-

⁷⁵⁴ I am particularly grateful to Michael Klarman for raising some of the points addressed in this Subsection.

ers of the Act understood it to be a mere extension of the principles of the 1866 Civil Rights Act. The arguments regarding Reconstruction measures, pro and con, show a striking similarity throughout the period.

Nonetheless, it is undeniable that public opinion—including the opinions of leading supporters of civil rights—changed between the periods 1866-68 and 1871-75. Opinions held during the latter period therefore are not a wholly reliable indicator of the opinions held during the former. An analogy might be drawn to the shift of opinion on affirmative action that occurred among supporters of civil rights between passage of the Civil Rights Act of 1964 (when affirmative action was explicitly disavowed)⁷⁵⁵ and a decade later (when affirmative action was firmly entrenched). In much the same way, Republican attitudes toward the race question may have become more radical as Reconstruction proceeded. Indeed, the attitude toward black suffrage suggests such a shift. In 1866, the Radicals were unable to secure enough votes to guarantee black political rights in the Fourteenth Amendment, and the Republican Party expressly disclaimed any commitment to black enfranchisement in its 1868 party platform.⁷⁵⁶ By early 1869, however, the political winds had changed and the Congress proposed the Fifteenth Amendment, which was quickly ratified by 1870. Perhaps a similar shift explains the willingness to vote for desegregation legislation after 1871.

The argument, however, cuts both ways. While Reconstructionist fervor apparently increased between 1866 and 1870, there is reason to believe that it cooled considerably in the years after 1870. Southern treatment of the freedmen outraged the North in the late 1860s, but as Grant's second term wore on, civil rights increasingly became a political liability for the Republicans.⁷⁵⁷ A nation that in 1868 voted overwhelmingly for the Republicans, the party of civil rights, voted almost as overwhelmingly for their opponents in 1874.⁷⁵⁸ The declining enthusiasm for civil rights can be seen in the

⁷⁵⁵ See *United Steelworkers v. Weber*, 443 U.S. 193, 230-55 (1979) (Rehnquist, J., dissenting) (analyzing the legislative history of the Civil Rights Act of 1964).

⁷⁵⁶ See *National Party Platforms 1840-1972* 39 (Donald Bruce Johnson & Kirk H. Porter, compilers, 5th ed. 1973).

⁷⁵⁷ See Foner, *supra* note 21, at 524-25.

⁷⁵⁸ See *id.* at 523.

careers of statesmen like Trumbull of Illinois, who was principal sponsor of the Civil Rights Act of 1866 but who, by 1872, was a Liberal Republican, and by 1877 a Democrat again. As Edmunds derisively observed in 1872, Trumbull “seems to have . . . spent all the love for equal rights that he had.”⁷⁵⁹ In 1875, Democratic Representative Storm of Pennsylvania could say that General Ben Butler “did not represent *any longer* the moral and political sentiments of the American people”⁷⁶⁰—as much an acknowledgment of past Radical strength as it was a claim of present Radical decline. The shift can be seen among Democrats, as well. In 1872, the Democrats adopted a party platform pledging support for equal rights so strong that Republicans insisted on attaching it as a preamble to the 1875 Act.⁷⁶¹ By that time, however, the Democrats were in unanimous opposition to civil rights legislation, and they considered their 1872 platform an embarrassment.⁷⁶²

The shifts in public opinion between 1866-68 and 1871-75 thus make any inference based on the latter period uncertain, but they do not push in one direction or the other. In the end, reliance on evidence from this period seems neither more nor less warranted than the accepted practice of relying on evidence from the administrations of the early Presidents in interpreting the Constitution of 1787. If we were to reject this evidence, consistency would demand that we cease looking to the practices of the Washington Administration in interpreting separation of powers or to those of Presidents Jefferson and Madison in interpreting the Religion Clauses.

b. Conflict Between Congressional and Popular Understandings

A second potential weakness in my argument is that popular opinion, especially as reflected in the results of the election of 1874,

⁷⁵⁹ Cong. Globe, 42d Cong., 2d Sess. 3264 (May 9, 1872).

⁷⁶⁰ 3 Cong. Rec. 951 (Feb. 3, 1875) (emphasis added).

⁷⁶¹ *Id.* at 1011 (Feb. 4, 1875). The passage in question affirmed that:

Whereas it is essential to just government we recognize the equality of all men before the law, and hold it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political . . .

Id.

⁷⁶² Representative Niblack, a Democrat from Indiana, protested the reading of the platform provision on the ground that the Party had been “intimidated” into adopting it. *Id.* at 1003 (Feb. 4, 1875).

may have conflicted with congressional opinion, and that it is the understandings of "We, the People" that must control constitutional interpretation. Why treat the congressional deliberations in 1874 as more authoritative than the elections of 1874? This, too, is a serious point, and it undoubtedly weakens the thesis of this Article—but not much. There are both empirical and theoretical reasons not to view the 1874 elections as reflective of the authentic voice of the Fourteenth Amendment.

It is a parlous enterprise to deduce popular understandings of the meaning of a legal instrument from the results of an election, which typically hinge on a number of issues. While school desegregation was obviously unpopular, especially in the South, so was the corruption, economic depression, and "Grantism" represented by the Republican Party.⁷⁶³ To be sure, Democrats and some Republicans interpreted the election of 1874 as a mandate against the civil rights bill, and this perception undoubtedly played a major part in determining the political fate of the proposed legislation. But thoughtful legislators could, and did, interpret the results in a different way. Consider the following comments: James Garfield remarked that "[t]he recent disasters of the republican party have not sprung from any of the brave acts done in the effort to do justice to the negro."⁷⁶⁴ John Shanks observed that Republican losses were concentrated among the "timid" who had "been afraid to stand up here and do right" and that forthright supporters of the bill had been reelected.⁷⁶⁵ Finally, General Butler lamented "that it is my deliberate conviction that the reason why some here have not been sent back is because we did not pass this bill a year ago. The people turned from us," he continued, "because we were a do-nothing party, afraid of our shadows The republican party

⁷⁶³ Historians are divided on the relative importance of the economic and Reconstruction issues to the election of 1874. William Gillette describes the election as "a referendum not only on reconstruction but also on civil rights." Gillette, *supra* note 18, at 256. Eric Foner, however, maintains that "the depression far outweighed Reconstruction as a cause of Republican defeat." Foner, *supra* note 21, at 524. See also Richard H. Abbott, *The Republican Party and the South, 1855-1877*, at 230 (1986) ("The backlash against civil rights, Northern dissatisfaction with the Grant administration's policy in dealing with the Panic of 1873, and a growing disillusionment with Reconstruction and Republican regimes in the South all led Northern voters to repudiate the Republicans.")

⁷⁶⁴ 3 Cong. Rec. 1005 (Feb. 4, 1875).

⁷⁶⁵ *Id.* at 1003.

being neither hot nor cold, the country rightly spewed us out of its mouth."⁷⁶⁶ Of course, it is always possible for true believers to say that the problem with an unpopular policy is that it was not taken far enough. The difficulty for historical analysis is that sometimes they are right.

A more fundamental reason to rely more heavily on the congressional deliberations is that they were conducted in constitutional terms by officers sworn to uphold the Constitution. Whether the statements and votes of the representatives and senators were an act of constitutional interpretation, as opposed to mere political decisionmaking, will be considered below; but the voters in the election of 1874 were almost surely acting on the basis of preferences and policy rather than conscientious reflection on the demands of the new constitutional order.

Finally, far more than other amendments, the Fourteenth Amendment was a congressional creation. The states and the people exercised little control. The state ratification debates did not dwell on the details of the proposed Amendment, and—an important point—the margin of victory for the Amendment was attained by coercion of the Southern states rather than by winning the support of the electorate in three-fourths of the States. When an Amendment obtains its supermajority through congressional exercise of its power to condition readmission of states to the Union, it is a fiction to treat the opinions of the people of the various states as controlling; it is Congress that effectively exercised the amendatory power.

In any event, to the extent that the elections of 1874 represent a backlash against civil rights and the congressional deliberations of 1874 represent a political view from an earlier stage, it is hard to see why the later view—being more distant both in time and in spirit from the Amendment—should be given more weight. The elections of 1874 were the beginning of the end of Reconstruction. The Reconstruction Amendments should not be interpreted to conform to the preferences of those who halted their enforcement.

⁷⁶⁶ *Id.* at 1009.

c. Interpretation and Policymaking

Even assuming that it has been established that a strong majority of both houses of Congress in 1872-74 voted for legislation that would desegregate public schools, the question remains: does this demonstrate that they believed that the Fourteenth Amendment compelled school desegregation, or was this merely their judgment about wise public policy? Essential to my argument here is the assumption that the members of Congress understood themselves to be enforcing the dictates of the Constitution and not merely deciding whether they believed public schools should be segregated. This issue requires consideration of the nature of the authority vested in Congress under Section 5 of the Amendment, which reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."⁷⁶⁷

There are five possible constructions of the relationship between legislation passed pursuant to Section 5 and the Amendment itself. First, it might be thought that the Privileges or Immunities Clause does not refer to any fixed set of rights (or even to a fixed methodology by which the interpreter can discern the set of protected rights), but that Congress has the authority to determine, by legislation, what are the "privileges or immunities of citizens of the United States." This interpretation would imply that, at least insofar as this Clause is concerned, Congress has the power not only to "enforce" but also to define the substantive reach of the Amendment. If, for example, Congress decided that the right to abortion (or protection from abortion) were a privilege or immunity of American citizens, then it could enact legislation to that effect, without regard to whether the Constitution would have that meaning of its own force. If this is the proper meaning of Section 5, then the majority support in Congress for school desegregation in 1872-74 does not imply that the courts had the authority to order school desegregation in 1954.

Second, it can be said that congressional action is necessary only to supplement the dictates of the Constitution itself—that is, to go *beyond* the dictates of the bare Constitution. Thus, congressional enactment of legislation to forbid a certain practice implicitly suggests that Congress did not believe that practice to be indepen-

⁷⁶⁷ U.S. Const. amend. XIV, § 5.

dently unconstitutional. If the practice is already unconstitutional, there is no need for legislation. If Congress perceives a need for legislation, this suggests that Congress did not understand the practice to be unconstitutional. Thus, legal historian Bernard Schwartz has argued with respect to the deliberations over the 1875 Act:

The 1874-75 debates on the proposed prohibition of racial discrimination in schools are directly relevant to the question of the intent of those who wrote the Fourteenth Amendment with regard to segregation in education. One who reads what is said in the debates . . . cannot help but conclude that the Congress that sat less than a decade after ratification of the Fourteenth Amendment did not think that the amendment had the effect of prohibiting school segregation which the Supreme Court was to attribute to it in the *Brown v. Board of Education* case of 1954. Certainly, if such effect had been considered to flow from the amendment, the whole debate on the proposed school provision in 1874-75 would have been irrelevant, for integrated schools would have been constitutionally required, regardless of any congressional provision in the matter.⁷⁶⁸

Third, it can be said that the Fourteenth Amendment is enforceable *only* through Acts of Congress passed pursuant to Section 5. In the words of the Supreme Court in *Ex parte Virginia*:⁷⁶⁹

It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. . . . It is the power of Congress which has been enlarged[.] Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective.⁷⁷⁰

This construction would suggest that the courts are not empowered to hold school segregation unconstitutional in the absence of an Act of Congress to that effect. Since Sumner's efforts failed, *Brown* was wrongly decided.

Fourth, it can be said that Congress has the authority under Section 5 to provide remedies for the enforcement of the rights and prohibitions of the Amendment, but not to expand or contract the underlying rights. Under this theory, a majority vote of Congress

⁷⁶⁸ Schwartz, *supra* note 13, at 660.

⁷⁶⁹ 100 U.S. 339 (1880).

⁷⁷⁰ *Id.* at 345.

to provide a remedy for a particular practice demonstrates that the majority deems that practice unconstitutional, but failure to provide a statutory remedy does not strip the courts of their inherent authority to enforce the Amendment as a matter of judicial review.

Fifth, it might be said that Congress has not just the authority but the duty to provide effective remedies for violations of the Amendment. This is the strongest case for treating the deliberations over the 1875 Act as a form of constitutional interpretation. For any member holding this view, a vote in favor of the Act is tantamount to a declaration that the practices forbidden by it are unconstitutional, and a vote against the Act is tantamount to a declaration that they are not.

Thus, under the first approach the history of the 1875 Act is not directly relevant to the constitutional question, under the second and third approaches the history is inconsistent with the result in *Brown*, and under the fourth and fifth approaches the history supports the result.

The second and third approaches outlined in the previous paragraphs are flatly wrong. If it were correct that a vote to outlaw a practice under the Section 5 power is an implicit judgment that the practice is not independently unconstitutional, then Congress's reenactment of the Civil Rights Act of 1866 in 1870 would be proof that unequal protection of the rights of contract, property, and security of the person was not viewed by the Congress of the day as unconstitutional. This is obviously preposterous. The theory is likewise inconsistent with Congress's enactment in 1870 of a statute declaring that all otherwise qualified citizens are entitled to vote without distinction based on race.⁷⁷¹ Legislation passed for the purpose of enforcing the Fourteenth Amendment typically will outlaw practices deemed by Congress to violate the Fourteenth Amendment, as even a cursory glance at the legislative history of any of the Reconstruction statutes will confirm.

The third position is closer to the truth, but still inaccurate. It is true that supporters of Reconstruction distrusted the courts and believed that congressional action would be needed to achieve the

⁷⁷¹ See Civil Rights Act of 1870, ch. 114, 16 Stat. 140. Under Professor Schwartz's analysis, this statute would be proof that the Fifteenth Amendment did not outlaw racial discrimination with respect to the franchise.

promise of the new Amendments. It was not unnatural that they would be skeptical of reliance on the institution that had produced *Dred Scott v. Sanford*⁷⁷² and *Ex parte Milligan*.⁷⁷³ Only a few years before, Congress had felt it necessary to strip the Supreme Court of its jurisdiction to consider the legitimacy of Reconstruction government in *Ex parte McCordle*.⁷⁷⁴ Thus, Section 5 reflected the common expectation that Congress, not the courts, would be the principal agency for enforcement of the Fourteenth Amendment. Senator Oliver Morton captured this understanding during the debates over the 1875 Act in his remark that “the remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts. The remedy was legislative, because in each the amendment itself provided that it shall be enforced by legislation on the part of Congress.”⁷⁷⁵

But it cannot seriously be maintained that the courts were understood to have no authority to enforce the Amendment in the absence of congressional action. The initial formulation of the Fourteenth Amendment was simply a grant of additional authority to Congress:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.⁷⁷⁶

In that form, the Amendment would not have served as an independent basis for judicial review. In its final version, by contrast, Section 1 imposes restraints on the states and Section 5 gives Congress the authority to enforce them. Many supporters of the Amendment stated that this would not only provide a firm constitutional basis for the Civil Rights Act of 1866, but would constitutionalize it and thus prevent its repeal by future Congresses. Representative Giles Hotchkiss of New York, who proposed this change, explained that civil rights should be “secured by a constitu-

⁷⁷² 60 U.S. (19 How.) 393 (1857).

⁷⁷³ 71 U.S. (4 Wall.) 2 (1866).

⁷⁷⁴ 74 U.S. (7 Wall.) 506 (1868).

⁷⁷⁵ Cong. Globe, 42d Cong., 2d Sess. 525 (Jan. 23, 1872).

⁷⁷⁶ Cong. Globe, 39th Cong., 1st Sess. 1091 (Feb. 28, 1866).

tional amendment that legislation cannot override."⁷⁷⁷ Hotchkiss added: "Then if the gentleman wishes to go further, and provide by laws of Congress for the enforcement of these rights, I will go with him."⁷⁷⁸ This history shows that Section 1 has force independently of acts of Congress and that congressional legislation is not a necessary predicate to judicial enforcement; the very point of the change was to ensure that future enforcement of the Amendment could not be stymied by unsympathetic Democrat-controlled Congresses. After collapse of support for school desegregation legislation in 1875, Representative James Monroe of Ohio voted to strike all reference to schools, in preference to a separate-but-equal provision, largely on the expectation that the courts would intervene. Blacks in the South, he said, "think their chances for good schools will be better under the Constitution with the protection of the courts than under a bill containing [separate-but-equal] provisions"⁷⁷⁹ This clearly indicated his belief that the courts have the power to strike down school segregation even in the absence of congressional legislation—though of course legislation would make that result all the more secure.

The first approach is logically possible, but with one possible exception,⁷⁸⁰ there is no evidence that any participant in the deliberations over the 1875 Act conceived of Congress's authority in this way. If it were believed that Congress has discretion to determine what the civil rights of Americans *should be* (as opposed to

⁷⁷⁷ Id. at 1095; accord id. at 2459 (May 8, 1866) (statement of Rep. Stevens); id. at 2462 (statement of Rep. Finck); id. at 2462 (statement of Rep. Garfield); id. at 2498 (May 9, 1866) (statement of Rep. Broomall); id. at 2896 (May 30, 1866) (statement of Sen. Howard).

⁷⁷⁸ Id. at 1095.

⁷⁷⁹ 3 Cong. Rec. 998 (Feb. 4, 1875).

⁷⁸⁰ Robert Hale of New York claimed he had voted against the Fourteenth Amendment solely on account of the excessive power given to Congress under Section 5. Id. at 979 (Feb. 4, 1875). Relying on *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Hale interpreted Section 5 as meaning that "within the grant of power by the Constitution to Congress for purposes of legislation Congress are authorized to select in their own discretion all measures appropriate to the end in view; that the question of fitness or desirability is for Congress alone and not for the courts." Id. at 980. In context, it is not clear whether Hale was referring to substantive rights or to remedies. In any event, Hale voted *against* the Cessna amendment to restore the school provision, so it is not possible to say that support for the school desegregation position was predicated on this constitutional theory. More likely, by exaggerating the degree of congressional power, Hale was retrospectively justifying his opposition to the Fourteenth Amendment.

determining what they *are*, and insisting upon an equality of enforcement), one would expect proponents of the Act to have argued in those terms, for it would have pretermitted the complicated constitutional argument about education and civil rights. No one did. Instead, the predominant view among Republicans was that the 1875 Act did not create new rights, but only created new remedies.⁷⁸¹ Representative Lynch commented that the bill “simply confers upon all citizens, *or rather recognizes the right which has already been conferred upon all citizens*, to send their children to any public free school”⁷⁸² Lynch explained, incidentally, that his constitutional judgment was based on a strict construction of congressional powers and the belief “that the Constitution as a whole should be so construed as to carry out the intention of the framers of the recent amendments”⁷⁸³

That leaves the fourth and fifth possibilities. While there were more than a few comments about the policy and expediency of the bill, the essential position of the proponents was that the bill was a necessary and appropriate means of enforcing rights already established by the Constitution. Senator Edmunds, for example, stated: “This bill proceeds upon the idea that the Constitution does secure to the citizen certain inherent rights, because they are rights, and then it merely undertakes to enforce those rights”⁷⁸⁴ By the same token, opponents thought they had refuted the proponents’ position when they showed that, in their opinion, “the fourteenth amendment [does not] enjoin[] upon us that we shall have mixed schools.”⁷⁸⁵ One thing on which “both sides agree,” according to Edmunds—and he went uncontradicted—was that the question was one of constitutional interpretation, not of legislative policy:

[E]ither . . . the democratic view of the [fourteenth] amendment is right, that it does not touch these subjects at all, and therefore we cannot interfere with the right of the State to regulate its common

⁷⁸¹ See, e.g., Cong. Globe, 42d Cong., 2d Sess. 3192 (May 8, 1872) (statement of Sen. Sherman); id. at 3264 (May 9, 1872) (statement of Sen. Edmunds).

⁷⁸² 3 Cong. Rec. 945 (Feb. 3, 1875) (emphasis added).

⁷⁸³ Id. at 943.

⁷⁸⁴ 2 Cong. Rec. 4172-73 (May 22, 1874).

⁷⁸⁵ Id. at 4171 (statement of Sen. Sargent).

schools . . . or else it does confer upon citizens of the United States a right, and that right is inherent⁷⁸⁶

It is not clear whether proponents felt under a constitutional obligation to pass the bill (once they had concluded that it would protect previously violated constitutional rights) or whether they merely believed they had authority to do so. Many Republicans argued that Congress had not just the power but the duty to enact effective remedies. Senator Henry Pease commented that he would vote for the Civil Rights Act of 1875 "because I believe that it is the bounden duty of the American Congress to enforce the provisions of the fourteenth amendment to the Constitution."⁷⁸⁷ Representative Ransier said that Congress has a "duty" to pass appropriate legislation to ensure a "full and complete" remedy for violations of the Fourteenth Amendment.⁷⁸⁸ Representative William Lawrence of Ohio, one of the original supporters of the Fourteenth Amendment, delivered the Republicans' most extensive disquisition on the significance of Section 5. Lawrence first argued that the schools provision was constitutionally compelled, on the ground that "equal privileges" in places and institutions supported by public taxation are protected by the Equal Protection Clause.⁷⁸⁹ He then argued at length that Congress had the power to enforce that right. "The fourteenth amendment was designed to secure this equality of rights;" he maintained, "and we have no discretion to say that we will not enforce its provisions. There is no question of discretion involved except as to the means we may employ."⁷⁹⁰ Democrats denied the existence of such a duty, arguing that "[a]s legislators it is as much your duty to look to the expediency of a law in reference to your constituents as to look to its constitutionality."⁷⁹¹ It seems probable that many Republicans, as well as Democrats, viewed the nature and extent of "appropriate" legislation as a matter of legislative discretion rather than constitutional duty.

⁷⁸⁶ *Id.* at 4172.

⁷⁸⁷ *Id.* at 4153 (May 22, 1874).

⁷⁸⁸ *Id.* at 383; accord 3 Cong. Rec. 980 (Feb. 4, 1875) (statement of Rep. Hale); 2 Cong. Rec. 410 (Jan. 6, 1874) (statement of Rep. Elliott).

⁷⁸⁹ 2 Cong. Rec. 412 (Jan. 6, 1874).

⁷⁹⁰ *Id.* at 414.

⁷⁹¹ 3 Cong. Rec. 952 (Feb. 3, 1875) (statement of Rep. Whitehead).

A vote in favor of legislation outlawing segregation was thus an implicit (and often an explicit) statement regarding the congressman's interpretation of the Fourteenth Amendment. These debates were as much acts of interpretation as they were of law-making. Thus, if it is established that a majority supported legislation to forbid school segregation under Section 5, this proves that the majority understood the Fourteenth Amendment to forbid the racial segregation of public schools.

IV. THE SUPREME COURT'S DESEGREGATION DECISIONS

Now we are able to examine the Supreme Court's principal decisions regarding desegregation in light of the original understanding, as revealed in the debates over the Civil Rights Act of 1875. I consider only the most important decisions: one contemporaneous with deliberations over the Act, one decided a generation later in the heyday of Jim Crow legislation, and, finally, one that brought the era of formal de jure segregation to an end.

A. *The First Desegregation Decision*

Surprisingly few people—even among constitutional lawyers—have heard of the Supreme Court's first case involving the lawfulness of racial segregation.⁷⁹² Yet in 1873, in *Railroad Company v. Brown*,⁷⁹³ (a remarkable coincidence of names) the Supreme Court unanimously held that the cars of a commuter railway must be desegregated, on the ground that segregated facilities are inherently unequal.⁷⁹⁴ This, according to the Court, was the prevailing view in Congress in the mid-1860s.⁷⁹⁵

In 1863, Congress authorized the Alexandria and Washington Railroad Company to extend its line northward to connect with another rail line in the District of Columbia. In so doing, Congress attached the condition "that no person shall be excluded from the

⁷⁹² I could find no reference to the case in Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988), or in any of six leading constitutional law casebooks, and there is no entry for the case in the *Encyclopedia of the American Constitution* (Leonard W. Levy, Kenneth L. Karst & Dennis J. Mahoney eds., 1986).

⁷⁹³ 84 U.S. (17 Wall.) 445 (1873).

⁷⁹⁴ *Id.* at 453.

⁷⁹⁵ *Id.*

cars on account of color."⁷⁹⁶ Notwithstanding this provision, the Railroad instituted a policy of separate but equal transportation for its route between Washington and Alexandria. In the run from Washington to Alexandria, the front car was reserved for blacks and the other car for whites; in the return run the placement was reversed. In this way, the company guaranteed that the facilities provided persons of the two races were identical, and "alike comfortable."⁷⁹⁷

On February 8, 1868, just five months before the ratification of the Fourteenth Amendment was complete, Catharine Brown, a black employee of the United States Senate, attempted to board the car reserved for whites. A railroad employee told her to go to the other car, and when she demurred he "put her out with force, and, as she alleged, some insult."⁷⁹⁸ She sued. The railroad defended on the ground that "it has literally obeyed" the congressional conditions prohibiting exclusion of any person from the cars on account of color "because it has never excluded this class of persons from the cars, but on the contrary, has always provided accommodations for them."⁷⁹⁹ In other words, segregation was not "literally" discrimination.

The case was argued to the Supreme Court and decided in 1873, in the midst of congressional debates over what would become the Civil Rights Act of 1875, during a period in which, according to the conventional wisdom, the lawfulness of segregation was firmly and widely accepted. The Court's reaction to the railroad's separate-but-equal argument is therefore extremely revealing. The Justices characterized that argument as "an ingenious attempt to evade a compliance with the obvious meaning of the requirement."⁸⁰⁰ The Court conceded that the words of the statute "taken literally might bear the interpretation put upon them" by the railroad, but stated

⁷⁹⁶ *Id.* at 446. This was one of a series of acts passed by Congress at the instigation of Senator Sumner, requiring desegregation of railways and streetcars in the District of Columbia. See Maltz, *supra* note 155, at 558-63.

⁷⁹⁷ *Brown*, 84 U.S. (17 Wall.) at 447.

⁷⁹⁸ *Id.* at 447-48.

⁷⁹⁹ *Id.* at 452. The railroad's "plain language" argument drew its force from the particular wording of the statute, which forbade exclusion of any person on account of race "from the cars"—rather than from "any car." *Id.* at 446.

⁸⁰⁰ *Id.* at 452.

that "Congress did not use them in any such limited sense."⁸⁰¹ The Court noted that there had been no need for legislation guaranteeing that the company would not exclude black passengers altogether; "self-interest" would suffice to prevent that.⁸⁰² "It was the discrimination in the use of the cars on account of color, where slavery obtained, which was the subject of discussion at the time," and Congress acted in the "belief that this discrimination was unjust."⁸⁰³ Indeed, the Court commented, "in the temper of Congress at the time, it is manifest the grant could not have been made without" the condition.⁸⁰⁴

This first desegregation case did not involve the Fourteenth Amendment, but presented merely a statutory question, and it is perhaps for this reason that it has been forgotten. Yet at heart, the issue is not much different from the question as it would arise under the Fourteenth Amendment:⁸⁰⁵ whether separate but equal facilities are a form of racial discrimination. On this point, it is significant that the Court did not merely find that its interpretation was the most plausible. It found the meaning "obvious" and the counterargument "ingenious." It used the term "discrimination" three times as embracing segregation. The Court specifically recalled "the temper of Congress at the time" and described it as "manifest" that Congress would not have allowed the railroad to extend its line if it were going to segregate the cars. This was the only time during Reconstruction that the Supreme Court would address the issue of segregation, and the opinion in *Brown* reinforces the conclusion of the 1875 Act debates: that, contrary to the conventional wisdom, during the brief period between the end of the Civil War and the end of Reconstruction segregation was widely considered discriminatory and unjust. Just possibly, the Supreme Court understood "the temper of Congress at the time" of the Fourteenth Amendment better than it has been understood since.

⁸⁰¹ *Id.*

⁸⁰² *Id.*

⁸⁰³ *Id.* at 452-53.

⁸⁰⁴ *Id.* at 453.

⁸⁰⁵ Putting aside the state-action problem, which relates in this context to the common carrier status of the railroad.

B. Plessy v. Ferguson

At issue in the 1875 Act debates was whether federal law could *forbid* private railroads and other common carriers to segregate their passengers by race. By the time of *Plessy v. Ferguson*⁸⁰⁶ in 1896, the issue was whether state law could *compel* segregation. *Plessy* involved a Louisiana statute, passed in 1890, requiring railroads in the state to "provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations."⁸⁰⁷ Statutes of this sort, which were a recent development in state law,⁸⁰⁸ were strongly opposed both by black citizens and by many railroads. Maintenance of separate facilities was a considerable expense, which railroads did not care to undertake. Indeed, in many Southern states an alliance between black citizens and railway interests successfully staved off Jim Crow legislation until the turn of the century, after *Plessy* had already been decided.⁸⁰⁹ The railroad company in the *Plessy* case cooperated with the challenge to the law, and it is rumored that it may even have contributed to the costs of Plessy's litigation.

Over a justly famous dissent by Justice John Marshall Harlan, the Supreme Court upheld the Louisiana statute. There are many interesting features of the case, treated at length in a book by historian Charles A. Lofgren.⁸¹⁰ The only question I will address is whether the decision comports with the original understanding of the Fourteenth Amendment, as revealed in the debates over the 1875 Act.

In the most obvious sense, *Plessy* involved precisely the question debated and resolved by the Congress in 1875: whether black citizens have a constitutionally protected right, equal to that of white

⁸⁰⁶ 163 U.S. 537 (1896).

⁸⁰⁷ Act of July 10, 1890, No. 111, 1890 La. Acts 152, 153 (quoted in *Plessy*, 163 U.S. at 540).

⁸⁰⁸ See *supra* text accompanying notes 173-77.

⁸⁰⁹ For a detailed discussion of the politics of Jim Crow laws in South Carolina, see Matthews, *supra* note 174. For an economic analysis of the companies' position and the enactment of Jim Crow statutes, see Jennifer Roback, *The Political Economy of Segregation: The Case of Segregated Streetcars*, 46 J. Econ. Hist. 893 (1986).

⁸¹⁰ Charles A. Lofgren, *The Plessy Case: A Legal-Historical Interpretation* (1987).

citizens, to accommodation on common carriers such as railroads. But the Court reached an answer opposite to that reached by the Congress in 1875. To the Congress, segregation of common carriers was a violation of the letter as well as the spirit of the Fourteenth Amendment. Railroads had well established common law obligations to serve all paying customers without discrimination; application of the 1875 Act to railroads was the least controversial part of the proposed bill. In 1872, Matthew Carpenter's watered-down civil rights bill, which mandated desegregation of common carriers but not schools or juries, passed the Senate by a 2-1 margin.⁸¹¹ Even after the 1874 elections, the common carrier provisions passed both houses of Congress by wide margins (162-99 in the House; 38-26 in the Senate⁸¹²). Proposals to allow separate but equal facilities were repeatedly rejected, the last attempt, in February 1875, failing by a vote of 91-114 in the House.⁸¹³

Each of the arguments accepted by the *Plessy* majority had been urged in debate by the Act's opponents, but had been refuted by the proponents and ultimately rejected. The Court began its analysis of the Fourteenth Amendment issues⁸¹⁴ with the proposition, familiar from the Civil Rights Act debates, that desegregation was an attempt to enforce "social equality." The Court explained the "object of the amendment" as

undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce

⁸¹¹ Cong. Globe, 42d Cong., 2d Sess. 3736 (May 21, 1872); see *supra* text accompanying notes 545-61.

⁸¹² 3 Cong. Rec. 1011 (Feb. 4, 1875) (House); *id.* at 1870 (Feb. 27, 1875) (Senate).

⁸¹³ *Id.* at 1010 (Feb. 4, 1875).

⁸¹⁴ The Court quickly disposed of *Plessy's* argument based on the Thirteenth Amendment, finding it "too clear for argument" that a "statute which implies merely a legal distinction between the white and colored races . . . has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude." *Plessy*, 163 U.S. at 542, 543. The Court noted that the Thirteenth Amendment had been thought "insufficient" to protect against laws imposing "onerous disabilities and burdens" on members of the colored race, and that the Fourteenth Amendment was "devised" to remedy this insufficiency. *Id.* at 542. Whether or not this is a valid interpretation of the Thirteenth Amendment, it is true that opponents of segregation during the 1875 Act debates relied principally on the Fourteenth.

social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.⁸¹⁵

This argument had been a central feature of the 1875 Act debates, and was refuted by proponents of the Act. They pointed out, persuasively, that desegregation was mandated only in the context of public facilities where patrons were already required to rub shoulders with other persons not of their choosing. Unless all persons with whom one shared a railway car thereby become one's social equals (including "thieves, prostitutes, gamblers, and others who have worse sins to answer for than the accident of color," as Confederate General P.G.T. Beauregard put it⁸¹⁶), then to ride in the same car was no sign of social equality.⁸¹⁷ On the contrary, the line between "civil" and "social" rights was the line between law and private choice. Because the law already governed the matter of who had access to common carriers, this matter was seen to fall in the civil sphere. Equality was to reign in the civil sphere.

Indeed, the "social equality" argument was even more implausible in *Plessy* than in the 1875 Act debates, because the question in *Plessy* was not whether the state would seek to enforce equality upon unwilling private parties, but whether the state could prevent willing parties from associating voluntarily with one another. It was a frequent theme of Democratic rhetoric against the 1875 Act that the matter of "social rights" and "social equality" could not be the subject of legislation. Representative H.D. McHenry of Kentucky, a staunch opponent of the 1875 Act, argued that the manner in which a person travels, is educated, or obtains entertainment "is a matter of contract, in which the law has no right to interfere." He continued:

If a man sees proper to associate with negroes, to eat at the same table, ride on the same seat with them in cars, or sees proper to send his children to the same schools with them, and place himself

⁸¹⁵ *Id.* at 544. To the extent that the Court meant to imply that black citizens desired segregation just as much as whites, this was a fiction exploded during the 1875 Act debates, see *supra* text accompanying notes 315-18, and was no more true in the 1890s.

⁸¹⁶ 2 Cong. Rec. app. at 479 (June 16, 1874) (quoted by Rep. Darrall).

⁸¹⁷ This is a summary of arguments discussed previously; see *supra* text accompanying notes 323-61.

upon the same level with them in any regard, I would not abridge his right to do so⁸¹⁸

Thurman, the leading Northern Democratic opponent of the bill in the Senate, couched this argument in libertarian language:

What is the true idea of civil liberty? It is simply that every citizen shall have a right to do what to him seemeth good, so far as he can do so without infringing the rights of others or endangering the peace of society or the existence or just powers of the Government.⁸¹⁹

If “the Government” interferes with this right, Thurman declared, it becomes a “tyrant.”⁸²⁰ He thus opposed the bill not because of a belief in segregation as such, or even in states’ rights, but in defense of “liberty”—the liberty for individuals, through private institutions, to decide such matters for themselves. Similarly, Senator Sargent of California objected to the proposition that the government should “interfere with the business of railroad companies and hotel-keepers in this inquisitive way,” invoking the “old maxim” that it was “the best government which governed the least.”⁸²¹ But while this libertarian position may have supported the opponents’ side in the 1875 controversy, it plainly was an argument in favor of *Plessy* in 1896. As Justice Harlan stated: “If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.”⁸²²

The *Plessy* Court also reiterated arguments, offered unsuccessfully by opponents of the 1875 Act, that segregation is not a form of inequality. Recall that in the 1875 Act debates, this claim took two forms. According to the formal argument, segregation was not unequal because it was imposed equally on persons of both races. The *Plessy* Court referred to this argument but hesitated to embrace it, adopting instead the second form of the argument—that the social meaning of segregation did not imply an imposition

⁸¹⁸ Cong. Globe, 42d Cong., 2d Sess. app. at 217 (Apr. 13, 1872).

⁸¹⁹ Id. at 27 (Feb. 6, 1872).

⁸²⁰ Id.

⁸²¹ 2 Cong. Rec. 4174-75 (May 22, 1874).

⁸²² *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting).

of inferior status upon blacks. The Justices apparently recognized that the formal equality argument would undermine settled understandings of civil rights, even for white citizens. Indeed, it was counsel for the plaintiff, Plessy, who articulated the formal argument as a parody of the defendant's position:

[Counsel for Plessy suggests] that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color.⁸²³

In other words, if segregation is not recognized as a form of discrimination, then the government would be free to enact legislation that all would recognize as discriminatory. The Court was not willing to embrace so sweeping a position. "The reply to all this," the Court said, "is that every exercise of the police power must be reasonable," which the Court defined as "enacted in good faith for the promotion [of] the public good, and not for the annoyance or oppression of a particular class."⁸²⁴ Symmetrical treatment was not enough; the ground of distinction must be reasonable. The Court thus abandoned explicit reliance on the formal argument, acknowledging that segregation would be unconstitutional if enacted for the "annoyance or oppression of a particular class." This made constitutionality turn on the purposes of the legislation rather than a syllogistic conception of equality.

Justice Harlan squarely confronted the formal equality argument with a formal argument of his own. He contended that the Constitution does not "permit any public authority to know the race of those entitled to be protected in the enjoyment of [civil] rights."⁸²⁵ A law is discriminatory if those who administer it are required to

⁸²³ *Id.* at 549-50.

⁸²⁴ *Id.* at 550.

⁸²⁵ *Id.* at 554 (Harlan, J., dissenting).

know the race of the persons affected. In other words: "Our Constitution is color-blind."⁸²⁶ In this, Harlan was appealing to a conception of civil rights that had figured prominently in the arguments of proponents of the 1875 Act.⁸²⁷ Although proponents of the Act had not used the term "color-blind," Representative Lynch had stated that the lawmaker's duty was "to know no race, no color, no religion, no nationality, except to prevent distinctions on any of these grounds, so far as the law is concerned."⁸²⁸ Sumner similarly said that the law "makes no discrimination on account of color,"⁸²⁹ and Senator Pratt had insisted that "free government demands the abolition of all distinctions founded on color and race."⁸³⁰

Rather than argue that segregation is definitionally equal treatment, the majority in *Plessy* argued that, understood in light of the social circumstances, segregation of the races did not "necessarily imply the inferiority of either race to the other."⁸³¹ In the most famous passage of the opinion, the Court explained:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if . . . the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption.⁸³²

This echoes many statements by opponents of the 1875 Act.⁸³³ It is especially reminiscent of a speech by Senator Cooper of Tennessee:

But, sir, it is said that they [black Americans] desire this law, or something similar, because it is an indignity to their race; and they

⁸²⁶ *Id.* at 559 (Harlan, J., dissenting).

⁸²⁷ See *supra* text accompanying notes 286-91.

⁸²⁸ 3 Cong. Rec. 945 (Feb. 3, 1875).

⁸²⁹ Cong. Globe, 42d Cong., 2d Sess. 385 (Jan. 15, 1872).

⁸³⁰ 2 Cong. Rec. 4083 (May 20, 1874); accord Cong. Globe, 42d Cong., 2d Sess. 819 (Feb. 5, 1872) (statement of Sen. Wilson).

⁸³¹ *Plessy*, 163 U.S. at 544.

⁸³² *Id.* at 551.

⁸³³ See *supra* text accompanying notes 292-300.

feel it as an indignity to their race to be refused admission to the different places here mentioned. Have they no pride of race and of kindred? Is there nothing in their nature that makes them proud of their race as the white man is of his? Think you that it would trouble the Anglo-Saxon for any other race to turn him aside? Think you he would care?⁸³⁴

The argument, however, did not carry the day in the 1875 Act debates. More compelling was Sumner's assertion that "any rule excluding a man on account of his color is an indignity, an insult, and a wrong."⁸³⁵ Senator Frelinghuysen called segregation by law "an enactment of personal degradation" and a form of "legalized disability or inferiority," effectively a denial of citizenship and a return to slavery.⁸³⁶ Far from conceding that segregation would be perceived as inoffensive if the shoe were on the other foot, Sumner, after describing the effects of segregation, felt confident in declaring that "[t]his is plain oppression, which you, sir, would feel keenly were it directed against you or your child."⁸³⁷ In the end, though schools were excluded from the bill, a large majority of both houses of Congress outlawed segregation in common carriers in plain rejection of the *Plessy* Court's argument.

Indeed, the *Plessy* majority, like the opponents of the 1875 Act, engaged in self-contradiction on this point. On the one hand, they maintained that segregated facilities are objectively equal, but on the other they complained that desegregation was an attempt to foster "social equality." But if segregated facilities really were equal, then social equality already would exist. If members of the "white race"—including the Justices in the majority—"choose" to construe racially mixed facilities as an imposition of "social equality," how can they fault the "black race" for construing segregated facilities as an imposition of social *inequality*?

The *Plessy* Court's inference that any badge of inferiority perceived by black citizens from the Jim Crow laws was a product of their own imaginations was so implausible that Justice Harlan, in dissent, suggested in effect that it was knowingly false. "The thin disguise of 'equal' accommodations for passengers in railroad

⁸³⁴ 2 Cong. Rec. 4155 (May 22, 1874).

⁸³⁵ Cong. Globe, 42d Cong., 2d Sess. 242 (1872) (Dec. 20, 1871).

⁸³⁶ 2 Cong. Rec. 3452 (Apr. 29, 1874).

⁸³⁷ Cong. Globe, 42d Cong., 2d Sess. 384 (Jan. 15, 1872).

coaches will not mislead any one," he observed.⁸³⁸ "[A]ll will admit," Justice Harlan said, conspicuously overlooking his brethren, that the segregation laws "proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens[.]"⁸³⁹ The true social meaning of the segregation laws, he maintained, is so obvious that it is universally understood.⁸⁴⁰

Finally, according to the Court, the case "reduces itself to the question whether the statute of Louisiana is a reasonable regulation," and in "determining the question of reasonableness [the state] is at liberty to act with reference to the established usages, customs and traditions of the people."⁸⁴¹ This analysis—the key to the decision—is mistaken as to both law and fact. It is true that the established usages, customs, and traditions of the people are relevant to determining the civil rights (or privileges or immunities) of the people. That is why application of the Act to schools was a genuinely difficult question in 1875. But established usages, customs, and traditions were *not* relevant to determining whether to allow distinctions of race or color with respect to those traditionally-established civil rights. Indeed, the Fourteenth Amendment was understood and intended to make an upheaval in the established usages, customs, and traditions of the people with regard (at least) to the equal citizenship of the race of former slaves. The content of "civil rights" may be conventionally determined, but the equality of rights is fixed by constitutional law. That is the essen-

⁸³⁸ *Plessy*, 163 U.S. at 562 (Harlan, J., dissenting).

⁸³⁹ *Id.* at 560 (Harlan, J., dissenting).

⁸⁴⁰ Professor Herbert Hovenkamp's study showing that the *Plessy* decision was in accord with the then-prevailing social scientific understanding of racial differences, see Hovenkamp, *supra* note 332, while perhaps exonerating the Justices of the charge that they were "prejudiced" in the sense of being ignorant of the best available evidence, does not exonerate them from the charge that they misrepresented the known social meaning of segregation. To be sure, the Justices may have been in tune with the "best" scientific approach of the day in believing that inequality is rooted in the natural inferiority of the black race; but that does not gainsay the fact that segregation was universally understood as implying the superiority of one race and the inferiority of the other, as Harlan correctly observed. Hovenkamp's argument goes to the reasonableness of the *Plessy* Court's preference for inequality, not to whether segregation was understood to imply inequality.

⁸⁴¹ *Plessy*, 163 U.S. at 550.

tial, fundamental normative core of the Amendment, which even opponents of the 1875 Act could not deny.⁸⁴²

Thus, even if it were true that railroads customarily were required to separate passengers by race, it would not justify the practice under the Fourteenth Amendment. But it was not true. Far from being an "established usage, custom, or tradition," the Jim Crow law in *Plessy* was an innovation. The Louisiana legislature passed the law in 1890, less than two years before Homer Plessy sought a seat in the white people's coach on the East Louisiana Railway. The first such law in the land—that of Florida—was passed in 1887.⁸⁴³ The "established custom," after the end of Reconstruction, was to leave this matter to the discretion of the private market, which sometimes resulted in segregation and sometimes resulted in mixed transportation. Jim Crow laws were passed toward the end of the century in order to *change* the status quo—to mandate a degree of separation between the races far more rigid and complete than the disorganized private sphere had produced.⁸⁴⁴

There was a real irony, then, in the Court's claim that "[l]egislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences."⁸⁴⁵ It was the Jim Crow legislators in the Southern states (not Plessy) who sought to use legislation to affect racial instincts—to shore up and intensify racial prejudice that was not strong enough to produce thoroughgoing apartheid without the assistance of law.

In an important sense, the *Plessy* Court's position was more extreme even than that taken by the leading opponents of desegregation in 1875. If "social rights" must be left to private choice, as Thurman, McHenry, Hill, Durham and others argued,⁸⁴⁶ then laws mandating segregation would be no less objectionable than laws prohibiting segregation. Indeed, Plessy could have used the words

⁸⁴² See, e.g., 2 Cong. Rec. app. at 314 (May 22, 1874) (statement of Sen. Merrimon) (observing that "the general purpose of [the Reconstruction Amendments] was to liberate the negro race and to confer upon them exactly the same civil rights that are enjoyed by the white citizens of the United States").

⁸⁴³ Act of May 19, 1887, ch. 3743, 1887 Fla. Acts and Resolutions 116.

⁸⁴⁴ See Woodward, *supra* note 72, at 105 (calling Jim Crow "an elaborate program of legislation to change the relations between races").

⁸⁴⁵ *Plessy*, 163 U.S. at 551.

⁸⁴⁶ See *supra* notes 335-39 and accompanying text.

of the *opponents* of the 1875 Act to support his attack on Jim Crow laws. For example, Representative Durham of Kentucky had argued that “[w]e have no more right or power to say who shall enter a theater or a hotel and be accommodated therein than to say who shall enter a private house.”⁸⁴⁷ If that is true for desegregation, it is equally true for segregation. Thus, the holding of *Plessy* should be recognized as inconsistent not only with the congressional majority’s desegregationist interpretation of the Fourteenth Amendment, but even with the Democratic minority’s position that social relations are outside the legitimate sphere of regulation.

This “social rights” argument was linked with the “state action” argument, where the arguments of the opposition in 1871-1875 likewise tend to support *Plessy*’s position in 1896. A principal question in the 1875 Act debates was whether federal intervention was necessary to enforce the right, common to all citizens, to enjoy the benefits of common carrier transportation without regard to their race. One of the most common arguments of the opponents was that Congress lacked power to legislate directly regarding the practices of railroads and other private businesses. This was based on the proposition that even if the equal benefit of the law of common carriers is a privilege and immunity of citizens (a “civil right”), the Fourteenth Amendment is not implicated until and unless a state makes or enforces a “law” that “abridges” that right. Senator Gordon of Georgia conceded that the Fourteenth Amendment “inhibits any State from passing laws denying to any citizens of the United States the immunities and privileges which belong to other citizens of the United States,” but “[u]ntil that law is passed, however—until by statute a State denies some right which belongs to all citizens of the United States . . . Congress has no power under the fourteenth amendment to interfere.”⁸⁴⁸ Similarly, Senator Thurman argued that

this bill is only to secure privileges and immunities, and in respect to them the Constitution is plain that no State shall make or enforce any law to deprive any citizen of them, and it is equally

⁸⁴⁷ 2 Cong. Rec. 405 (Jan. 6, 1874).

⁸⁴⁸ 3 Cong. Rec. 1864 (Feb. 27, 1875). The specific context of his remarks was the jury provision of the bill, but the theory would apply to other issues.

clear that you have no right to interfere until the State has made or enforced such a law.⁸⁴⁹

The leading speaker against the Act in the House, Alexander Stephens, took a similar position.⁸⁵⁰ Under this view, segregation by force of custom, private decision, or even discretionary action of individual officials is outside the strictures of the Fourteenth Amendment; but an actual statute compelling discrimination—like the Louisiana statute at issue in *Plessy*—would be a violation.

Opponents of the 1875 Act stoutly maintained that there were no laws—even in the Southern states—that abridged the common law right of black passengers to equal service. Representative John Atkins, a lawyer from Tennessee, “appeal[ed] to the innumerable State statutes to-day” and “confidently assert[ed] that in all that mass of laws there is not to be found one that discriminates between its citizens [on the basis of] race, color, or previous condition of servitude.”⁸⁵¹ He said that “[t]here is no State statute forbidding colored people from entering any of the schools, churches, inns, theaters, &c. They are only required to submit to even chances with white people.”⁸⁵² Atkins’ statement may have been an exaggeration (there were such laws that applied to schools), but as applied to common carriers it was accurate. There *were* no laws in the Southern states compelling separation of the races in common carriers at the time the Civil Rights Act of 1875 was debated. No one could make such a statement by the time of *Plessy*.

The Supreme Court avoided the force of this argument only by repeatedly misstating the question presented in *Plessy*. Thus, it maintained that “[i]f the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits and a voluntary consent of individuals.”⁸⁵³ This conveniently overlooked the fact that Jim Crow laws *required* segregation and imposed criminal penalties upon those who sought to meet together in covered institutions by voluntary

⁸⁴⁹ Cong. Globe, 42d Cong., 2d Sess. 496 (Jan. 22, 1872).

⁸⁵⁰ 2 Cong. Rec. 380 (Jan. 5, 1874) (stating that enforcement of the Fourteenth Amendment is limited to “the judgments of courts . . . declaring any State act in violation of the prohibitions to be null and of no effect”).

⁸⁵¹ 2 Cong. Rec. 454 (Jan. 7, 1874).

⁸⁵² *Id.*; accord 3 Cong. Rec. 980 (Feb. 4, 1875) (statement of Rep. Lamar).

⁸⁵³ *Plessy*, 163 U.S. at 551.

consent. "Legislation is powerless," said the Court, "to eradicate racial instincts or to abolish distinctions based upon physical differences."⁸⁵⁴ That is a debatable proposition, but it turns the issue on its head. No one in *Plessy* was seeking "legislation" to abolish distinctions; *Plessy* was challenging legislation *enforcing* racial distinctions imposed upon the private market by the state. The Court was wrong in framing the issue as whether the Fourteenth Amendment would "*enforce* social . . . equality."⁸⁵⁵ The question was whether the Amendment would tolerate state legislation to enforce social *inequality*.⁸⁵⁶

As has been seen, the congressional majority in the years immediately following ratification of the Fourteenth Amendment believed that the common law had already interfered with the private market with respect to the duty of common carriage and public accommodation. They therefore understood themselves simply to be extending the same rights to black citizens as already existed for whites. Some thought that this went too far in invading the rights of private businesses, but they were voted down. Against this backdrop, *Plessy* was not a difficult case. If the majority thought that segregation must be prohibited, and a large part of the minority thought that it should be left to private choice, that does not leave much support for a law that interferes with private choice by compelling segregation.

C. *Brown v. Board of Education*

Just as the Court unconsciously echoed the arguments of opponents of the 1875 Act in its opinion in *Plessy*, the central proposi-

⁸⁵⁴ *Id.*

⁸⁵⁵ *Id.* at 544 (emphasis added).

⁸⁵⁶ It has become common in constitutional scholarship to presume a link between *Plessy* and the laissez-faire doctrines of the *Lochner* era, taking at face value some of the misleading statements by the Court in its opinion. See, e.g., Bruce Ackerman, *We The People: Foundations* 146-50 (1991); Cass R. Sunstein, *The Partial Constitution* 42-51 (1993). But Jim Crow was manifestly not a product of laissez-faire ideology. Passage of the segregation laws coincided with an upsurge of agrarian-oriented regulation, especially of railroads. The progressive reform movement in the South, with few exceptions, was also the white supremacist movement. Woodward, *supra* note 72, at 91. Jim Crow laws swept the Southern legislatures when, buffeted by the depression of the 1890s, the business-oriented "conservatives" who had dominated Southern politics were displaced by the "progressives," and even the conservatives sought to maintain their political position by switching to white supremacy.

tion of Chief Justice Earl Warren's opinion in *Brown v. Board of Education*⁸⁵⁷ could have come from the mouth of Charles Sumner. To separate children "from others of similar age and qualifications solely because of their race," Warren wrote, "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."⁸⁵⁸ The *Plessy* Court had good reason to be silent about the source of its ideas: the historical authorities standing behind the *Plessy* decision were, for the most part, senators and representatives hostile to the Fourteenth Amendment and the 1875 Act. To rely openly on the arguments of the opponents would have tended to discredit the decision. By contrast, the historical progenitors of the *Brown* decision were the champions of the Reconstruction Amendments and, on relevant constitutional issues, the victors in the debates over its meaning and enforcement.

One would never know this from reading the opinions. Indeed, the *Brown* opinion, with its talk of not "turn[ing] the clock back,"⁸⁵⁹ gives every impression that the Court thought it was struggling *against* the historical understanding and original meaning of the Constitution—an impression that, I am now convinced, was unnecessary and even misleading. The Court summarized the historical evidence in just three sentences:

The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.⁸⁶⁰

⁸⁵⁷ 347 U.S. 483 (1954).

⁸⁵⁸ *Id.* at 494.

⁸⁵⁹ *Id.* at 492. The Court's full statement was that "we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written." The word "even" in this sentence is very odd, for it suggests that it would have been less of a strain to turn the clock back to 1896 than to 1868. It suggests that the Court saw the jurisprudential challenge more in terms of precedent (*Plessy* in 1896) than original understanding (ratification in 1868). If the Court had taken an originalist approach, it would have seen that the history of the Reconstruction period offered a principled basis for rejecting the erroneous precedent of 1896. It is important to turn the clock back to the proper year.

⁸⁶⁰ *Id.* at 489.

The problem with this summary is that it treats the relevant dispute as between the “most avid proponents” of the Amendment and those “antagonistic” to it. But the Amendment *passed*. That is no longer the question. The question now is what the Amendment *meant*—not to its most avid proponents or most virulent enemies, but to the great mass of citizens and their representatives, who had the authority to add this Amendment to the Constitution. That a significant segment of the population was hostile to the Amendment is utterly irrelevant to its meaning (except insofar as their understanding of the *meaning* of the Amendment casts light on its commonly accepted meaning). Nor does it matter what the Amendment’s most avid proponents “intended” (except insofar as they claimed, and others accepted, that their intentions had been embodied in the Amendment). And most importantly, the summary implies that nothing useful is known about what “others in Congress and the state legislatures” thought. These “others”—presumably those who supported the Amendment but were not its “most avid” proponents—were no less articulate than the extremes. They participated in deliberations, they voted, and they made constitutional arguments. They provided the votes to pass legislation outlawing segregation in common carriers, and majority support in both houses for legislation to desegregate the public schools. The uncertainties here are not greater than in other areas of constitutional law, in which the Court boldly acts on the basis of the best knowledge it can summon about the relevant provisions.

From a vantage point of forty years, it may not seem to matter much that the Court missed the historical argument, so long as it reached the proper decision. But at the time of *Brown*, it was far from clear that the Court’s decision would carry the day. It invited massive resistance in the South, much of it in the enraged tones of those who thought that the Constitution had been willfully misinterpreted in service of social engineering. It was, indeed, more than a decade before the desegregation decision was actually enforced—and then, the agent of change was the Congress.⁸⁶¹ The first and foremost public argument of the resistance was based on history. The so-called Southern Manifesto (signed by virtually the

⁸⁶¹ See Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 39-172 (1991).

entire congressional delegations of the states of the Deep South, thereby lending respectability and authority to the resistance) was based primarily on the supposed inconsistency between the Court's decision and the history of the Fourteenth Amendment.⁸⁶² It invoked the debates over the Fourteenth Amendment, segregation of schools in the District of Columbia, practices of the Northern states, and other popular half-truths canvassed in Section I of this Article. The Manifesto exploited the Court's implicit concessions regarding this history to full advantage, and declared that the Court "with no legal basis for such action, undertook to exercise their naked judicial power and substituted their personal political and social ideas for the established law of the land."⁸⁶³ Might it not have helped for the Court to have shown that its "personal political and social ideas" were shared by the champions of the Amendment at the time—and even conceded, in important respect, by much of the Southern Democratic opposition? While not even the most effective opinion for the Court could have easily reconciled the segregationist South to this seemingly radical social change, the opinion offered no answer to the critics on what they perceived to be their strongest ground. If ever the Court needed to invoke the hallowed authority of the framers of the Constitution, this was the time. But the Court did not, and due to its neglect of history, could not.

Having unnecessarily created the impression that the historical understanding of the Fourteenth Amendment was consistent with de jure segregation, the Court proceeded to address the constitutional question in ways that are curious, and seemingly counter-productive. As noted above, the two grounds for legal argument over the constitutionality of segregated public education are: (1) whether education is a civil right, and (2) whether segregation is unequal. The *Brown* opinion addresses both of these issues, but in ways that depart from the theoretical grounding of the desegregation legislation of the Reconstruction Congress.

⁸⁶² The Southern Manifesto was the most authoritative and widely publicized statement of opposition to *Brown*. In an invitation to resistance, it "commend[ed] the motives of those states which have declared the intention to resist forced integration." Text of 96 Congressmen's Declaration on Integration, N.Y. Times, Mar. 12, 1956, at 19.

⁸⁶³ *Id.*

The Court correctly noted that the place of education in American life had undergone a dramatic transformation in the years between enactment of the Fourteenth Amendment and the decision in *Brown*, and that these changes were relevant to the constitutional question.⁸⁶⁴ In the earlier era, no child—white or black—could be said to have a “right” to a common school education in much of the nation. The common school system, especially in the South, was uneven, spottily funded, and in many localities nonexistent. This gave some plausibility to the claims of those opponents of school desegregation legislation who claimed that education was not a civil right. As the *Brown* Court noted, however, things had changed by 1954, and this should have produced a different legal conclusion.

Unfortunately, the *Brown* Court did not frame the question in terms of whether education was a civil right, but rather in terms of whether education was “important.”⁸⁶⁵ This rather missed the point. Not everything that is “important” is a civil right and—more to the point—not everything that is a civil right is “important.” The constitutional principle is that black citizens are entitled to a perfect and complete equality in all matters of civil right.

The analytical confusion is compounded by the Court’s apparent belief that the importance of education is a feature that could distinguish *Brown* from *Plessy*. While far from clear, the most natural reading of *Brown* is that the desegregation principle applies only “in the field of public education” and not to transportation or other areas of life.⁸⁶⁶ In light of the Court’s discussion of the “importance” of education, the apparent rationale for distinguishing education from transportation is that the latter does not have such a strong connection to “democratic society,” the performance of “public responsibilities,” “good citizenship,” or the “opportunity”

⁸⁶⁴ See *Brown*, 347 U.S. at 492-93.

⁸⁶⁵ *Brown*, 347 U.S. at 493.

⁸⁶⁶ See *id.* at 494-95. The Court did not overrule the earlier decision, stating only that “[a]ny language” in *Plessy* contradicting the “finding” that segregated education is unequal is “rejected.” *Id.* The Court stated its holding as follows: “We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.” *Id.* at 495. This strongly suggests that the “language” in *Plessy* that was “rejected” was its discussion of segregated education, and that the doctrine of separate but equal might well continue to be valid in the context of transportation.

to "succeed in life."⁸⁶⁷ The irony is that, in the nineteenth century, the right to nondiscriminatory access to common carriers was far more firmly established as a "civil right" than was the incipient right to a public education. As education evolved into an enforceable legal right, that did not differentiate it from the right to common carriage, but put it on the same constitutional footing. The Court's attempt to distinguish rather than overrule *Plessy* is utterly inconsistent with the constitutional theory on which the Civil Rights Act of 1875 rested.

Moreover, this analytical confusion had a practical consequence. Many Southerners, not unnaturally, read the opinion as implying that in matters of lesser importance, including transportation, segregation would be permissible. This purchased trouble for future cases. Education may well be "the most important function of state and local governments,"⁸⁶⁸ but in the years immediately after *Brown*, plaintiffs brought cases involving segregation of some distinctly less important functions of government, from airport coffee shops to municipal auditoriums. What would be the Court's answer in those cases? It decided these cases—among the most controversial in its history—by per curiam orders and summary dispositions, without any serious discussion of the merits.⁸⁶⁹ *Never* did the Court get around to informing the nation of the legal basis for desegregating the South, outside the context of education. In *Johnson v. Virginia*,⁸⁷⁰ a case involving a segregated courtroom decided eight years after *Brown*, the Court finally announced that "a State may not constitutionally require segregation of public facilities."⁸⁷¹ The only reason the Court gave, however, was that

⁸⁶⁷ *Id.* at 493.

⁸⁶⁸ *Id.*

⁸⁶⁹ See, e.g., *Schiro v. Bynum*, 375 U.S. 395 (1964) (per curiam) (municipal auditorium); *Turner v. City of Memphis*, 369 U.S. 350 (1962) (per curiam) (restaurant in municipal airport); *State Athletic Comm'n v. Dorsey*, 359 U.S. 533 (1959) (per curiam) (athletic contests); *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (per curiam) (public golf course and parks); *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (public transportation); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam) (municipal golf courses); *Mayor of Baltimore City v. Dawson*, 350 U.S. 877 (1955) (per curiam) (public beaches); *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954) (per curiam) (municipal amphitheaters).

⁸⁷⁰ 373 U.S. 61 (1963) (per curiam).

⁸⁷¹ *Id.* at 62.

this issue was “no longer open to question.”⁸⁷² It is embarrassing that the first of the three cases cited for this proposition, *Mayor of Baltimore City v. Dawson*,⁸⁷³ had supplied no reasons whatsoever; the second, *Turner v. City of Memphis*,⁸⁷⁴ rested solely on the precedents of *Dawson* and *Brown*, with no explanation for the extension of the holding; and the third was *Brown*, which appeared to be based, in some sense, on the peculiarly important character of education.⁸⁷⁵ The Court thus forfeited its opportunity to explain the real basis for its decision, which is rooted in an equality of rights—not in the importance of education.

The second constitutional issue was whether segregation is a form of inequality. Here the *Brown* opinion is on stronger ground, in its rejection of the *Plessy* Court’s conclusion that segregation does not import a stigma of inequality.⁸⁷⁶ But even here, the Court adopted a rhetoric that would give color to the resistance. Rather than root its decision in constitutional and legal principle, historical evidence, or even in the common sense of the matter, the *Brown* Court portrayed its disagreement with the reasoning of *Plessy* as turning on differences in “psychological knowledge.”⁸⁷⁷ In a famous footnote, the Court cited books and articles from the social science literature,⁸⁷⁸ concluding that its holding was thus “amply supported by modern authority.”⁸⁷⁹ This weakened the force and persuasiveness of the Court’s holding, for two reasons.

First, it made the unconstitutionality of segregation appear to be contingent on controversial and potentially changeable empirical judgments, in the evaluation of which the Supreme Court has no natural competence or authority.⁸⁸⁰ The problem was particularly acute because the leading piece of social science evidence, Kenneth

⁸⁷² *Id.*

⁸⁷³ 350 U.S. 877 (1955) (per curiam).

⁸⁷⁴ 369 U.S. 350 (1962) (per curiam).

⁸⁷⁵ See *Johnson*, 373 U.S. at 62 (citing *Dawson*, *Turner* and *Brown*).

⁸⁷⁶ *Brown*, 347 U.S. at 494-95.

⁸⁷⁷ *Id.* at 494.

⁸⁷⁸ *Id.* at 494 n.11.

⁸⁷⁹ *Id.* at 494.

⁸⁸⁰ Compare Justice Antonin Scalia’s remarks in *Lee v. Weisman*, 112 S. Ct. 2649, 2681 (1992) (Scalia, J., dissenting), about “psychology practiced by amateurs”: “A few citations of ‘[r]esearch in psychology’ that have no particular bearing upon the precise issue here, cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing.” (Citations omitted.) Whether or not this response is fair and valid, it

Clark's famous study of the selection of black and white dolls, did not evidently support the Court's conclusion.⁸⁸¹ This invited such reactions as the notorious trial in the Southern District of Georgia, in which the court took evidence on the empirical validity of the social science evidence in *Brown* and, having concluded that it was faulty, refused to follow the decision.⁸⁸²

Herbert Hovenkamp's study, *Social Science and Segregation Before Brown*, offers the further cautionary note that the nineteenth-century decisions upholding segregation were based on then-prevailing social scientific knowledge no less than *Brown* was based on the social scientific knowledge of its day.⁸⁸³ There is no reason to assume modern "science"—or for that matter, modern philosophy—will be congruent with our constitutional principles. Social science evidence certainly has its place in the law, and judges should not be ignorant of the real-world effects of their decisions. But the Court sacrifices its position of authority when it makes judgments appear to rest on contested issues of empirical fact, ordinarily the stuff of legislative resolution, instead of constitutional principles, which are entrusted to the Court's charge. To submerge the issue of constitutional principle weakened the force of the Court's opinion in *Brown*.

Second, the emphasis on the psychological and pedagogical effects on black schoolchildren distracted attention from the social function of segregation in Southern society. I stated at the beginning of this Section that the Court's comment on the effects of segregation on the "hearts and minds" of the schoolchildren could have come from Sumner. But effects of this sort were not at the heart of Sumner's opposition to segregation. The critical point, according to Sumner and his allies, was the formal expression of subordination. "[A]ny rule excluding a man on account of his

should be evident that reliance on contestable psychological studies to overturn democratic decisions is bad judicial rhetoric.

⁸⁸¹ The study had no control group, and when replicated in jurisdictions with desegregated schools showed effects even larger than those in the South. For evaluations of *Brown*'s use of social scientific evidence, see Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. Rev. 150, 157-68 (1955); Symposium, *The Courts, Social Science, and School Desegregation*, 39 *Law & Contemp. Probs.* 1 (1975).

⁸⁸² *Stell v. Savannah-Chatham Bd. of Educ.*, 220 F. Supp. 667 (S.D. Ga. 1963), rev'd, 333 F.2d 55 (5th Cir. 1964), cert. denied, 379 U.S. 933 (1964).

⁸⁸³ See Hovenkamp, *supra* note 332, at 664-65.

color,” Sumner said, “is an indignity, an insult, and a wrong”⁸⁸⁴ Frelinghuysen called segregation by law “an enactment of personal degradation” and a form of “legalized disability or inferiority.”⁸⁸⁵ The key issue was equality before the law. Even if the motivations and achievements of black schoolchildren were *not* measurably affected by segregation, it still would be inconsistent with the Fourteenth Amendment’s insistence on equality of citizenship for the state to brand members of one race as too “inferior and degraded”⁸⁸⁶ to mix with the other.

This is not a proposition of psychology, to be studied in controlled experiments and disputed in technical journals. It is a matter of constitutional principle and common moral understanding. When segregationists complained of the attempt to force “social equality,” they were admitting, quite clearly, that segregation is part and parcel of a system of inequality. The Court should have held that the state may play no part in such a system. That is what Sumner would have said:

It 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

. . . Colored children, living near what is called the common school, are driven from its doors, and compelled to walk a considerable distance, often troublesome and in certain conditions of the weather difficult, to attend the separate school. One of these children has suffered from this exposure, and I have myself witnessed the emotion of the parent. . . . Now, it is idle to assert that children compelled to this exceptional journeying to and fro, are in the enjoyment of equal rights.

. . . The indignity offered to the colored child is worse than any compulsory exposure, and here not only the child suffers, but the race to which he belongs is blasted and the whole community is hardened in wrong.

. . . Surely the race enslaved for generations has suffered enough without being compelled to bear this prolonged proscription.⁸⁸⁷

⁸⁸⁴ Cong. Globe, 42d Cong., 2d Sess. 242 (1872) (Dec. 20, 1871).

⁸⁸⁵ 2 Cong. Rec. 3452 (Apr. 29, 1874).

⁸⁸⁶ *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting).

⁸⁸⁷ Cong. Globe, 42d Cong., 2d Sess. 384 (Jan. 15, 1872).

And we should not allow the ultimate fate of the Civil Rights Act of 1875 to obscure the fact that on this fundamental interpretation of the requirement of equality, Sumner carried large majorities of both houses of Congress with him, even as Reconstruction was drawing to a close. Sumner's words were the authentic voice of the Reconstruction Amendments, well worth the effort of turning the clock back.

CONCLUSION

Racial segregation presented the most important question of constitutional law in the decade of *Brown*, but that question was addressed by the courts in an historical vacuum, as if constitutional law were a matter of social policy rather than legal principle. Most commentators have assumed that the ahistorical quality of *Brown* was unavoidable, because an historical approach to the question would have produced a morally unacceptable answer. This Article shows, to the contrary, that school segregation was understood during Reconstruction to violate the principles of equality of the Fourteenth Amendment.

Between 1870 and 1875, both houses of Congress voted repeatedly, by large margins, in favor of legislation premised on the theory that de jure segregation of the public schools is unconstitutional. The desegregation bills never became law because, for procedural reasons, a two-thirds majority of the House of Representatives was required for final passage. Even so, the Reconstruction Congress passed legislation prohibiting segregation of inns, theaters, railroads, and other common carriers, and rejected legislation that would have countenanced segregated education on a separate-but-equal basis. The Court in *Brown* refused to "turn the clock back." But had it done so, it would have discovered strong support for its holding—stronger than the dubious "modern authority" on which the Court relied.