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## Thirteenth Amendment to the Constitution of the United States

### CONSUMMATION TO ABOLITION AND KEY TO THE FOURTEENTH AMENDMENT

*Jacobus tenBroek\**

Section 1. Neither Slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

—*The Thirteenth Amendment to the United States Constitution.*

#### I.

IN THE political, social, economic and judicial history of the United States, the Thirteenth Amendment has had a minor, even an insignificant part. Its history, subsequent to enactment, has never lived up to its historic promise as the "grand yet simple declaration of the personal freedom of all of the human race within the jurisdiction of this government."<sup>1</sup> Designed for the sweeping and basic purpose of sanctifying and nationalizing the right of freedom, few indeed, have successfully invoked it. Under its aegis, peonage—compulsory labor for debt—was uprooted as a legal institution in New Mexico by act of Congress passed in 1867. Later applications of this statute and the Amendment have struck at state laws which, while appearing merely to punish fraud among laborers, had the actual effect of punishing failure to perform labor contracts and thus of peonizing the victims. Statutes of Alabama, Georgia and Florida were nullified which made it a criminal offense to obtain advances of money under a promise to perform labor but with intent to defraud and which further made the failure to perform the labor prima facie evidence of the intent to defraud.<sup>2</sup> Also nullified was an Alabama code provision under which additional criminal prosecutions were available to keep a person already convicted of crime

\* University of California. This article in a somewhat altered form is a portion of a book to be published during 1951 by the University of California Press as TENBROEK, *THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT*.

<sup>1</sup> Mr. Justice Miller in *Slaughter House Cases*, 16 Wall. 36 (U.S. 1873).

<sup>2</sup> *Pollock v. Williams*, 322 U.S. 4 (1943); *Taylor v. Georgia*, 315 U.S. 25 (1941); *Bailey v. Alabama*, 219 U.S. 219 (1911).

at labor to satisfy the demands of his employer who had paid his fine and costs.<sup>3</sup> This is the sum of the Amendment's bounty. The Amendment is not broad enough, the Supreme Court has held, to protect Negroes against being driven from their job by force and terror;<sup>4</sup> to prevent color discriminations in the use of public conveyances, hotels and theaters;<sup>5</sup> to condemn covenants forbidding the transfer of land to persons of negro blood;<sup>6</sup> to authorize Congress to punish those who "conspire . . . for the purpose of depriving . . . any person . . . of the equal protection of the laws or of equal privileges or immunities under the laws."<sup>7</sup>

In reaching these rulings the Supreme Court has expressed and acted upon two central ideas. The first is a conception of what the Amendment denounces. In this view, it denounces "slavery and involuntary servitude." These terms, "all understand," refer to "a condition of enforced compulsory service of one to another." They do not refer to the badges, incidents and indicia which historically accompanied the "condition of enforced compulsory service" and which were its legal supports and concomitants. Consequently, the Amendment which abolished slavery did not protect men in the rights which slavery denied. The denial of these rights—the right to contract, sue, own property, enter the common callings of one's choice, for example—though an inseparable incident to slavery was not what constituted slavery. The second is a conception of the relationship of the Thirteenth and Fourteenth Amendments and of the nature and province of each. According to this view, both Amendments are basically prohibitive in character and therefore basically negative. They merely forbid the invasion of certain rights. The congressional enforcement power, appended to both Amendments, is limited to the obstruction and removal of such invasions. It does not extend to the affirmative protection of the rights the invasion of which is forbidden. There, however, the comparison ends. The prohibition of the Thirteenth Amendment is absolute; that of the Fourteenth is restricted to certain violators. Under the Thirteenth Amendment legislation may be "direct and primary" operating upon the acts of individuals whether sanctioned by state authority or not. Under the Fourteenth Amendment, legislation is confined to counteracting state laws and the actions of state officials. Finally, the freedom guaranteed by the Thirteenth Amendment is not nearly as comprehensive as the "liberty" safeguarded by the due process clause of the Fourteenth Amendment; nor does it include the privileges and immunities of citizens of the United States or the equal protection of the laws protected by the other two clauses of Section One of the Fourteenth Amendment.

The purpose of this article is to consider the historical correctness or incorrectness of these two ideas which, save for a brief period immediately

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<sup>3</sup> *Reynolds v. United States*, 98 U.S. 145 (1879).

<sup>4</sup> *Hodges v. United States*, 203 U.S. 1 (1906).

<sup>5</sup> *Civil Rights Cases*, 109 U.S. 3 (1883).

<sup>6</sup> *Corrigan v. Buckley*, 271 U.S. 323 (1926).

<sup>7</sup> *United States v. Harris*, 106 U.S. 629 (1883); *Butler v. Perry*, 240 U.S. 328 (1916); *Robertson v. Baldwin*, 165 U.S. 275 (1897).

following the adoption of the Amendment, have been repeatedly reaffirmed through seventy-five years of interpretation and now are dogmatically accepted. The questions to be examined are: What were the historical purposes of the Thirteenth Amendment? Was its "inciting cause" solely the liberation of the enslaved Negroes? Was its intent merely to effect release from physical bondage or was it to abolish as well the badges and incidents of that bondage? Was the Thirteenth Amendment only the first step in a comprehensive three-step plan designed, first, through the Thirteenth Amendment, to abolish chattel slavery; second, through the Fourteenth Amendment, to restore the freed Negro to a condition of civil equality; and third, through the Fifteenth Amendment, to safeguard him in his political rights—or contrarywise, was the Thirteenth Amendment, standing alone, intended to establish freedom and to protect all men, black and white, bond and free fully and equally in the enjoyment of all the essential rights which inhere in and constitute that freedom?

If the Thirteenth Amendment is viewed first as the constitutional consummation of organized abolitionism and then as repeated and re-enacted by the Fourteenth Amendment the historical answers to these questions must be returned in favor of the broadest alternative. The evidence that the Thirteenth Amendment was so intended drawn from the period of the introduction and adoption of the Thirteenth Amendment and particularly from the congressional debates upon it will be the subject of this investigation.<sup>8</sup>

## II.

The original proposition for a constitutional amendment abolishing slavery throughout the United States was introduced in the House by James M. Ashley of Ohio on the 14th of December, 1863. Ashley managed the Amendment in the House; Lyman Trumbull of Illinois in the Senate. It was debated bitterly and at length in the spring of 1864. It rode to easy victory in the Senate but failed to secure the requisite two-thirds majority in the House. This failure made it an issue in the presidential campaign of that year. In December, released from the limitations of his border-state policy by Maryland's voluntary abolition of slavery and sustained by the popular decision at the polls, Lincoln threw his full weight behind the Amendment. The earlier negative action of the House was reconsidered in January, 1865, and, after a long debate in which nearly one-third of the members participated, was finally reversed.

The discussions in the House and Senate in the spring of 1864 constitute the first debate over the Thirteenth Amendment; those in the House in January, 1865, the second. Since these were integrally a part of a single episode, we shall consider them together. A third important congressional debate respecting the Thirteenth Amendment occurred in December, 1865 and the spring of 1866 in connection with the Freedmen's Bureau and Civil

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<sup>8</sup> The evidence drawn from the goals and constitutional theory developed and disseminated by the abolitionists over the preceding thirty years is produced and examined in TENBROEK, *THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (to be published 1951).

Rights Bills and other implementing legislation. This debate will be separately examined.

### III.

The congressional debates in the spring of 1864 and January 1865 make plain that the traditionally accepted limiting answers to the questions posed above were not the answers originally intended by the Amendment's sponsors or contemplated by its opponents.

As might be imagined from the subject and the historic occasion of these debates, rambling discursions into history, morals, religion and politics were the order of the day. But, though the debates were, in these respects, long and pedestrian, as concerns the meaning of the Amendment, they were singularly illuminating. In fact, in one crucial phase, they were unique: Many of the consequences of the Amendment forecast by the opponents, far from being denied or minimized by the sponsors, were espoused as the very objects desired and intended to be accomplished by the measure.

With the South no longer present in the Halls of Congress and the outcome of the Civil War more or less clearly discernible, the whole character of the slavery debate shifted. Slavery was defended as a positive good and the true condition of the African race only by such rare "vestigial remainders" of an earlier age as Fernando Wood of New York. Abolitionist barbs about inhumanity, immorality, irreligion and sin now evoked little response. The Christianizing, civilizing and humanitarian merits of slavery were conspicuously not presented. The economic and social argument that slavery was indispensable to the prosperity and cultural refinement of the South, central features of the positive good dogma, became subdued and peripheral. Natural rights to property, always a constitutional bulwark to the slavery system from the time of the Picken's speech and the Pinckney Report in 1836, also had practically vanished, though abolition by constitutional amendment was the ultimate contingency which the natural rights argument was best adapted to meet. These positions, occupied for thirty years by pro-slavery forces, now were left unmanned. In short, the battle had ceased to be over slavery itself. With the victory of Northern arms, slavery as a legal institution was at an end, save in a few border states where it could not hope long to survive surrounded by a free nation. Those who resisted the Thirteenth Amendment—spokesmen of the loyal slave states, Democrats and a few conservative Republicans—were in small part fighting a rear-guard action for a pro-slavery cause they knew to be lost. Far more importantly, they were organizing all of their forces for a last-ditch stand against the second of the two revolutions which had been in progress: The revolution in federalism.

The principal argument put forward by the congressional opponents of the Thirteenth Amendment, accordingly, was that the measure constituted an unwarrantable invasion of the rights of the states and a corresponding unwarrantable extension of the power of the central government. In fact, so unwarrantable was the invasion and the extension as to violate the basic conditions of the federal compact, destroy the federal character of the

government and subvert the whole constitutional system. "Within the scope and reason of the Constitution," said Fernando Wood, Democrat of New York:

. . . any amendment to it would be legitimate when ratified by the required three-fourths of the states; but for those three-fourths to attempt a revolution in social or religious rights by seizing upon what was never intended to be delegated by any of the parties to the compact would be a prodigy of injustice. Carried out under the forms of law, a wrong more fatally so because made by the very highest authority. If an amendment were now proposed to the Constitution declaring an establishment of religion or prohibiting the free exercise of it by the citizen, it would be parallel with the present and no more obnoxious than this is to merited condemnation . . . . The local jurisdiction over slavery was one of the subjects peculiarly guarded and guaranteed to the states, and an amendment ratified by any number of states less than the whole, though within the letter of the article which provides for amendments, would be contrary to the spirit of the instrument, and so in reality an act of gross bad faith.<sup>9</sup>

It would therefore be unconstitutional. It would revolutionize rather than amend the Constitution.<sup>10</sup>

The opponents of the Amendment did not stop with sweeping declamation. In one speech after another they itemized their fears and apprehensions, the factors which made the measure revolutionary. "The slavery issue," said Anton Herrick of New York, "which this resolution seeks to finally settle . . . is legitimately merged in the higher issue of the right of the states to control their domestic affairs, and to fix each for itself the status, not only of the negro, but of all other people who dwell within their borders."<sup>11</sup> ". . . the amendment," added William S. Holman, of Indiana, "confers on Congress the power to invade any state to enforce the freedom of the African in war or peace. What is the meaning of all that? Is freedom the simple exemption from personal servitude? No, Sir, mere exemption from servitude is a miserable idea of freedom. A pariah in the state, a subject but not a citizen, holding any right at the will of the governing power. What is this but slavery?"<sup>12</sup> Concluded Robert Mallory of Kentucky: ". . . You propose to leave them (the emancipated negroes) where they are freed, and protect them in their right to remain there. You do not intend, however, to leave them to the tender mercies of those states. You propose by a most flagrant violation of their rights to hold the control of this large class in these various states in your own hands."<sup>13</sup> That the object of the Amendment was not only to free the negroes but to "make them our equals before the law," was a constant source of complaint.<sup>14</sup> Elijah Ward of New York, expressing his opposition to the Thirteenth Amendment, said,

<sup>9</sup> CONG. GLOBE, 38th Cong., 1st Sess. 2941 (1864).

<sup>10</sup> Davis of Kentucky, *id.* at App. 104; Saulsbury of Delaware, *id.* at 1364; Powell of Kentucky, *id.* at 1483.

<sup>11</sup> *Id.* at 2615.

<sup>12</sup> *Id.* at 2692.

<sup>13</sup> *Id.* at 2982-83.

<sup>14</sup> See, e.g., CONG. GLOBE, 38th Cong., 2d Sess. 179-80, 216 (1865).

"We are now called upon to sanction a Joint Resolution to amend the Constitution so that all persons shall be equal under the law, without regard to color, and so that no person shall hereafter be held in bondage."<sup>15</sup>

Thus, the case of those who resisted the passage of the Thirteenth Amendment was built almost entirely on opposition to the expansion and consolidation of the national power. With slavery already dead, that expansion and consolidation would be neither great nor of continuing importance if the Amendment effected only a "simple exemption from personal servitude." The thing that gave the revolution in federalism significance was the sweeping conception of what the amendment did. Beyond toppling over the corpse of slavery, most if not all elements of the congressional opposition asserted that the amendment would guarantee to the emancipated negro a basic minimum of rights—equality before the law, protection in life and person, opportunity to live, work and move about—and that Congress would be empowered to safeguard and protect these. Outside of this area of basic agreement, opinions varied. Some charged that the amendment was designed to bring about social equality;<sup>16</sup> others that miscegenation<sup>17</sup> was within its purview; still others, that the enfranchisement<sup>18</sup> of the negro was intended. But these diversities do not obscure the hard core of common understanding among the opposition as to the meaning of the amendment and what it would do.

The case made out by the sponsors and supporters of the Thirteenth Amendment was no less explicit on this central issue. The amendment was presented not as one step in a series of steps yet to come, not as an act of partial fulfillment, not as the opportunistic achievement of a limited objective. It was exultantly held up as "the final step," "the crowning act," "the capstone upon the sublime structure"; the joyous "consummation of abolitionism." To the proponents of the amendment, though slavery was dead, the remote contingency of resurrection had to be provided against; the incidents of slavery had yet to be obliterated; the emancipated negro and his white friends had to be protected in the privileges and civil liberties of free men; and the federal power as the instrument for achieving these purposes had to be permanently assured. Victory in both revolutions needed to be appropriately symbolized and made permanent.

Throughout the debates, these were the points the abolitionists hammered home with ardor and relentlessness. As had been true of their constitutional attack from the time of its original formulation, two major ideas were combined and recombined into a single argument and purpose: First, the Lockean presuppositions about natural rights and the protective function of government; second, slavery's denial of these rights and this protection not only to the blacks, bond and free, but to the whites as well. The opening speech in the House debate, delivered by James F. Wilson of Iowa,<sup>19</sup>

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<sup>15</sup> CONG. GLOBE, 38th Cong., 2d Sess. 177 (1865).

<sup>16</sup> CONG. GLOBE, 38th Cong., 1st Sess. 2944, 2987 (1864).

<sup>17</sup> *Id.* at 1465, 2979.

<sup>18</sup> *Id.* at 180, 216, 2962.

<sup>19</sup> CONG. GLOBE, 38th Cong., 1st Sess. 1199 (1864).

chairman of the Judiciary Committee and co-author of the Amendment, emphasized both of these elements and their interrelationship with clearness and force. The system of slavery, Wilson argued, violated the clauses of the Preamble, disregarded the supremacy of the Constitution, and denied the privileges and immunities of citizens of the United States guaranteed by the comity clause. Among those privileges and immunities were the rights of the First Amendment—"freedom of religious opinion, freedom of speech and press, and the right of assemblage for the purpose of petition." These were rights which belonged "to every American citizen, high or low, rich or poor . . ." Yet to what extent were they respected as the supreme law of the land "in states where slavery controlled legislation, presided in the courts, directed the executives, and commanded the mob?" "Twenty millions of free men in the free states," he answered, "were practically reduced to the condition of semi-citizens of the United States; for the enjoyment of their rights, privileges and immunities as citizens depended upon a perpetual residence north of Mason's and Dixon's line. South of that line the rights which I have mentioned, and many more which I might mention, could be enjoyed only when debased to the uses of slavery." He concluded, "it is quite time, Sir, for the people of the free states to look these facts squarely in the face and provide a remedy which shall make the future safe for the rights of each and every citizen." That remedy, thus aimed at the broad objective of making, "the future safe for the rights of . . . every citizen," was the seemingly narrow prohibition on slavery and involuntary servitude contained in the Thirteenth Amendment.

The arraignment of slavery by Henry Wilson, veteran and eloquent abolitionist Senator from Massachusetts, followed this same familiar pattern.<sup>20</sup> Slavery was the "prolific mother" of mobbings, beatings, violence, southern maltreatment of northern seamen and citizens. Wilson asserted:

If this amendment shall be incorporated by the will of the nation into the Constitution of the United States, it will obliterate the last lingering vestiges of the slave system; its chattelizing, degrading and bloody codes; its dark, malignant barbarizing spirit; all it was and is, everything connected with it or pertaining to it, . . . when this amendment to the Constitution shall be consummated, the shackle will fall from the limbs of the hapless bondman . . . the schoolhouse will rise to enlighten the darkened intellect of a race imbruted by long years of enforced ignorance. Then the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law which makes sacred alike the proud homes and lowly cabins of freedom. Then the wronged victim of the slave system, the poor white man . . . impoverished, debased, dishonored by the system that makes toil a badge of disgrace, and the instruction of the brain and soul of a man a crime, will . . . begin to run the race of improvement, progress and elevation.

Senator Harlan of Iowa elaborated on "the necessary incidents of slavery which it was the specific object of the amendment to abolish. These were: "the breach of the conjugal relationship"; the abolition of the par-

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<sup>20</sup> *Id.* at 1319, 1321, 1324 (1864).

ental relation, "robbing the offspring of the care and attention of his parents"; abolition "of the relation of person to property," "the destruction of the slaves' capacity to acquire and hold" (property), and the imposition of "this disability on their posterity forever"; denial to the slaves "of a status in court," especially, "the right to testify," "the suppression of the freedom of speech and press, not only among those downtrodden people themselves but among the white race"; "perpetuity of the ignorance of its victims."<sup>21</sup> This Amendment, argued E. C. Ingersoll of Illinois, will mean "freedom of speech," "the right to proclaim the eternal principles of liberty, truth and justice in Mobile, Savannah, or Charleston with the same freedom and security as . . . at the foot of Bunker Hill Monument." It "will secure to the oppressed slave his natural and God-given rights . . . a right to live, and live in a state of freedom . . . a right to breathe the free air, and to enjoy God's free sunshine . . . . A right to till the soil, to earn his bread by the sweat of his brow, and to enjoy the rewards of his own labor . . . . A right to the endearments and enjoyment of family ties." The Amendment will mean "that the rights of mankind, without regard to color or race, are respected and protected."<sup>22</sup> "This proposed Amendment is designed," argued William D. Kelley of Pennsylvania, ". . . to accomplish the very purpose with which they charged us in the beginning, namely, the abolition of slavery in the United States, and the political and social elevation of Negroes to all the rights of white men."<sup>23</sup>

"The effect of such Amendment," said Godlove S. Orth, of Indiana, will be to prohibit slavery in these United States, and be a practical application of that self-evident truth, 'that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness.' " What shall be done with the former slaves and their masters? ". . . giving to each equal protection under the law, bid them go forth with the Scriptural injunction, 'in the sweat of thy face shalt thou eat bread.' "<sup>24</sup> Argued James M. Ashley of Ohio:<sup>25</sup>

Slavery has for many years defied the government and trampled upon the National Constitution, by kidnapping, imprisoning, mobbing, and murdering white citizens of the United States guilty of no offense except protesting against its terrible crimes. It has silenced every free pulpit within its terrible control, . . . it has denied the masses of poor white children within its power the privilege of free schools and made free speech and a free press impossible within its domain; . . . it so constituted its courts that the complaints and appeals of these people could not be heard by reason of the decision "that black men had no rights which white men were bound to respect."<sup>26</sup>

<sup>21</sup> CONG. GLOBE, 38th Cong., 1st Sess. 1439, 1440 (1864).

<sup>22</sup> *Id.* at 2989, 2990.

<sup>23</sup> *Id.* at 2987.

<sup>24</sup> CONG. GLOBE, 38th Cong., 2d Sess., pt. 1, 142-43 (1865).

<sup>25</sup> *Id.* at 13, 139.

<sup>26</sup> See also CONG. GLOBE (1864, 1865) for the speeches of Thomas T. Davis of New York at 154 (Jan. 7, 1865); John A. Kasson of Iowa at 193 (Jan. 10, 1865); Nathaniel B.

Thus the congressional debates in the spring of 1864 and January 1865 explode the traditionally accepted beliefs about the scope and meaning of the Thirteenth Amendment. They show that the proponents of the measure intended thereby a revolution in federalism; that the opponents of the Amendment understood that intended purpose and made it virtually the sole basis of their opposition to the Amendment; that thus the Amendment was passed by Congress in the face of the well-articulated fear that it would revolutionize the federal system and the publicly expressed purpose to do so, that is, with complete agreement between proponents and opponents as to its effect. To grasp this revolution, these debates make clear, one need only to appreciate the three-fold meaning of the word "slavery" as then used and understood. What was the "slavery" which the Thirteenth Amendment would abolish?

In the first place, the Amendment would strike "the shackle . . . from the limbs of the hapless bondman." It would destroy slavery's "chattelizing, degrading and bloody codes." Slavery in its narrowest and strictest sense—slavery as legally enforceable personal servitude—would thus be forever "put down and extinguished." This much the Amendment would certainly do. But this much had already been done by other acts and events. With respect to slavery in this primary and limited sense, little remained to be accomplished by the Amendment except to give "completeness and permanence to emancipation." And that the Amendment was intended to do.

Secondly, slavery which was within the reach of the Amendment extended far beyond the personal burden of the slaves and the characteristics of immediate bondage. The congressional debates repeated what the history of abolitionism had already made abundantly clear. The free colored person, South and North, as the abolitionists knew and had labored for him, was only less degraded, spurned and restricted than his enslaved fellow. He bore all the burdens, badges and indicia of slavery save only the technical one. His freedom along with that of his enshackled brother had been an integral part of the life and work of "the Great Crusade." His slavery as well as that of the "hapless bondman" was to be abolished by the Thirteenth Amendment.

The opposite of slavery is liberty. The liberty which the abolition of slavery would bring about, spelled out by thirty years of anti-slavery controversy, was now again itemized and detailed in the congressional debates. The Amendment would "convert into a man that which the law had declared to be a chattel." It would be "a practical application of that self-evident truth 'that all men are created equal; that they are endowed by their Creator with certain unalienable rights.'" It would "bring the Constitution into avowed harmony with the Declaration of Independence." It

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Smithers of Delaware at 217 (Jan. 11, 1865); Green Clay Smith of Kentucky at 237 (Jan. 12, 1865); James S. Rollins of Missouri at 258 (Jan. 13, 1865); William Higby of California at 478 (Jan. 28, 1865); Lyman Trumbull of Illinois (1st Sess.) at 1313 (Mar. 28, 1864); John B. Henderson of Missouri at 1465 (April 7, 1864); Charles Sumner of Massachusetts at 1479-83 (April 8, 1864); Daniel Morris of New York at 2615 (May 31, 1864); John F. Farnsworth of Illinois at 2979 (June 15, 1864).

would recognize and confirm the principle that "nature made all men free and entitled them to equal rights before the law." It would "secure to the oppressed slave his natural and God-given rights," "the sacred rights of human nature," "the rights of mankind." It would assure that these rights were "respected and protected"; it would "give to each, equal protection under the law." It would safeguard the right to be educated to the "race imbruted by long years of enforced ignorance." "The hallowed family relations of husband and wife, parent and child," would "be protected by the guardian spirit of that law which makes sacred alike the proud homes and lowly cabins of freedom." It would guarantee to the free Negro "the right to live," "the capacity to acquire and hold property," the "right to till the soil, to earn his bread by the sweat of his brow, and to enjoy the rewards of his own labor." It would make certain that all of these rights would receive "the protection of the government," the protection of "equal laws," and that the Negro would be given "a status in court," especially the untrammelled right to testify.

Thirdly, the slavery which was to be abolished by the Amendment consisted of the incidents of the system which impaired and destroyed the rights of the whites. In part, the framers, sponsors and supporters of the Thirteenth Amendment felt that, with chattel bondage abolished and the Negro elevated to legal and civil equality, the pulsing heart of the system would be stilled and all of the appendages would soon atrophy and disappear. Some of the outgrowths—the "nameless woes," the "sumless agonies of civil war," the "sweltered venom" filling the hearts of the Southern people, the "dark and malignant hatred of the free states"—some of these outgrowths of slavery would die automatically and they could not in any event be legislated out of existence. Others could; and the Thirteenth Amendment was intended as specific legislation or as authorizing specific legislation against these. It was meant to be a direct ban against many of the evils radiating out from the system of slavery as well as a prohibition of the system itself. It would bring to an end the "kidnapping, imprisoning, mobbing and murdering" of "white citizens of the United States, guilty of no offense." It would make it possible for white citizens to exercise their constitutional right under the comity clause to reside in Southern states regardless of their opinions. It would carry out the constitutional declaration "that each citizen of the United States shall have equal privileges in every other state." It would protect citizens in their rights under the First Amendment and comity clause to freedom of speech, freedom of press, freedom of religion and freedom of assembly. It would "make the future safe for the rights of each and every citizen."

This then was the slavery which the Thirteenth Amendment would abolish: the involuntary personal servitude of the bondman; the denial to the blacks, bond and free, of their natural rights through the failure of the government to protect them and to protect them equally; the denial to the whites of their natural and constitutional rights through a similar failure of government. Stated affirmatively, and in the alternative phrases and con-

cepts used repeatedly throughout the debates, the Thirteenth Amendment would: first, guarantee the equal protection of the laws to men in their natural and to citizens in their constitutional rights; and/or, second, safeguard citizens of the United States equally in their constitutional privileges and immunities; and/or, running a bad but nevertheless articulated third, enforce the constitutional guarantee to all persons against deprivation of life, liberty, or property without due process of law.

Just as the major elements of unity in abolitionist constitutional and natural rights theory emerged in the congressional debates over the Thirteenth Amendment and formed the explicitly articulated as well as the broadly historical basis of the Amendment, so the divergent elements of abolitionist doctrine equally manifested themselves. They also supply a basis of the Amendment and add to our understanding of it.

As it had long before and did even more sharply later, the question of the enfranchisement of the Negro divided anti-slavery men, leadership as well as rank-and-file. Those who thought of this as an immediately desirable goal or as a necessary consequence of the social compact or the Constitution were, however, undoubtedly a small minority. In the congressional debates, Democratic spokesmen often insisted that the Republicans intended, under the Thirteenth Amendment, to give the freed Negro the vote, "to be used throughout all time for the purpose of keeping control of the federal government, and of the (Southern) states."<sup>27</sup> Such politically minded Jacobins as Stevens, Wade and Chandler doubtless saw the likely party advantage to be derived from giving the Negro the vote. That the enfranchisement of the freedmen would result from the Thirteenth Amendment or could be achieved under it, whether for partisan political or more generally abolitionist ends, was, however, not avowed or admitted even by the most extreme of the Radicals. If it was believed at all by those who put the Amendment across, it belongs in the category of secret or conspiratorial intentions. Josiah B. Crinnell, representative from Iowa, spoke the stock and historically correct answer of the abolitionists to the charges of the Democrats:

But we are met with another objection, that if we emancipate we must enfranchise also. I deny the conclusion; but I should not be deterred from the move, even if it were correct. A recognition of natural rights is one thing, a grant of political franchises is quite another. We extend to all white men the protection of law when they land upon our shores. We grant them political rights when they comply with the conditions which those laws prescribe. If political rights must necessarily follow the possession of personal liberty, then all but male citizens in our country are slaves.<sup>28</sup>

The principal source of disagreement among the abolitionists revealed by the debates over the Thirteenth Amendment was, of course, the very one which had served as the basis of the only important doctrinal difference on constitutional questions which had developed in the movement. It had

<sup>27</sup> CONG. GLOBE, 38th Cong., 2d Sess. 179 (1865).

<sup>28</sup> *Id.* at 302.

originated in the late thirties and persisted down through the Civil War. It had nothing to do with the scope of abolitionist objectives. It had to do only with the constitutional means of achieving those objectives. Did Congress have the power by direct action to abolish slavery in the states under the Constitution as it existed or was an amendment necessary before such action could be taken? In other words, was the Thirteenth Amendment declaratory or amendatory? Did it simply reaffirm what the Constitution already provided or did it change the Constitution or add to it?

On this question the abolitionists were split. Some hardened constitutional apostates, like Charles Sumner, unequivocally took the position in the debates that the Thirteenth Amendment would be entirely declaratory, that under the Constitution as it then stood Congress could, "by a single brief statute . . . sweep slavery out of existence." In Sumner's view, such a statute was authorized by the common defense and war clauses, by the republican form of government guaranty, and by the due process provision of the Fifth Amendment. The last named, especially was "in itself alone a whole bill of rights," "an express guarantee of personal liberty and an express prohibition against its invasion anywhere," "in itself . . . a source of power" for Congress to carry out the guarantee and to enforce the prohibition everywhere in the country.<sup>29</sup> Other abolitionist sponsors of the Amendment leaned heavily on the declaratory theory but were less explicit about congressional power to enforce the anti-slavery provisions of the Constitution and perhaps believed that it did not exist. Wilson's important March 18, 1864 speech typified and gave expression to the attitude of this group.<sup>30</sup> It was left to James M. Ashley of Ohio, however, to state the declaratory theory in its basically nationalistic, anti-state compact constitutional ramifications.<sup>31</sup> In an able speech, delivered in January, 1865, he substantially recapitulated the doctrine developed by Spooner and Tiffany, and, in some phases, by J. Q. Adams. "The unity and citizenship of the people," Ashley asserted, "existed before the Revolution, and before the national Constitution." In fact, it was in order "to secure" this "unity," this "pre-existing nationality," this "national citizenship," for which "life, fortune and honor" had been periled in the Revolution that the Constitution was formed. "The utter indefensibility of the state sovereignty dogmas, and . . . the supreme power intended by the framers of the Constitution to be lodged in the National Government" were particularly demonstrated by the republican form of government guarantee and the comity clause of the Constitution. The comity clause "secures nationality of citizenship"; "a universal franchise which cannot be confined to states, but belongs to the citizens of the Republic."

The abolitionists who believed that the Thirteenth Amendment was amendatory, that it would revise or change the Constitution, harkened back to the stand of the American Anti-Slavery Society, adopted originally in its

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<sup>29</sup> CONG. GLOBE, 38th Cong., 1st Sess. 1479 *et seq.* (1864).

<sup>30</sup> *Supra* note 19.

<sup>31</sup> CONG. GLOBE, 38th Cong., 2d Sess. 1384 (1865).

Constitution of 1833 and copied in the Constitutions of most of the state and local anti-slavery societies. The United States Constitution not only did not authorize Congress to uproot slavery in the states where it existed but it protected slavery there. Elsewhere—in the District of Columbia, in the Territories—Congress possessed the power and the duty to act in behalf of freedom. And, moreover, Congress was bound to exercise the powers it possessed over the District, the Territories and interstate commerce to hedge slavery in, to confine it “to the spots it already polluted.” But beyond that, Congress could not constitutionally go “to touch slavery in the states.” “. . . such, Sir, was my position,” said Thaddeus Stevens, the leading exponent of this view in the 1865 debates, “not disturbing slavery where the Constitution protected it, but abolishing it wherever we have the constitutional power, and prohibiting its further extension.” “As the Constitution now stands” “the subject of slavery has not been entrusted to us by the states, and . . . therefore it is reserved.”<sup>32</sup>

Placed in the context of this constitutional divergency among the abolitionists, the function of the Thirteenth Amendment is not confused but clarified. The split between the declaratory and amendatory theorists shows that there was disagreement about how the Thirteenth Amendment affected the pre-existing Constitution but none about the meaning of the Constitution after the adoption of the Amendment. To the declaratory theorists who believed both that the Constitution was anti-slavery and that Congress was empowered to carry out the anti-slavery provisions of it, the Thirteenth Amendment would confirm, reaffirm, reiterate; it would bring out anew the true nature of the Constitution which had been “degraded to wear chains so long that its real character” was “scarcely known.” To the declaratory theorists who believed that the Constitution was anti-slavery but that a power of enforcement was lacking, the Thirteenth Amendment commanded freedom all over again and provided a means “to carry it into effect,” “a remedy” against disobedience. To the amendatory theorists the Thirteenth Amendment brought about a fundamental change: it took from the states what hitherto had been constitutionally reserved to them, the power to protect or promote slavery; it abolished slavery throughout the country, nationalized the right of freedom and made the national Congress the organ of enforcement. Thus, in the eyes of all abolitionists, the Thirteenth Amendment either gave or confirmed congressional power to enforce a constitutional prohibition against slavery everywhere in the United States; and the liberty which Congress now had constitutional mandate to enforce was not just the liberty of the blacks but the liberty of the whites as well and included not just freedom from personal bondage but protection in a wide range of natural and constitutional rights. The revolution in federalism had been given its ultimate constitutional sanction.

#### IV.

The Thirteenth Amendment was declared ratified and in force on December 18th, 1865. Meanwhile, on December 5th the 39th Congress had

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<sup>32</sup> *Id.* at 265-66.

convened. The great issues of reconstruction which that Congress was to face were emerging and taking shape in men's minds: fiscal retrenchment, the re-establishment of balance between civil and military authority, rebuilding the political structure of the rebel states, finding a new basis on which to resurrect the shattered economy and society of the South. Standing in the forefront of these problems was what to do with the freedmen, "the everlasting, inevitable Negro." This was the question which "puzzled all brains and vexed all statesmanship." Loosened not only from the legal but the economic ties which fixed their place in society and their part in production, many of them wandering aimlessly about the countryside or huddled near Northern Army camps and in philanthropic centers, the victims alike of continued white oppression and of their own long past of slavery, the former bondmen constituted a vast relief and welfare problem as well as a problem of legal protection and Lockean political theory. All shades of Republican opinion agreed that the care of the race emancipated by the war and made by circumstances the wards of the nation was the responsibility of the nation. "We have," said Thaddeus Stevens, "turned or are about to turn loose four million slaves without a hut to shelter them or a cent in their pockets. The diabolical laws of slavery have prevented them from acquiring an education, understanding the commonest laws of contract, or of managing the ordinary business of life. This Congress is bound to look after them until they can take care of themselves."<sup>83</sup>

The national responsibility had been discharged in part by an earlier comprehensive act passed in the preceding March, coordinating and centralizing through the Freedmen's Bureau existing war time organizations for the care of the liberated Negro. The bureau had been given far-reaching jurisdiction: It had been made the general guardian and, backed by the United States Army, the guarantor of the general welfare and interests of the former slaves. It had been given charge of their family relations and was to supervise charitable relief and educational work among them. It was to aid them in the purchase or lease of land and to distribute abandoned lands to them. It had been given jurisdiction of all controversies in which freedmen were involved whether blacks alone were concerned or whites also were parties. The whole realm of Negro-White labor relations in the South had been made the province of the bureau. It was to safeguard the freedmen against victimization by white employers, against oppressive working conditions and unreasonably low wages, against coercion, intimidation or anything remotely approaching involuntary labor or actual slavery. The bureau had been thus empowered to play an important, if not a determinative part, in the process of reorganizing and reconstituting the social and economic life of the South and in insuring genuine freedom to the former slaves.

But at best protection afforded by the Freedmen's Bureau was temporary, irregularly administered, and inadequate. Broader and more explicitly statutory guarantees were regarded as necessary if the freedmen were to be

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<sup>83</sup> CONG. GLOBE, 39th Cong., 1st Sess. 74 (1865).

given both something more than parchment rights and freedom from the forms of bondage. Hardly were the doors of the 39th Congress opened before an assortment of bills was introduced for this purpose. Representative Farnsworth of Illinois offered a resolution which, though concerned primarily with the rights of Negro soldiers, declared generally that "as all just powers of government are derived from the consent of the governed, that cannot be regarded as a just government which denies a large portion of its citizens who share its pecuniary and military burdens" the right to express their consent, "and which refuses them full protection in the enjoyment of their inalienable rights."<sup>34</sup> Representative Benjamin F. Loan of Missouri submitted a resolution directing the select committee on freedom to consider "legislation securing the freedmen and the colored citizens of the states recently in rebellion the political and civil rights of other citizens of the United States."<sup>35</sup> Senator Henry Wilson of Massachusetts sponsored a bill confined to the rebel states and to be enforced by the Army and Freedmen's Bureau. It declared null and void all "laws, statutes, acts, ordinances, rules and regulations" establishing or maintaining "any inequality of civil rights and privileges" on account of color or previous slavery.<sup>36</sup> Senator Sumner of Massachusetts introduced two bills embodying much the same program. They struck down in the Confederate States "all laws and customs . . . establishing any oligarchical privileges and any distinction of rights on account of color or race." They ordained that "all persons in such states are recognized as equal before the law." They gave the courts of the United States exclusive jurisdiction of all suits, criminal or civil, to which a person of African descent was a party.<sup>37</sup>

These proposals all failed of enactment. They are significant because they show that the early statutory plans to safeguard the human rights and essential interests of the freedmen revolved about certain central ideas: "full protection in the enjoyment of their inalienable rights"; "equality of civil rights and privileges"; the same rights as other citizens; equality before the law. The common denominator, settled in men's minds by thirty years of abolitionist proselytization as the basis for and a means of achieving Negro rights, was thus the concept of the equal protection of the laws for men's civil, i.e., natural, rights. The failure to adopt these measures was not due to any doubts about the propriety or adequacy of the basis and means. They were immediately replaced in the Republican program by other measures featuring the same elements. The principal objection made by fellow Republicans was rather that the legislation was too narrowly conceived, being based on the war power, confined to the rebel states, and aimed only at the annulment of bad laws. The great need and opportunity was to make the protection permanent, to cast it in universal form (though immediately and primarily the boon of the freedmen), to make it applicable to the whole

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<sup>34</sup> *Id.* at 46.

<sup>35</sup> *Id.* at 69.

<sup>36</sup> *Id.* at 39.

<sup>37</sup> *Id.* at 91-95.

country and to ground it firmly not in the old Constitution but in the New Amendment.

In the achievement of these wider purposes the leadership of Senator Trumbull in his capacity as chairman of the Senate Judiciary Committee soon became dominant. As he saw it, the task was to "abolish slavery, not only in name but in fact." Because "it is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his rights," Congress must "give effect to the provision . . . making all persons free."<sup>38</sup> It must wipe out the remnants, badges and indicia of slavery. It was to enable Congress to do this—or rather to remove all doubt and argument about Congress' power to do this—that Section Two of the Thirteenth Amendment had been added. The time had come to implement that Amendment and use that power. Trumbull's Civil Rights Bill and its supplementary companion, an Amendment to the Freedman's Bureau Act, became almost immediately the heart of the Republican legislative program.

The congressional battle that raged around these two bills<sup>39</sup> constituted the third important debate over the Thirteenth Amendment. By the Amendment, the principle of universal liberty had been established. The Freedmen's Bureau and Civil Rights bills represented the efforts of the Amendment's framers, acting contemporaneously with its ratification, to implement the Amendment and define the principle. This debate, accordingly, had the distinct advantage of being evoked by specific legislative plans, of being tied down to a particular application of the liberty insured by the Amendment. As a result, not only did attention necessarily focus on Section Two of the Amendment granting Congress power of enforcement, but the persons and the rights protected, the area of asserted state sovereignty invaded and the notion of liberty itself—all were given concrete significance.

Basically, the two acts proceeded upon exactly the same theory: That the way to implement the Thirteenth Amendment and secure liberty was to protect men in their "civil rights and immunities" and to do so directly through the national government—the agents of the bureau in the one case, the federal courts in the other. The rights and immunities thus to be nationalized and protected, moreover, were not to be "left to the uncertain and ambiguous language" of a general formula. They, or some of them were to be "distinctly specified." Section One of the Civil Rights Bill and Section Seven of the Freedmen's Bureau Bill, accordingly, contain an identical list of the civil rights of men to be guaranteed by the national government. The list is short but the rights enumerated are sweeping. The first—"the right to make and enforce contracts"—safeguards men in their labor relations, business affairs and ordinary transactions. The second—the right to buy, sell and own real and personal property—is virtually indispensable in our system to the maintenance of life itself, let alone anything like economic improvement. The third—the right "to sue, be parties and give evidence"—

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<sup>38</sup> CONG. GLOBE, 39th Cong., 1st Sess. 43 (1865).

<sup>39</sup> And also to some extent around the other implementing legislation, especially Senator Wilson's bill summarized above.

guarantees access to the judiciary as the normal means of maintaining rights; guarantees, that is, the protection of the courts. The fourth—the right to “full and equal benefit of all laws and proceedings for the security of person and estate”—is an explicit guarantee of the “full” and “equal” protection of men in their persons and their property by laws. The right to the equal protection of the laws—the right to have other civil rights protected and equally by laws—is thus itself counted among men’s fundamental “civil rights and immunities.” Moreover, this is not only a matter of receiving the benefit of such laws. The detriment of the laws, the punishment under them, may not be unequal, may not be different for identical offenses, without a similar violation of civil rights.

Taken together, read in the light of their abolitionist origins and stated purposes, these bills were the practical application of the idea of equality as an essential principle of liberty. They represented the progress from abolitionist constitutional and political theory to abolitionist law, from doctrine to enactment. Consistent with those origins and purposes, and with the facts of federalism as the abolitionists had learned them, in a third of a century of struggle the federal government alone was to be the agency of enforcement. Thus was effected a complete nationalization of the civil or natural rights of persons.

Neither of the bills was confined to the Negro. The Freedmen’s Bureau Bill extended the protection and services of the bureau to “refugees and freedmen in all parts of the United States.” The Civil Rights Bill covered “the inhabitants of any state or territory of the United States.” The first, however, dealt almost exclusively with freedmen and black refugees, contained many welfare and educational features which had a special relevance to the Negro, and extended beyond the rebel states in order to permit the bureau to operate in loyal Delaware and Kentucky where slavery had been abolished by the Thirteenth Amendment and to aid the thousands of freedmen who had migrated into Southern Illinois, Indiana and Ohio. The Civil Rights Bill was intended to be permanent, truly countrywide and inclusive of “persons of all races.” The debates over these bills contain many references to loyal southern whites “who have been reduced from men almost to chattels because of their fidelity to our flag, to our constitution, and to this country” and who therefore need national “care” and “protection.”<sup>40</sup>

Nor was either of these bills restricted to the corrective removal of discriminatory state legislation or official action. The Freedmen’s Bureau Bill prohibited the denial of the mentioned rights if the denial was “in consequence of any state or local law, ordinance, police, or other regulation, custom, or prejudice. . . .” The use of the word “custom” to some extent, and of the word “prejudice” altogether, removes the limitation imposed by the earlier words in the section. An abrogation of civil rights made “in consequence of any state or local . . . custom or prejudice” might as easily be perpetrated by private individuals or by unofficial community activity as by state officers armed with statute or ordinance. Moreover, Section Seven

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<sup>40</sup> CONG. GLOBE, 39th Cong., 1st Sess. 438 (1866).

of the Freedmen's Bureau Bill was part of a large and comprehensive system for the care of the freedmen. That system encompassed not merely safeguarding the Negro against discriminatory state legislation, but against invasions of his rights and the essential conditions of his freedom from whatever source private-outrage, employer oppression or official action. The language of the Civil Rights Bill is more ambiguous. While it provides that "the inhabitants of every race and color . . . shall have the same right to make and enforce contracts," and so forth, a possibly restrictive proviso is added: "Any law, statute, ordinance, regulation or custom, to the contrary notwithstanding." If this proviso be taken to limit the category of invaders of "the same rights to make and enforce contracts" and so forth, and if the omission of the word "prejudice" from the list be emphasized, the case for confining the application of the bill to the nullification of state acts is put in its most favorable light. Thus to confine the bill, however, overlooks the use of the word "custom." It also disregards the fact that the proviso may not apply to the prohibition, appearing earlier in the same sentence, against any "discrimination in civil rights or immunities among the inhabitants." But, in any event, the "full and equal benefit" provisions of both the Civil Rights and Freedmen's Bureau bills immediately broadened their coverage to include state inaction as well as state action. "Full and equal benefit" of all laws and proceedings for the protection of person and property can in many cases, only be afforded by extending protection to the unprotected rather than withdrawing protection from those who have it. Invasions of civil rights made possible by the failure of the state to supply protection, consequently, fall within the language set forth.

The congressional debates make this point clear. A great deal was said about the infamous Black Codes. They were only less rigorous than the slave codes which they had replaced. Under them, the freedman was socially an outcast, industrially a serf, legally a separate and oppressed class. Slavery, abolished by the organic law of the nation, was in fact revived by these statutes of the states. Knowledge of this was prominently displayed in the Congressional Globe. The Black Codes were read, analyzed, dissected in detail. Their obliteration unquestionably was a specific object of the Freedmen's Bureau and Civil Rights bills. But the senators and representatives also had before them a sizeable body of data bearing on the treatment of the Negro, the loyal White and the Northerner in the South by private individuals and unofficial groups. General Grant's report, in other respects most helpful to the conservatives, was used by the radicals for its declaration that "in some form, the Freedmen's Bureau is an absolute necessity until civil law is established and enforced, securing to the freedmen their rights and full protection." Carl Schurz's report, while conflicting with that of General Grant with respect to many aspects of national policy and conditions in the South, agreed in its emphasis on the need to protect the freedmen both against "oppressive legislation" and "private persecution." Accounts in newspapers north and south, Freedmen's Bureau and other official documents, private reports and correspondence were all adduced to show

that "murder, shootings, whippings, robbing and brutal treatment of every kind," were "daily inflicted" on freedmen and their white friends.<sup>41</sup> Much of this evidence was contested as to its truth, but, true or false, it showed the realm of fact that was within the contemplation of those who framed and put across the Freedmen's Bureau and Civil Rights bills. Moreover, though opponents denied or minimized the facts asserted, they did not contend that the bills in question would not reach such facts if they did exist. Private outrage and atrocity were, equally with the Black Codes, evils which this legislation was designed to correct.

The persistent questions now recur: How was this vast system for the national protection of the civil rights of men "of all races" derived from the Thirteenth Amendment? Could it be sustained by a mere prohibition against "slavery and involuntary servitude?" Are these words of the Amendment of such a character as to accomplish or confirm a revolution in the federal system?

The answers to these questions, abundantly and clearly supplied by the earlier debates over the Thirteenth Amendment, were now again repeated by the sponsors and supporters of the Civil Rights and Freedmen's Bureau bills. Not so however with respect to those who opposed them. Democrats and a fringe of conservative Republicans now switched to a restrictive interpretation of the Thirteenth Amendment. The liberal view of its language which they had adopted in opposing its passage they now rejected as never having been correct. The evil of Negro elevation and equality which they had loudly proclaimed it would bring about they now insisted had not been intended to be achieved by it.

In the third debate over the Thirteenth Amendment, the Democrats and some Republicans took the position, first, that the Amendment merely dissolved the relation of master and slave. Said Senator Edgar Cowan of Pennsylvania, for example, "nobody pretends that it [the Amendment] was to be wider in its operation than to cover the relation which existed between the master and his Negro African slave . . . that particular relation and the breaking of it up, is the subject of the first clause of the Amendment, and it does not extend any further, and cannot by any possible implication, contortion, or straining, be made to go further. . . ." Section two "was intended . . . to give to the Negro the privilege of the habeas corpus; that is, if anybody persisted in the face of the constitutional amendment in holding him as a slave, that he should have an appropriate remedy to be delivered."<sup>42</sup>

To this narrow constructionist argument as to the meaning of "slavery" and its abolition, was added weight from another source, namely, Seward's folly in labeling Section Two of the Amendment, a limitation on rather than a grant of power to Congress.<sup>43</sup> Though the interpretation and the motive

<sup>41</sup> See *e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 95, 168, 339, 340, 438, 503.

<sup>42</sup> CONG. GLOBE, 1st Sess., 39th Cong.: Cowan at 499 (Jan. 30, 1866); Saulsbury at 113 (Dec. 21, 1865), 476 (Jan. 29, 1866); Hendricks at 317 (Jan. 19, 1866).

<sup>43</sup> Seward, as Secretary of State, telegraphed the provisional governor of South Carolina, Perry, when the latter objected that Section Two of the Thirteenth Amendment might be con-

behind it were not difficult to explain, in view of Seward's well-known conciliatory and political tendencies to be all things to all men, yet, coming from one with Seward's connections with the administration and former connections with the abolitionist movement, this pronouncement supplied welcome ammunition to the Democrats and reactionaries who resisted all change. It also had an effect upon the radicals. While many of them denounced it as untenable, Thaddeus Stevens accepted it as a statement of administration policy and therefore as showing the necessity for a new amendment.

Still a third basis of the narrow constructionism now expressed by the Democrats and some Republicans related directly to the revolution in federalism brought about by the Thirteenth Amendment if it were held to sustain the Freedmen's Bureau and Civil Rights bills. Those measures, it was clearly recognized, were an exercise of congressional power in the regulation of the civil status of the inhabitants of the states, vested in the United States courts a jurisdiction over property, contracts, and crimes hitherto all but universally conceded to be the exclusive province of the states, and established the national government as the protector of the individual rights against state oppression or against oppression due to state inaction. To many a conservative of that day, unaware of or still resisting the great change that thirty years of abolitionism had wrought and the Civil War had confirmed this "seemed like a complete revelation of the diabolical spirit of centralization, of which only the cloven hoof had been manifested heretofore." "Are we to alter," asked Cowan, "the whole frame and structure of the laws, are we to overturn the whole Constitution in order to get at a remedy for these people?" The Thirteenth Amendment "never was intended to overturn this government and revolutionize all the laws of the states everywhere." "If under color of this constitutional Amendment, we have a right to pass such laws as these," "we have a right to overturn the states themselves completely."<sup>44</sup>

While the opponents of the Freedmen's Bureau and Civil Rights bills, in the third debate over the Thirteenth Amendment, thus precisely reversed their position as to the meaning and effect of the Amendment, sponsors and supporters of the legislation adhered strictly to their earlier expressed doctrines. Senator Trumbull, a principal draftsman both of the Thirteenth Amendment and the Civil Rights Bill, in his speech opening the debate on the latter, described their relationship to each other. The Civil Rights Bill, he said, was "intended to give effect" to the Thirteenth Amendment by securing "to all persons within the United States practical freedom."<sup>45</sup> "Of

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strued as authorizing legislation protecting civil rights that his objection was "querulous," that the clause was restrictive in its character. CONG. GLOBE, 1st Sess., 39th Cong. 43 (1865).

<sup>44</sup> CONG. GLOBE, 1st Sess., 39th Cong. (1866); Cowan at 499.

<sup>45</sup> Few of the radicals took the cavalier view of the constitutional problem that Senator Fessenden did. He was very doubtful about the constitutionality of the bureau bill, especially the land purchase provisions. He thought he might in an extreme case go as far as Trumbull and say this was necessary to make the slave free and that Congress could do whatever was necessary for that purpose. "I cannot work the problem out, and nobody else can, to show that in the Constitution itself there is a clear power; but I can work the problem out to show that

what avail," he asked, "was the immortal Declaration" of Independence to the millions of slaves? "Of what avail to the citizens of Massachusetts, who, a few years ago, went to South Carolina to enforce a constitutional right in court, that the Constitution of the United States declared that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states? And of what avail will it now be that the Constitution of the United States has declared that slavery shall not exist, if in the late slaveholding states laws are to be enacted and enforced depriving persons of African descent of privileges which are essential to freemen?"

"It is the intention of this bill to secure those rights." What rights? The natural rights of men specified in the Declaration and the privileges and immunities of citizens under the comity clause. Trumbull implies here and makes plain elsewhere in his speech that these two sources referred to the same rights. How is the protection of these natural rights of men, these privileges and immunities of citizens—as now listed in the Civil Rights Bill—authorized by the Thirteenth Amendment?

Said Trumbull:

It is difficult, perhaps, to define accurately what slavery is and liberty is. Liberty and slavery are opposite terms; one is opposed to the other. We know that in a civil government, in organized society, no such thing can exist as natural or absolute liberty. Natural liberty is defined to be the—

"Power of acting as one thinks fit, without any restraint or control, unless by the law of nature, being a right inherent in us by birth, and one of the gifts of God to man in his creation, when he imbued him with the faculty of will."

But every man who enters society gives up a part of this natural liberty, which is the liberty of the savage, the liberty which the wild beast has, for the advantages he obtains in the protection which civil government gives him. Civil liberty, or the liberty which a person enjoys in society, is thus defined by Blackstone:

"Civil liberty is not other than natural liberty, so far restrained by human laws and no further, as is necessary and expedient for the general advantage of the public."

That is the liberty to which every citizen is entitled; that is the liberty which was intended to be secured by the Declaration of Independence and the Constitution of the United States, originally and more especially by the Amendment which has recently been adopted: and in a note to Blackstone's Commentaries it is stated that—

"In this definition of civil liberty it ought to be understood, or rather expressed, that the restraints introduced by the law should be equal to all, or as much so as the nature of things will admit."

Then, sir, I take it that any statute which is not equal to all, and which deprived any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited. We may, perhaps, arrive at a more

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the power may be found when the positive necessity of the thing is apparent, where the thing must be done, and must be done by the Government as a consequence of other things that it was compelled to do, and that it had a perfect right to do." *Id.* at 366.

correct definition of the term "citizen of the United States" by referring to that clause of the Constitution which I have already quoted, and which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." What rights are secured to the citizens of each State under that provision? Such fundamental rights as belong to every free person.<sup>46</sup>

<sup>46</sup> Many other speeches are to the same effect. Senator John Sherman of Ohio expressed his belief that "it is the duty of Congress to give to the freedmen of the southern States *ample protection in all their natural rights*." The Thirteenth Amendment left "no doubt" of the power of Congress to do so. "Here," he said, "is not only a guarantee of liberty to every inhabitant of the United States, but an express grant of power to Congress to secure this liberty by appropriate legislation. Now, unless a man may be free without the right to sue and be sued, to plead and be impleaded, to acquire and hold property, and to testify in the court of justice, then Congress has the power, by the express terms of this amendment, to secure all these rights. To say that a man is a freeman and yet is not able to assert and maintain his right, in a court of justice, is a negation of terms. Therefore the power is expressly given to Congress to secure all their rights of freedom by appropriate legislation. The reason why this power was given is also drawn from the history of a clause of the Constitution," namely, the comity clause, Article 4, Section 2. "There never was any doubt about the construction of this clause of the Constitution—that is, that a man who was recognized as a citizen of one State had the right to go anywhere within the United States and exercise the immunity of a citizen of the United States; but the trouble was in enforcing this constitutional provision." "To avoid this very difficulty, that of a guarantee without a power to enforce it, this second section of the constitutional amendment was adopted, which does give to Congress in clear and express terms the right to secure, by appropriate legislation, to every person within the United States, liberty." CONG. GLOBE, 39th Cong., 1st Sess. 41 (1866).

Senator William Stewart, moderate from Nevada, said, "I am in favor of legislation under the constitutional amendment that shall secure to him [the freedman] a chance to live, a chance to hold property, a chance to be heard in the courts, a chance to enjoy his civil rights, a chance to rise in the scale of humanity, a chance to be a man. . . . We have given him freedom, and that implies that he shall have all the civil rights necessary to the enjoyment of that freedom. The Senator from Illinois has introduced two bills [the Freedmen's Bureau and Civil Rights bills] well and carefully prepared, which if passed by Congress will give full and ample protection under the constitutional amendment to the negro in his civil liberty; and guarantee to him civil rights, to which we are pledged." *Id.* at 298; see similar remarks by Stewart, *id.* at 110, 111, 297, 445.

Senator Henry Wilson of Massachusetts argued . . . "we must see to it that the man made free by the Constitution of the United States, sanctioned by the voice of the American people, is a freeman indeed; that he can go where he pleases, work when and for whom he pleases; that he can sue and be sued; that he can lease and buy and sell and own property, real and personal; that he can go into the schools and educate himself and his children; that the rights and guarantees of the good old common law are his, and that he walks the earth, proud and erect in the conscious dignity of a free man, who knows that his cabin, however humble, is protected by the just and equal laws of his country." *Id.* at 111.

Senator Henry S. Lane from Indiana maintained: "They [the negroes] are free by the constitutional amendment lately enacted, and entitled to all the privileges and immunities of other free citizens of the United States. It is made your especial duty by the second section of that amendment, by appropriate legislation to carry out that emancipation. If that second section were not embraced in the amendment at all your duty would be as strong, the duty would be paramount, to protect them in all rights as free and manumitted people. I do not consider that the second section of that amendment does anything but declare what is the duty of Congress, after having passed such an amendment to the Constitution of the United States, to secure them in all their rights and privileges."

"What are the objects sought to be accomplished by this bill? That these freedmen shall be secured in the possession of all the rights, privileges, and immunities of freemen; in other words, that we shall give effect to the proclamation of emancipation and to the constitutional amendment." *Id.* at 602.

See also Trumbull's remarks, *id.* at 322, and Senator Sumner's remarks, *id.* at 91. See Cook, *id.* at 1123.

Martin F. Thayer of Pennsylvania maintained that the constitutional foundation of the Civil Rights Act was to be found in the Thirteenth Amendment, the comity clause and that

Trumbull thus elaborated the natural rights philosophy underlying the Thirteenth Amendment and implementing legislation. While he later points to the black codes as instances of discriminatory state legislation which it is the aim of his bills to prevent, it is plain from this excerpt that he is also thinking of individual action based on custom or prejudice and made possible by the absence of state legislation or other restraint. Accordingly, he argues that in a state of nature all men are free to act as they please, without any restraint, except such as may be imposed by the law of nature. Upon entering society "every man . . . gives up a part of this natural liberty . . . for the advantages he obtains in the protection which the civil government gives him." So liberty or civil liberty is what one gets in society as a result

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clause "which guarantees to all the citizens of the United States their rights to life, liberty and property." *Id.* at 2464.

Representative James F. Wilson of Iowa, chairman of the House Judiciary Committee, introduced the Civil Rights Bill in the House with even more sweeping constitutional declarations than those of Trumbull in the Senate. He planted the bill squarely upon the Thirteenth Amendment which made "a specific delegation of power to Congress." He argued "A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery. Anything which protects him in the possession of these rights insures him against reduction to slavery." But if the bill "in its enlarged operation step out of the bounds of this express delegation of power," Wilson found it constitutional still. He said "if citizens of the United States, as such, are entitled to possess and enjoy the great fundamental civil rights which it is the true office of Government to protect, and to equality in the exemptions of the law, we must of necessity be clothed with the power to insure to each and every citizen these things which belong to him as a constituent member of the great national family. Whatever these great fundamental rights are, we must be invested with power to legislate for their protection or our Constitution fails in the first and most important office of government." Wilson went on to find that these "great fundamental rights" were the natural rights of men. He defined them with Blackstone and Kent as the right to personal security, personal liberty and private property. "Before our Constitution was formed, the great fundamental rights which I have mentioned, belonged to every person who became a member of our great national family. No one surrendered a jot or tittle of these rights by consenting to the formation of the Government. The entire machinery of government as organized by the Constitution was designed, among other things, to secure a more perfect enjoyment of these rights. A legislative department was created that laws necessary and proper to this end might be enacted. A judicial department was erected to expound and administer the laws. An executive department was formed for the purpose of enforcing and seeing to the execution of these laws. And these several departments of government possess the power to enact, administer, and enforce the laws 'necessary and proper' to secure these rights which existed anterior to the ordination of the Constitution.

"Upon this broad principle I rest my justification of this bill. I assert that we possess the power to do those things which governments are organized to do; that we may protect a citizen of the United States against a violation of his rights by the law of a single State; that by our laws and our courts we may intervene to maintain the proud character of American citizenship; that this power permeates our whole system, is a part of it, without which the States can run riot over every fundamental right belonging to citizens of the United States; that the right to exercise this power depends upon no express delegation, but runs with the rights it is designed to protect; that we possess the same latitude in respect to the selection of means through which to exercise this power that belongs to us when a power rests upon express delegation; and that the decisions which support the latter maintain the former." *Id.* at 1118.

Senator Reverdy Johnson of Maryland took a narrower view of the Thirteenth Amendment but believed that the attributes of citizenship could be conferred on the free Negro by authorizing him under the judiciary article to sue, contract, be a witness, etc. "If I am right . . . that we can authorize them to sue, authorize them to contract, authorize them to do everything short of voting, it is not because there is anything in the Constitution of the United States that confers the authority to give to a negro the right to contract, but it is because it is a necessary, incidental function of a Government that it should have authority to provide that the rights of everybody within its limits shall be protected, and protected alike." *Id.* at 530.

of governmental restraint on the conduct of others. Without such governmental restraint, that is, without such laws and their enforcement, there is no civil liberty. Hence the absence of laws is a denial or withholding the protection which was the reason for creating or entering civil society. All of this was said so often and so earnestly, not only by Trumbull but by the rest of the sponsors of this combined constitutional and legislative program that it cannot be doubted as the common doctrinal foundation. Constitutional historians, too, have well understood it. The reason it bears repetition and re-emphasis here is that Trumbull and the other sponsors did what constitutional historians have not so well understood; he took the next step of articulating the relationship of this natural rights philosophy to the concept of the equal protection of the laws. "Then, Sir," he said in summing up, "I take it that any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited." Civil rights which are "secured to other citizens"—"secured" how? By the only method by which rights can be secured, namely, by supplying protection, by imposing restraints on those who would invade the rights. Hence, "deprivation" or "denial" of laws "not equal to all" will occur just as much by failure to supply the protection or impose the restraints as by black codes imposing special burdens on a selected class.

Emphasizing this same central issue Senator Jacob M. Howard from Michigan, cast the argument in terms of the rights that were denied to slaves. "What is a slave?" A slave, Howard answered after the manner of abolitionists for thirty years preceding, "had no rights, nor nothing which he could call his own. He had not the right to become a husband or a father in the eye of the law. . . . He owned no property, because the law prohibited him. He could not take real or personal estate either by sale, by grant, or by descent, or by inheritance. He did not own the bread he earned and ate. He stood upon the face of the earth completely isolated from the society in which he happened to be; he was nothing but a chattel, subject to the will of his owner, and unprotected in his rights by the law of the state where he happened to live."<sup>47</sup> The opposite of the slave is the free man; the opposite of slavery is liberty. The Thirteenth Amendment's abolition of slavery, therefore, is a declaration "that all persons in the United States should be free." But what is freedom? Freedom is the possession of those rights which were denied to the slave, i.e., natural or civil rights. The Radicals differed as to the length of the list of natural rights but they agreed that it was at least as long as that presented in Section One of the Civil Rights and Section Seven of the Freedmen's Bureau bills. The possession of these rights depends upon protection by government; indeed, so much so, that protection by government is regarded as one of men's civil rights or as a "necessary incident" of men's civil rights. Governments act through laws and hence the protection which governments are instituted to supply must

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<sup>47</sup> CONG. GLOBE, 39th Cong., 1st Sess. 503-504 (1866).

be by laws. Thus the Thirteenth Amendment made all men free, that is, restored civil rights to those who had been deprived of them and entitled them to the protection of the laws—in this case, according to Section Two, the laws of Congress.

William Lawrence, a member of the Ohio delegation, in a carefully worked out speech delivered in the House marked out the foundations of the Civil Rights Bill in even greater detail and comprehensiveness.<sup>48</sup> He argued that “so far as there is any power in the state to limit, enlarge or declare civil rights, all these are left to the states.” In this sense, the Civil Rights Act merely provided that “whatever” of the listed civil rights “may be enjoyed by any shall be shared by all citizens in each state.” All of this, however, was subject to the “limitation that there are some inherent and inalienable rights, pertaining to every citizen, which cannot be abolished or abridged by state constitutions or laws.” Thus far, Lawrence is saying that, within the area of its optional operation, if the state acts at all, it must treat everybody alike. But with respect to “the inherent and inalienable rights, pertaining to every citizen” the state must refrain from passing “constitutions and laws” which “abolish or abridge them.” The duty of the state, however, does not end with the observance of this negative limitation. Lawrence goes on to add: “There is in this country no such thing as legislative omnipotence. When it is said in state constitutions that ‘all legislative power is vested in a Senate and House of Representatives,’ authority is not thereby conferred to destroy all that is valuable in citizenship. Legislative powers exist in our system to protect, not to destroy, the inalienable rights of men.” In the case of the inalienable rights of men or citizens, then, the obligation of the state is not discharged until it has furnished whatever protection is necessary to maintain those rights, *i.e.*, full or ample protection.

Lawrence then bears down directly on citizenship and its particular rights. The citizenship section of the Civil Rights Act, he said, was declaratory. But even if it weren't, the national government by virtue of its sovereignty and the constitutional section about a rule of uniform naturalization has complete authority over citizenship, including the power to declare what rights appertain to it. Lawrence quotes the Declaration of Independence, the Preamble and the Fifth Amendment to show that three of the rights of citizens are life, liberty and property. “It has never been deemed necessary to enact in any constitution or law that citizens should have the right to life or liberty or the right to acquire property. These rights are recognized by the Constitution as existing anterior to and independent of laws and all constitutions.” Furthermore, not only are these rights “inherent and indestructible, but the means whereby they may be possessed and enjoyed are equally so.”

It is idle to say that a citizen shall have the right to life, yet to deny him the right to labor, whereby alone he can live. It is a mockery to say that a citizen may have a right to live, and yet deny him the right to make a con-

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<sup>48</sup> *Id.* at 1832.

tract to secure the privilege and the rewards of labor. It is worse than mockery to say that men may be clothed by the national authority, with the character of citizens, yet may be stripped by state authority of the means by which citizens exist . . . .

Every citizen, therefore, has the absolute right to life, the right to personal security, personal liberty, and the right to acquire and enjoy property. These are rights of citizenship. As necessary incidents of these absolute rights, there are others, as the right to make and enforce contracts, to purchase, hold, and enjoy property, and to share the benefit of laws for the security of person and property.

It is not enough to note that this statement of Lawrence is an explicit articulation of the natural rights philosophy and that in it the natural rights of men are identified also as the rights appertaining to citizenship, important though these facts are in understanding both the significance of the Thirteenth Amendment and the concepts and clauses of the Fourteenth Amendment. Even more significant is the way in which Lawrence ties all this up with the equal protection concept and thus spells out the meaning of that concept. The equal protection requirement is itself a "necessary incident" of men's natural rights and consists of a negative limitation and an affirmative command. Failure of the legislature to supply the protection which it was instituted to supply is a denial of the requirement quite as much as a legislative enactment singling out a particular group for abusive treatment. Lawrence repeats this point over and over again. "Now," he said, "there are two ways in which a state may undertake to deprive citizens of these absolute, inherent and inalienable rights: either by prohibitory laws, or by a failure to protect any one of them."<sup>49</sup>

In the discussion of the scope and nature of the Thirteenth Amendment and the constitutionality of the Freedmen's Bureau bill and Civil Rights bills the role of the idea of equality, it can be seen, again was a dominant one. This results from the close connection between the idea of equality and the idea of governmental protection. In truth, the fact of very great importance is that these two notions often were inseparably intermingled. "I have thought," said Timothy H. Howe, abolitionist Senator from Wisconsin, "that it belonged to republican institutions to carry out, to execute the doctrines of the Declaration of Independence, to make men equal. That they are not equal in social estimation, that they are not equal in mental culture, that they are not equal in physical stature, I know very well; but I have thought the weaker they were the more the government was bound to foster and protect them. If government be designed for the protection of the weak, certainly the weaker men are the more they need its protec-

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<sup>49</sup> Again Lawrence said, "If the people of a state should become hostile to a large class of naturalized citizens and should enact laws to prohibit them and no other citizens from making contracts, from suing, from giving evidence, from inheriting, buying, holding, or selling property, or even from coming into the state, that would be prohibitory legislation. If the state should simply enact laws for native born citizens and provide no law under which naturalized citizens could enjoy anyone of these rights, and should deny them all protection by civil process or penal enactments, that would be a denial of justice."

tion.”<sup>50</sup> So it is the protection of the laws that makes men equal. Moreover, this was not an attitude confined to the radicals. Senator Edgar Cowan, Pennsylvania conservative, put it thus: “What is meant by equality” is that if a man “is assailed by one stronger than himself the government will protect him to punish the assailant. It means that if a man owes another money the government will provide a means by which the debtor shall be compelled to pay, . . . that if an intruder and trespasser gets upon his land he shall have a remedy to recover it. That is what I understand by equality before the law.”<sup>51</sup>

The usual notion of the equal protection of the laws is that it is a comparative concept. The requirement is met if one man has the same right as another. Men are protected equally if all of them are not protected. This comparative view was the one expressed by Senator Henry Wilson of Massachusetts.

He said:

By the equality of man, we mean that the poorest man, be he black or white . . . is as much entitled to the protection of the law as the richest and proudest man . . . We mean that the poor man, whose wife may be dressed in a cheap calico, is as much entitled to have her protected by equal law as is the rich man to have his jeweled bride protected by the law of the land . . . That the poor man’s cabin though it may be the cabin of a poor freedman in the depths of the Carolinas is entitled to the protection of the same law that protects the palace of a Stewart or an Astor.<sup>52</sup>

The significant thing is that these two conceptions, both identifying equality and governmental protection, but the one stating the equal protection of the laws as a comparative, the other as an absolute right of individuals are basically identical. The first blush impression that they are different arises from a failure to realize that there is a constant and assumed factor in both of them, namely, the obligation of government to supply protection. When Wilson says that the poor man has the same right to protection that the rich man does, he is not saying that the poor man would have no complaint if neither he nor the rich man received protection. He is saying in effect that the rich man has a right to protection; the poor man has a right to protection; they have the same right to protection. Both are entitled, all men are entitled, to the protection of the laws. If some men do not receive it, they are denied the full or the equal protection of the laws. If all men receive the full protection of the laws, they equally receive the protection of the laws or they receive the equal protection of the laws. On the other hand, if men equally receive the protection of the laws, they all receive the full protection of the laws since it is assumed that the protection of the laws will always be supplied in some form and to most people. In this context, the “equal” protection of the laws and the “full” protection of the laws are virtually synonyms. The use of both words, “full” and “equal” in the Freedmen’s Bureau and Civil Rights bills is thus highly

<sup>50</sup> CONG. GLOBE, 38th Cong., 1st Sess. 438 (1864).

<sup>51</sup> *Id.* at 342.

<sup>52</sup> *Id.* at 343.

significant. Elsewhere, throughout the discussion and in other bills, these words are used sometimes together, sometimes alternatively, but always redundantly or interchangeably.

The equal protection of the laws, then, as an integral part of the social compact-natural rights doctrine, and as nourished, matured and understood by the abolitionists, was far from the simple command of comparative treatment that courts and later generations have made it. Freemen, all men, were entitled to have their natural rights protected by government. Indeed, it was for that purpose and that purpose only that men entered society and formed governments. Once slavery was abolished, the legal pretense for withholding the protection of the laws from some people was at an end. Those people, too, must then be protected fully, equally. The equal protection of the laws, is thus a command for the full or ample protection of the laws. It is basically an affirmative command to supply the protection of the laws. This is its primary character. Its negative on governmental action is secondary and almost incidental. In the words of Senator Yates' resolution, it is a command that all persons "shall be protected in the full and equal enjoyment of all their civil . . . rights."<sup>53</sup> This view makes intelligible Trumbull's otherwise odd statement that "any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty, and is in fact, a badge of servitude which, by the Constitution, is prohibited."

In a revealing impromptu speech on December 19, 1865, Senator Trumbull summed up the essential features of the Thirteenth Amendment and his purpose in sponsoring the Freedmen's Bureau Bill:

I desire to give notice that I shall to-morrow, or on some early day thereafter, ask leave to introduce a bill to enlarge the powers of the Freedmen's Bureau so as to secure freedom to all persons within the United States, and protect every individual in the full enjoyment of the rights of person and property and furnish him with means for their vindication. In giving this notice I desire to say that it is given in view of the adoption of the constitutional amendment abolishing slavery. I have never doubted that, on the adoption of that amendment it would be competent for Congress to protect every person in the United States in all the rights of person and property belonging to the free citizen; and to secure these rights is the object of the bill which I propose to introduce. I think it important that action should be taken on this subject at an early day for the purpose of quieting apprehensions in the minds of many friends of freedom lest by local legislation or a prevailing public sentiment in some of the States persons of the African race should continue to be oppressed and in fact deprived of their freedom, and for the purpose also of showing to those among whom slavery has heretofore existed that unless by local legislation they provide for the real freedom of their former slaves, the federal government will, by virtue of its own authority, see that they are fully protected.

The bill which I desire to introduce is intended to accomplish these ob-

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<sup>53</sup> CONG. GLOBE, 39th Cong., 1st Sess. 472 (1866), Senator Richard Yates, Illinois (Jan. 29, 1866).

jects. I hope there may be no necessity for enforcing such a bill in any part of the Union; but I consider that under the constitutional amendment Congress is bound to see that freedom is in fact secured to every person throughout the land; he must be fully protected in all his rights of person and property; and any legislation or any public sentiment which deprived any human being in the land of those great rights of liberty will be in defiance of the Constitution; and if the states and local authorities, by legislation or otherwise, deny these rights, it is incumbent on us to see that they are secured.<sup>54</sup>

This casual utterance, is a clear-cut expression of the state's affirmative duty to protect as well as its negative obligation not to pass discriminatory legislation, of the authority of Congress to protect Negroes against individual invasions of their new-found freedom and civil rights when the inaction of the state or its failure to supply protection make such invasions possible, and of the Thirteenth Amendment as the constitutional foundation upon which this radical redistribution of power rested. Trumbull speaks of securing freedom to all persons and protecting every individual in "the full enjoyment of the rights of persons and property" and the means of their vindication. Later it is plain he is thinking entirely of blacks and is using these universal words simply because he is intent on raising the blacks to the standard of the whites. The use of the universal words thus has a significance inextricably intertwined with the idea of equality. "Full enjoyment of the rights of persons and property" and the means of their vindication is the "equal" enjoyment of these rights. That enjoyment on the part of the recently freed Negroes was rendered far less than full or equal by legislative enactments, such as the Black Codes, prohibitory in their nature which singled out the Negro for separate and abusive treatment. These accordingly fell within the ban of the Amendment and of congressional power. "Full enjoyment of the rights of persons and property" was less than a reality also by reason of "a prevailing public sentiment in some of the States;" that is to say, that by reason of the deep-rooted prejudices and attitudes toward the Negro translated into private action and community pressure, "persons of the African race continue to be oppressed and in fact deprived of their freedom." So these, too, are within the ban of the Amendment and within the reach of congressional power under it. Not however as an original matter. The primary duty of protection is still with the states. It is only when acting they act discriminatorily or when not acting they fail to supply protection against private inroads the federal power springs into life. The Southerners are accordingly told that "unless by local legislation they provide for the real freedom of their former slaves, the federal government will by virtue of its own authority see that they are fully protected." So "full enjoyment of the right of person and property" is the same as "equal enjoyment" of those rights; and the "full enjoyment" of such rights depend upon (1) the absence of discriminatory state legislative or other official action and (2) the presence of adequate affirmative protection

<sup>53</sup> CONG. GLOBE, 39th Cong., 1st Sess. 472 (1866), Senator Richard Yates, Illinois (Jan. 29, 1866).

to prevent or cope with individual invasions. This then is equal protection. At the very foundation of the system constructed out of the Thirteenth Amendment and the Freedmen's Bureau and Civil Rights Bills is an idea of "equal protection" as far flung as the problem of human rights and as substantive as any guarantee of those absolute rights could well be.

The striking thing then about the Thirteenth Amendment is that it was intended by its drafters and sponsors as a consummation to abolitionism in the broad sense in which thirty years of agitation and organized activity had defined that movement. The Amendment was seen by its drafters and sponsors as doing the whole job—not just cutting loose the fetters which bound the physical person of the slave; but restoring to him his natural, inalienable and civil rights; or what was the same thing in other words, guaranteeing to him the privileges and immunities of citizens of the United States. Slavery and liberty were contradictory and mutually exclusive states. If slavery were abolished then liberty must exist. But liberty in society, civil liberty, consists of natural liberty as restrained by human laws protecting all men in their antecedent rights and being both general and equal. Nor, carrying out this well articulated major premise and the diplomacy of the Fathers in 1787 was any word of caste or color used in the Amendment. And so within its ambit is the power "to secure freedom to all persons and protect every individual in the full enjoyment of person and property and the means of their vindication." Thus underlying the narrow words of the Amendment and imported by them into the Constitution are the theories of Locke, the Declaration of Independence, the Declaration of Rights in the state constitutions and the fundamental principles of the common law. This was the effect of a prohibition of slavery and involuntary servitude; and a grant of power to Congress to enforce it by appropriate legislation designated the agency and imposed the responsibility for the protection of the rights thus nationalized.<sup>55</sup>

#### v.

The one point upon which historians of the Fourteenth Amendment all agree, and indeed, which the evidence places beyond cavil, is that the Fourteenth Amendment was designed to place the constitutionality of the Freedmen's Bureau and Civil Rights bills, particularly the latter, beyond doubt.<sup>56</sup>

<sup>55</sup> Three of the Justices of the Supreme Court, in opinions delivered at circuit before the post bellum reaction and counterrevolution had set in, took this broad view of the Thirteenth Amendment and concluded that the Civil Rights Act was constitutional under it: Justice Swayne in *United States v. Rhodes*, 1 Abb. 28 (U. S. 1866); Chief Justice Chase in *Matter of Elizabeth Turner*, 1 Abb. 84 (U. S. 1867); Justice Bradley in *United States v. Cruikshank*, 1 Woods 308, 318 (U. S. 1874). The *Rhodes* case involved the right of a Negress to testify against a white man in the courts of Kentucky, denied by the laws of that state. In the *Turner* case, the Chief Justice struck down under the "full and equal benefit of all laws" provision of the Civil Rights Act, a Maryland system for apprenticing freed Negro children to their former masters under conditions more rigorous than those applied to other apprentices. See also *Smith v. Moody*, 26 Ind. 299, 306 (1866); *People v. Washington*, 36 Cal. 658 (1869); cf. *Bowlin v. Commonwealth*, 2 Bush 5 (Kentucky 1867).

<sup>56</sup> FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949); WARSOFF, *EQUALITY AND THE LAW* (1938).

The principal source and nature of the doubt have already been indicated in the discussion of the third debate over the Thirteenth Amendment. The doubt related to the capacity of the Thirteenth Amendment to sustain this far-reaching legislative program. The Thirteenth Amendment, it had been argued, was designed merely to free the slave from personal bondage. Section Two restricted rather than enlarged its scope. And, in any event, the amendment could not be construed as destroying or seriously modifying the federal system as it existed hitherto. Primarily these arguments were raised by those who were basically opposed to the Civil Rights and Freedmen's Bureau bills. But the impetus thus given a new amendment was sug-mented by other doubts entertained by some of the staunchest friends of the legislation. From the very beginning of the Thirty-ninth Congress, there were those who felt that the rights secured in the Civil Rights and Freedmen's Bureau bills, especially as they applied to the Negro, should be placed beyond the power of shifting congressional majorities. This group did not question the program by which the rights of individuals were nationalized, by which the jurisdiction of the states was ousted if not properly exercised and that of Congress and the Federal courts instituted. They felt that this program should be made an inescapable obligation of the whole federal government—not merely a discretionary alternative of Congress—by fixing it in the Constitution itself. This idea, well defined at the beginning of the Thirty-ninth Congress among the radicals, gradually spread and became the conviction of the overwhelming majority of all Republicans, radicals and conservatives alike.

Thus the Thirteenth Amendment played an important part in the evolution of the Fourteenth Amendment, not as universalizing freedom which the Fourteenth Amendment presupposes, or as the first step in a comprehensive two or three step plan, but because, after its passage, doubts about its adequacy became so serious as to make it seem advisable to try to do the same job all over again by another amendment. And the character of the doubts, the existence of which gave rise to the new amendment and which that amendment was intended to remove, tell much about the meaning of the new amendment. The statutory plan which the Fourteenth Amendment was to place beyond all constitutional doubt and the substantive provisions of which it was to incorporate was intended "to protect every individual in the full enjoyment of the rights of person and property." That statutory plan did supply the means of vindicating those rights through the instrumentalities of the federal government. It did intrude the federal government between the state and its inhabitants. It did constitute the federal government the protector of the civil, i.e. the natural rights of the individual. It did interfere with the states' right to determine disputes relating to property, contracts and crimes. It did "revolutionize the laws of the states everywhere." It did overturn the pre-existing division of powers between the state and the central government. All of these things can be read in the words of the Civil Rights bills. Their presence there, can be amply confirmed by resorting to the intentions of the framers, the circumstances which brought

the act forth, the historical experience which the act was designed to culminate and embody. The fact that the new amendment was written and passed, at the very least, to make certain that that statutory plan was constitutional, to remove doubts about the adequacy of the Thirteenth Amendment to sustain it, and to place its substantive provisions in the Constitution itself, should place the minimum capacity of the new amendment beyond controversy.

#### VI.

The anti-slavery backgrounds of the Civil War amendments are conceded by all. The nature of those backgrounds, however, have been almost entirely forgotten.

In its bearing on the Constitution and the Civil War amendments, the anti-slavery movement must be viewed, first, as a great historic experience in the national life of the United States. The Civil War amendments were the culmination and embodiment of that experience. As such, their meaning is to be gathered from the comprehensive goals of the abolitionist crusade, from the abrogation of the natural rights of men, bond and free, black and white, which were the active causes of that crusade, from the unmistakable nationalistic implications of the abolitionist movement, and from the constitutional theory which the abolitionists evolved to fit those goals, causes and implications. Read in this way, the Thirteenth and Fourteenth Amendments can only be taken to assure national constitutional and governmental protection of men in their natural rights or of citizens in their privileges and immunities fully and equally and regardless of federal principles—natural rights which accordingly government could never allow to be abrogated by others and could itself abrogate only when forfeited by crime proved by established legal procedures.

The anti-slavery origins of the Civil War amendments may be viewed, second, in a far narrower framework: in the limited context of the immediate political and legislative history—say 1861 to 1866—which encompassed the actual translation of crusading goal into constitutional amendment, of abstract doctrine into concrete enactment. The short range history and the limited context show the manner in which the translation was made and confirm and repeat conclusions derived from the long range history and the broad context.

The Republican Party, operating through its eventual control of Congress, propelled by an internal machine made up of radicals and downright abolitionists, moving forward under a platform whose anti-slavery constitutional principles and statements were directly traceable through Giddings and Chase to organized abolitionist origins—having achieved political power and capitalizing on the outcome of the Civil War carried through a combined constitutional and legislative program consisting of the Thirteenth Amendment, the Freedmen's Bureau and Civil Rights bills, and the Fourteenth Amendment. In doing so, they employed the constitutional ideas, the very concepts and clauses which, a quarter of a century earlier,

had been evolved by Birney and Weld, Stanton and Wright, Stewart and Tiffany, Goodell, Gerrit Smith, Chase and Olcott.

The Thirteenth Amendment nationalized the right of freedom. It thereby nationalized the equal right of all to enjoy protection in those natural rights which constitute that freedom. The Freedmen's Bureau Bill and the Civil Rights Act supplied national government protection to the rights of contract, of property, of the equal protection of the courts and of the "full and equal benefit of all laws for the security of person and property." These two measures were legislative implementations of the Thirteenth Amendment as authorized by its second section. The Fourteenth Amendment reenacted the Thirteenth Amendment and made the program of legislation designed to implement it constitutionally secure or a part of the Constitution. The Fourteenth Amendment added again, as the Thirteenth Amendment had done earlier, a power and duty of congressional enforcement. The national protection of men in their natural rights or of citizens in their privileges and immunities which was the basic idea of this whole repeatedly reenacted program—expressed in its language, reiterated in the debates upon it, emphasized in the circumstances which brought it forth stage by stage, and made inevitable by the historic experience and movement which it culminated and embodied—extended to individuals without regard to the private or governmental character of the violator and was both constitutional and congressional.