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# RATIFICATION OF THE FOURTEENTH AMENDMENT IN NORTH CAROLINA

*James E. Bond\**

## INTRODUCTION

This study of the North Carolina debate over ratification of the fourteenth amendment illustrates the value of the state ratification debates as an interpretive source. The debate was a long one, and advocates fully expressed their views. If the North Carolina debate reflects a pattern common throughout the other states, that pattern would call into question the validity of many of the interpretations that the Supreme Court has given section 1. The debate in North Carolina does not suggest any previously unsuspected understanding. It does, however, reinforce the view that section 1 was never intended to incorporate the Bill of Rights, that the due process clause was never intended to guarantee substantive rights, and that the equal protection clause was never intended to justify special legislation for minorities.

This study also illustrates the challenge of analyzing the state ratification debates. In North Carolina, the legislative debate on the fourteenth amendment was not recorded. The Joint Committee Report on the amendment is relevant but scarcely illuminating. The illuminating debate occurred on the stump. That debate must be pieced together from the surviving speeches, the editorial commentary that they provoked, and the private letters that critiqued both speeches and commentary. The debate is not lost, but it is buried in materials not readily available or easily assimilated.

The importance of the fourteenth amendment alone justifies the effort. The fourteenth amendment is a second American Constitution, the "new birth of freedom" for which Lincoln had prayed at Gettysburg. It therefore merits the same exhaustive historical annotation that scholars have lavished on the original. Perhaps in these state ratification debates will be found the interpretive key that will at last unlock the historical mysteries that conceal the original understanding.

The first section of the fourteenth amendment tells a state that it cannot deprive an American citizen of the privileges and immunities of citizenship or deny any person within its jurisdiction due process or equal protection of the laws.<sup>1</sup> Added as a sop to the radical Republicans who

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1. Section 1 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

insisted on its inclusion, the first section has outlived the other three substantive sections, all of which their framers thought more important. Today the first section is the fourteenth amendment. More constitutional cases turn on the application of its three great clauses than on the application of any other section of the Constitution. Yet more than a century after its adoption, litigants still quarrel over the meaning of those clauses.

In an effort to determine the original understanding, scholars have analyzed the social, economic, and political conditions that induced Congress to consider the amendment.<sup>2</sup> They have also dissected the legislative debates that persuaded Congress to adopt it.<sup>3</sup> These scholars have not studied the subsequent state ratification debates, however.<sup>4</sup> This omission is curious for two reasons. First, all who believe that the original understanding should determine the contemporary application of the amendment concede the relevance of the state debates.<sup>5</sup> Second, the often bitter fights over its ratification generated widespread discussion of the amendment in the states from 1866 to 1868.

The present article focuses on the ratification debate in North Carolina. That debate is instructive for several reasons. In the first place, the legislature considered the amendment on two separate occasions. In December 1866, the legislature overwhelmingly rejected it. Little more than eighteen months later, a new legislature overwhelmingly endorsed it. Sec-

reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

2. See, e.g., J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1956); J. TENBROEK, *EQUAL UNDER THE LAW* (1956) (originally published in 1951 under the title *THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT*); Graham, *The Early Anti-Slavery Backgrounds of the Fourteenth Amendment*, 1950 WIS. L. REV. 479, 610.

3. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY* 37-68, 134-245 (1977); 2 W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 1083-118 (1953); B. KENDRICK, *JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* (1914); Avins, *Social Equality and the Fourteenth Amendment: The Original Understanding*, 4 HOUS. L. REV. 640 (1967); BICKEL, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); FAIRMAN, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949); KELLY, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049 (1956); VAN ALSTYNE, *The Fourteenth Amendment, the Right to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33.

4. Professor Fairman did survey the state debates in his influential article. See FAIRMAN, *supra* note 3, at 81-132. Justice Harlan surveyed "state materials relating to the ratification process" even more briefly in *Oregon v. Mitchell*, 400 U.S. 112, 195-200 (1970) (Harlan, J., concurring in part and dissenting in part). See also H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908).

5. The Supreme Court itself recognized the relevance of the state debates when it ordered counsel in *Brown v. Board of Educ.*, 345 U.S. 972 (1953), to answer the following question: "What evidence is there that . . . the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?" See generally Kaczorowski, *Searching for the Intent of the Framers of the Fourteenth Amendment*, 5 CONN. L. REV. 368 (1972-73).

ond, North Carolinians fought several political battles between 1866 and 1868, and in those battles they often debated the meaning of the fourteenth amendment. Third, North Carolinians adopted a new constitution in 1868 and thereafter enacted reform legislation, much of which reflected their understanding of the concepts embodied in the fourteenth amendment. Finally, North Carolinians throughout this period argued incessantly about two topics critical to any understanding of the fourteenth amendment: the status of blacks and the relationship between the national and state governments.

#### I. EARLY DEBATE OVER THE FOURTEENTH AMENDMENT: THE CONSERVATIVES DOMINATE

The debate in North Carolina can best be understood if it is followed chronologically, because the history of the fourteenth amendment in North Carolina cannot be understood apart from the history of the state.<sup>6</sup> The two year debate over the amendment both reflected and shaped that history. The successive political crisis in which the amendment became entangled both illuminated and obscured its meaning. The story of the fourteenth amendment in North Carolina thus begins, not with its submission to the states in June 1866, but a year earlier, with Lee's surrender at Appomattox.

Following the collapse of the Confederacy, North Carolina, like other southern states, acquiesced in what it understood to be the demands of the national government. It adopted an anti-secession ordinance.<sup>7</sup> It ratified the anti-slavery amendment.<sup>8</sup> It passed laws that guaranteed the former slaves certain civil rights.<sup>9</sup> By early 1866, these actions had convinced

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6. The standard history for the period is J. HAMILTON, *RECONSTRUCTION IN NORTH CAROLINA* (1914). Hamilton's work is thorough but biased. At points, it reads like an apology for the Democratic Party and its aristocratic and racist policies. The chronological appendix following this article will also help the reader understand the period. See Appendix.

7. The 1865 State Convention, organized at President Johnson's direction by William Holden, the provisional governor, promulgated the ordinance, which voters approved on November 9, 1865, by a vote of 20,870 to 1,983.

8. During the legislative debate over ratification in late November 1865, the House defeated a resolution that would have stated the legislature's understanding that the enforcement clause did not give Congress any power to legislate on behalf of the civil or political rights of freedmen. *HOUSE JOURNAL* 26 (1865). After the Senate ratified, one of its committees reported a similar resolution, which was passed at the end of the session. *SENATE JOURNAL* 84 (1865). These debates over Congress' enforcement powers foreshadowed the debate over § 5 of the 14th amendment. Earlier in the month, the people themselves had approved the anti-slavery ordinance promulgated by the State Convention.

9. The 1865 State Convention declined to address the problem of the legal status of freed slaves. Governor Worth called a special session of the legislature in January 1866, and it did abolish some laws that treated blacks differently from whites. It retained many distinctions, however. For example, blacks were given the privilege of suing in court, but they could not testify in altercations between two white men unless both agreed to accept the testimony. Another example of the double standard was the punishment for rape, which carried a mandatory death penalty for blacks only. See generally J. HAMILTON, *supra* note 6, at 153-56.

President Johnson that the southern states should be readmitted to the Union.<sup>10</sup>

Conservative southern leaders readily agreed, and they publicly trumpeted presidential pronouncements on restoration.<sup>11</sup> In private, however, these conservative leaders expressed grave reservations about the validity and wisdom of presidential Reconstruction. While they had submitted to its terms because they saw no other alternative, they considered their submission "a moral sacrifice justified only by overriding practical considerations."<sup>12</sup>

The conservative southern leaders' condemnation of the Civil Rights Bill, passed in the spring of 1866 over the President's veto, demonstrated their unrelenting hostility to equal rights for blacks and their continuing suspicion of national authority. The editor of the most influential conservative paper in the state denounced the bill as the product of "a mad and foolish policy of negro equality."<sup>13</sup> Although the editor insisted that the bill conferred on blacks only those civil rights already guaranteed them under the laws of North Carolina,<sup>14</sup> he feared that blacks and their supporters would demand social and political equality under its provisions.<sup>15</sup> The fact that federal courts would have jurisdiction to decide those claims made recognition of these rights all the more likely. One observer thus concluded: "The Southern people can regard the bill in no other light than a direct impeachment of their declarations that they will do justice to the freedmen, and of the fidelity of our Judiciary and Courts."<sup>16</sup> Discussions of the bill in the state's conservative press revealed how "the Southern people" would "do justice to the freedmen." First, they would construe the privileges and immunities of citizenship narrowly. Only those privileges and immunities peculiar to United States citizenship and necessary to civil freedom would be guaranteed blacks.<sup>17</sup> The privileges and immunities of citizenship did not include social or political rights. Second, conservative leaders revealed that they would view

10. By the summer of 1866, most of the southern states had reorganized their governments under the terms of presidential Reconstruction. They had complied with all the President's demands and had elected officials who felt that their states were thus entitled to be readmitted.

11. For example, Robert E. Lee praised the "strong efforts . . . being made by conservative men, North and South, to sustain President Johnson in his policy." 4 D. FREEMAN, ROBERT E. LEE 240 (1935).

12. E. McGee, *North Carolina Conservatives and Reconstruction* 358 (1972) (unpublished doctoral dissertation, University of North Carolina).

13. *Raleigh Sentinel*, Apr. 11, 1866, at 2, col. 1.

14. *Id.*, Apr. 14, 1866, at 2, col. 1. Later, the conservatives conceded that freedmen possessed "certain rights . . . agreed upon and sanctioned by the universal consent of mankind, called *natural rights*. These are the rights of protection to life, to liberty, or to property, and to the pursuit of happiness, or what has been more commonly designated, of late, '*equality before the law*.'" *Id.*, Nov. 5, 1867, at 2, col. 1. Freedmen in North Carolina were legally recognized as citizens.

15. *Id.*, Apr. 4, 1866, at 2, col. 2.

16. *Wilmington Daily Dispatch*, Apr. 11, 1866, at 2, col. 4.

17. *Raleigh Sentinel*, Apr. 12, 1866, at 2, col. 1.

narrowly any obligation to treat blacks equally. They expressed horror that blacks "had presumed to walk into churches and occupy seats usually . . . occupied by whites"<sup>18</sup> or that officials might have to perform mixed marriages.

At the same time, a minority of white North Carolinians, many of whom had opposed the war or had quickly lost enthusiasm for it, refused to follow the conservative white majority. Aligning themselves with the newly freed blacks, they hoped to create a new liberal majority.<sup>19</sup> This coalition was prepared to recognize far broader rights for blacks than were the conservatives. Although these minority whites initially waffled on the question of negro suffrage, they came to realize that their electoral success depended upon enfranchising blacks. The leaders of what ultimately became the Union or Republican Party worked closely with the radical leadership in Congress.<sup>20</sup> They plied the radicals with stories of

18. *Id.*, May 4, 1866, at 2, col. 2.

19. These minority whites sought to fuse poor whites and blacks into a majority party:

In one word, conservatism means simply this: none but the educated and the property-holders should be allowed to take any part in the government. The vast majority of the people, both white and colored, not being blessed with wealth or education, are thus placed at the mercy of the governing few, and all history shows that a limited governing class or oligarchy, have invariably oppressed the masses to advance themselves. The same line of argument that takes suffrage from the black man, takes it away from the humble white man; and conservative politicians have no hesitation in saying privately, that if their views were carried out, there should be a property qualification for white and black alike. If the poor uneducated white man would guard his own rights, let him see to it that the colored citizens are not deprived of theirs.

Raleigh Standard, May 16, 1868, at 2, col. 1. According to the Asheville Pioneer:

[T]here can be no doubt that the sixty thousand colored men of this State will, with perhaps a rare exception, cast their lot with the Republican party. Out of the eighty thousand white votes of this State we may safely put thirty or forty thousand as the number of loyal votes, and with these and the sixty thousand colored votes we shall have such a triumph for the Republican party . . .

Asheville Pioneer, Sept. 26, 1867, at 1, col. 1.

Conservatives may have feared this populism as much as they feared civil rights for blacks. The editor of the Sentinel criticized the "new [1868] constitution" for the following reason: "It will totally discard that essential republican principle that property has a claim to representation or a right to protection or guarantee in the property holder qualifications of the representative or public officer." Raleigh Sentinel, Feb. 18, 1868, at 2, col. 1. *See also* Letter to A.M. Tomlinson & Sons (Apr. 11, 1868), reprinted in 2 CORRESPONDENCE OF JONATHAN WORTH 1185 (J. Hamilton ed. 1909):

I regard the proposed new [1868] constitution as virtual confiscation. No government, based on the will of mere numbers, irrespective of intelligence or virtue, can last long. Providence has so ordered it that a majority of mankind are improvident. Self interest is a ruling principle of our frail nature and hence the non-property holder will be antagonistic to the property holder. Civilization consists in the possession and protection of property. If we cannot defeat the adoption of the proposed Constitution the principle will be triumphant that those who have no interest in the protection of property and the preservation of order, will be the ruling power.

20. For example, Holden went to Washington in December 1866 and January 1867 to confer with Congressional radicals. H. Raper, William Woods Holden: A Political Biography 204 (1951) (unpublished doctoral dissertation, University of North Carolina). Those who

conservative intransigence on race questions and conservative persecution of Union sympathizers. They privately urged a stringent Reconstruction that would, not surprisingly, bring them into power.

Leaders of the state's nascent Republican Party thus advised North Carolinians to accept the fourteenth amendment. They warned that if North Carolina refused to ratify the amendment, she would be subjected to even harsher terms.<sup>21</sup> William Holden, the former provisional governor who led the radicals, speculated, for example, that Congress might confiscate land and give everyone forty acres and a mule.<sup>22</sup>

Conservative leaders, echoing President Johnson's plea, advised North Carolina to reject the amendment. These conservatives watched and waited, hoping that a resurgent Democratic Party under the President's leadership would snuff out Republican radicalism in the North.<sup>23</sup> At the same time, they fought to prevent its emergence in North Carolina.

During the late summer and fall of 1866, the people thus debated the wisdom of ratifying the fourteenth amendment. It was the fundamental issue in the gubernatorial election between Worth, the conservative candidate, and Dockery, Holden's stand-in,<sup>24</sup> and in most legislative districts.

could not travel to Washington "flooded the mails with letters of advice to radicals in Congress." Russ, *Radical Disfranchisement in North Carolina 1867-1868*, 11 N.C. HIST. REV. 271, 275-76 (1934).

Governor Worth was apprized of Holden's efforts by his "eyes" in Washington, B.S. Hedrick:

I have it on good authority that Dr. Powell and Holden have a scheme, approved by certain members of Congress to go to work and organize a *new* so-called loyal State Govt. They will begin by invitations to the people to assemble in their sovereign capacity and elect delegates to a Convention at which all *loyal men*, white and black will be allowed to vote. This Convention will form a constitution and such as will be accepted by Congress.

Letter from B.S. Hedrick (Feb. 26, 1867), reprinted in 2 CORRESPONDENCE OF JONATHAN WORTH, *supra* note 19, at 900.

21. A few conservatives recommended ratification for that reason as well. See, e.g., *Western Democrat*, Oct. 9, 1866, at 3, col. 1 ("We do not like the amendment, but if we can do no better, we would advise its adoption."). See also *id.*, Mar. 26, 1867, at 3, col. 1; *id.*, Mar. 5, 1867, at 3, col. 1; *id.*, Feb. 19, 1867, at 3, col. 1; *id.*, Dec. 4, 1866, at 3, col. 1.

22. *Raleigh Standard*, Apr. 4, 1866, at 3, col. 1. Although both the white and black leaders of the Republican Party opposed confiscation, they used it as a threat. See *Raleigh Register*, Sept. 6, 1867, at 3, col. 1 ("How can it be expected that men will cooperate with a party which threatens them with confiscation . . . ?"). One student has concluded that confiscation was one of the two most discussed issues in the summer of 1867. H. Raper, *supra* note 20, at 212.

23. *Wilmington Journal*, Sept. 27, 1866, at 2, col. 1 ("So long as the President stands by them, the South will refuse to ratify these amendments."). Even after the Democratic election debacle in the North, Governor Worth reassured his conservative supporters that "the great body of [the Northern people] do not entertain towards us the destroying malevolence, which we would infer from the speeches of many of their intemperate partisan leaders and a portion of the press." EXEC. & LEG. DOC. OF N.C., EXEC. DOC. NO. 25, at 4 (1866-67).

24. General Dockery declined to accept the nomination, given by a small group of Unionists under Holden's leadership. The General nevertheless declared in favor of the 14th amendment, and the Unionists actively campaigned for him. Worth sniffed:

By the end of the campaign, all observers agreed that "[n]o subject has been more fully discussed in North Carolina, and none upon which the great body of our people have made up a more deliberate judgment, than that."<sup>25</sup>

Those who opposed ratification relentlessly savaged the amendment. They objected to it on broad constitutional grounds. Congress had no right to promulgate the amendment because the southern states had been excluded from the deliberative process.<sup>26</sup> They objected to its form. The amendment combined four unrelated provisions, each one a separate amendment.<sup>27</sup> They objected to it because it imposed dishonorable terms. "Humiliating" and "degrading" were the adjectives most frequently used to describe its provisions.<sup>28</sup> One unhappy gentleman captured this sentiment graphically in a private letter: the radicals, he wrote, propose to make us "drink our own piss and eat our own dung."<sup>29</sup>

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It is understood here this evening that Genl Dockery declines to accept the nomination, on the grounds that the nominating meeting was not large enough—and on the further ground that the election is too near at hand to give him time to canvass the State,—but approving the Howard amendment.—The purpose is, through secret organizations, to vote for him without subjecting him to the mortification of defeat as a Candidate. You will probably find his printed tickets at every precinct.

Letter to C.C. Clark (Oct. 1, 1866), *reprinted in* 2 CORRESPONDENCE OF JONATHAN WORTH, *supra* note 19, at 806.

25. Raleigh Sentinel, Dec. 6, 1866, at 2, col. 1.

26. The following excerpt from a speech by Governor Worth typifies the argument made on this point:

The Constitution provides that "the House of Representatives shall be composed of members, chosen every second year by the people of the several States," and that "the Senate of the United States shall be composed of two Senators from each State." This proposition is not made to us by a Congress so composed; this State, with eleven others, being denied representation in the body which proposed thus to amend the fundamental law. It was the clear intention of the Constitution that every State should have a right to representation in a Congress proposing alterations in the original articles of compact; and on this account alone, no State, pretending to have rights under the Constitution can, with proper scrupulousness or dignity, ratify an amendment thus proposed.

Greensboro Patriot, Nov. 23, 1866, at 1, col. 3.

27. The Greensboro Patriot noted:

It is remarkable that this proposed amendment contemplates, under one article, to change the Constitution in eight particulars; some of them altogether incongruous to be ratified as a whole. We are not allowed to ratify such of them as we approve and reject those we disapprove.—This is the first attempt to introduce the vice of omnibus legislation into the grave matter of changing the fundamental law.

*Id.*

28. See, e.g., Raleigh Sentinel, July 7, 1866, at 2, col. 2 (amendment "designed to degrade and humiliate the South"); Wilmington Journal, June 28, 1866, at 4, col. 2 (approval of amendment would require "surrender of honor and manhood"); Old North State, June 26, 1866, at 2, col. 1 (amendment is a "degrading" proposition); Wadesboro Argus, May 16, 1866, at 2, col. 2 (amendment is a "plan to heap indignity on the South"); Fayetteville News, May 8, 1866, at 2, col. 1 (amendment is "dishonorable"); Western Democrat, May 8, 1866, at 3, col. 1 (amendment contains "degrading" provisions).

29. Letter from D.F. Caldwell (Sept. 30, 1866), *reprinted in* 2 CORRESPONDENCE OF



The disqualification provisions of section 3 particularly incensed a majority of white North Carolinians.<sup>30</sup> As soon as the Reconstruction Committee made its proposal public, the most widely read conservative paper in the state labeled the third section an "insult."<sup>31</sup> Section 3 would "bar out all citizens who, in the estimation of the people, are fit to fill their places."<sup>32</sup> Most white North Carolinians refused to turn their backs on those who had led them through the war. In election after election, they returned secession leaders to public office; those elected promptly filled appointive offices with men who had been sympathetic to secession.

These leaders saw no reason why they should be disqualified. Indeed, they railed against the injustice of being excluded from office. Governor Worth, writing a friend, exclaimed: "This Howard amendment [the fourteenth amendment], if adopted, declares me so contaminated that I am unworthy to be elected to any office in the State—even that of Constable."<sup>33</sup> As the campaign drew to a close, the governor repeated the point. "Come what may I will not ratify an amendment of the Constitution by which I would declare myself ineligible as a constable . . ."<sup>34</sup> At the end of the campaign, the editor of the *Wilmington Daily Dispatch* still found that North Carolinians objected to the amendment primarily because "it excluded a class of their people."<sup>35</sup>

Disgust at the disqualification provision hardly exhausted the specific objections to ratification. Opponents also objected to section 2, which forced the state to choose between granting blacks the right to vote and losing representation in Congress. Most white North Carolinians recoiled at the prospect of black voters, and diatribes against it filled the air and the press. As the editor of the *Sentinel* declared, "[g]iving to the colored people generally the right of suffrage would lead to the worst consequences."<sup>36</sup> Most white North Carolinians believed that blacks could not vote intelligently because they had neither brains nor morals.<sup>37</sup> This in-

JONATHAN WORTH, *supra* note 19, at 802.

30. *Old North State*, Sept. 29, 1866, at 2, col. 3.

31. *Raleigh Sentinel*, May 3, 1866, at 2, col. 1.

32. *Greensboro Patriot*, July 13, 1866, at 4, col. 2.

33. Letter to D.H. Starbuck (Sept. 29, 1866), *reprinted in 2 CORRESPONDENCE OF JONATHAN WORTH*, *supra* note 19, at 796.

34. Letter to B. S. Hedrick (Oct. 1, 1866), *reprinted in 2 CORRESPONDENCE OF JONATHAN WORTH*, *supra* note 19, at 805.

35. *Wilmington Daily Dispatch*, Oct. 31, 1866, at 2, col. 1.

36. *Raleigh Sentinel*, June 16, 1866, at 2, col. 1.

37. The following description captures how most conservatives viewed the black: "He is careless, credulous and dependent; easily excited, easily duped, easily frightened; always the ready victim of the stronger will. He is material for the hands of anybody who wishes to make use of him. Invested with full political rights, the race must be a magazine of mischief." *Wadesboro Argus*, Nov. 22, 1866, at 1, col. 5.

Although the public statements of many whites about blacks shock the reader today, they were temperate in comparison to the private comments many uttered. Governor Worth wrote that "the negro is a drone—he cannot (because nature has forbidden it) be made a good and useful citizen. . . . [T]he normal condition of the African is that of a savage. . . . [P]rovidence, for inscrutable reasons, has made him incapable of permanent civilization and useful citizenship." Letter to William Clark (Feb. 16, 1868), *reprinted in 2 CORRESPONDENCE*

tense fear of negro suffrage generated enormous opposition to the amendment, which was, conservative leaders asserted, designed to force negro suffrage on the South.<sup>38</sup>

The general constitutional objections to the drafting of the amendment and the more specific objections to the disqualification and representation provisions dominated the discussion,<sup>39</sup> but opponents did not overlook section 1. In discussing it, opponents concentrated their fire on three points, repeating the same arguments they had made against the Civil Rights Bill. Their rhetorical strategy thus belied their contention that section 1 extended new rights to blacks. Instead, their arguments implicitly confirmed the view that section 1 merely transformed the statutory provisions of the Civil Rights Bill into constitutional law. Similarly, conservatives impliedly conceded the narrow scope of section 1 when they dismissed the argument that ratification would assure readmission by insisting that Congress would still demand political rights for blacks.<sup>40</sup>

The ambiguity of the privileges and immunities clause was, of course, their first objection. A radical Congress or meddlesome federal judges might construe it to include all sorts of political rights, including the right to vote. Radicals would argue that suffrage is a privilege and immunity of citizenship, and under section 5 Congress might pass statutes guaranteeing suffrage for blacks.<sup>41</sup> In this way opponents raised once again the bug-

OF JONATHAN WORTH, *supra* note 19, at 1155.

38. Raleigh Sentinel, Aug. 14, 1866, at 2, col. 2.

39. That these were the major objections is evidenced by the following summary, which the Sentinel later offered:

We could not give [the 14th amendment] our approval: first, because it proposed, as we thought, a radical change in the government itself, conferring powers upon the Congress over the internal police and regulations of the States, at war with the whole spirit and tone of the Constitution; at least that that was its tendency and would result from its adoption. This, we repeatedly stated, was our strongest objection to it. Secondly, because we regarded the new principle of representation embraced in it, as necessarily forcing upon the Southern States and, designed to force upon them, negro suffrage.

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Thirdly, we opposed it, because the disfranchising clause forced upon Southern men, no more worthy —no more loyal than the disfranchised, the dishonorable act, of fixing upon their neighbors and friends the stigma of treason.

*Id.*, Mar. 6, 1867, at 2, col. 1.

Another recurrent criticism was that the radicals sought to insure their political supremacy through the 14th amendment (and, later, through the Reconstruction Acts). *See, e.g., id.*, Feb. 15, 1867, at 2, col. 1 ("The fixed and unalterable purpose of the Republican party, to hold on to the control of the government at all hazards, and to maintain that position, whatever may be the consequences, has been apparent for some time to all attentive observers."); Carolina Watchman, Oct. 1, 1866, at 1, col. 1 (real point of constitutional amendment is to deprive the South of all representation for the negro); Wilmington Daily Dispatch, May 4, 1866, at 2, col. 3 (intent of amendment is to deprive the South of opportunity to participate in next presidential election).

40. *See* Wilmington Daily Dispatch, Oct. 10, 1866, at 2, col. 1.

41. *See, e.g.,* Fayetteville News, Feb. 12, 1867, at 2, col. 2 ("universal and impartial suffrage" is a substantial feature of the Howard amendment); Raleigh Sentinel, Sept. 29, 1866, at 2, col. 1; Wilmington Daily Dispatch, May 16, 1866, at 2, col. 1 (Congress has power

aboo of the black voter.

The ambiguity of the equal protection clause was a second objection. A radical Congress or meddlesome federal judges might construe it to include all sorts of rights, including the right of blacks to associate with whites. Many whites loathed any personal contact with blacks other than as their masters or employers. Going to school or church together was anathema.<sup>42</sup> Serving under blacks in the militia or being judged by them in court was inconceivable.<sup>43</sup> Intermarriage was unthinkable.<sup>44</sup> Whites feared mongrelization, and opponents of the amendment played on their fears.

Third and finally, opponents objected to the national government's assumption of authority in these areas. They repeatedly raised the spectre that Congress would usurp traditional state authority under the guise of enforcing the section 1 guarantees.<sup>45</sup> Opponents quoted the dire prediction of the Governor of Mississippi: "We may find Congress assuming absolute control over all the people of a state and their domestic concerns and this virtually abolishes the State."<sup>46</sup> The ever vigilant editor of the *Sentinel* warned: "The first and fifth sections . . . contain the germ of consolidation and destruction of the . . . state governments."<sup>47</sup>

Even if Congress chose not to exercise its section 5 powers, opponents feared that federal judges might seize upon the section 1 guarantees as a "pretext for extending the jurisdiction of the Federal Courts into the most minute and trivial occurrences, between native white citizens and blacks, and between the former and immigrants from other states."<sup>48</sup>

to declare the right to vote a privilege of citizenship and impose Negro suffrage).

42. *Raleigh Sentinel*, June 19, 1866, at 2, col. 3. In an editorial on "Colored Schools," the editor remarked: "We have a proper sympathy for the welfare of the colored race, but we do not prefer its welfare to the ruin of the Southern whites." *Id.*

43. *Id.*, Oct. 7, 1867, at 2, col. 1. "We will guarantee that no intelligent lawyer of . . . the city of Boston could contemplate the spectacle, daily presented in our Courts, of negroes fresh from the corn-field and the hovel filling our jury-boxes, and sitting in judgment upon the most complicated issues of fact and the most vexed problems of law, without shuddering." *Id.*

44. *Wilmington Daily Dispatch*, Apr. 11, 1866, at 2, col. 4 (denouncing Civil Rights Bill because it will require mixed marriages to be performed on pain of penalty). Even those generally sympathetic to black rights disapproved of interracial marriages. The special committee that Provisional Governor Holden had appointed recommended, for example, that marriage between whites and blacks be forbidden and that any person issuing a license or performing a ceremony be punished.

45. See, e.g., *Raleigh Sentinel*, Nov. 15, 1867, at 2, col. 1 (the 14th amendment "changes the entire form of government"); *Greensboro Patriot*, Nov. 23, 1866, at 1, col. 3 (states will cease to be self-governing communities); *Old North State*, Oct. 11, 1866, at 2, col. 1 (amendment "is consolidation in its worst form"); *Wilmington Daily Dispatch*, Sept. 13, 1866, at 2, col. 1 (amendment would "revolutionize the whole character of the government").

46. *Wilmington Daily Dispatch*, Oct. 16, 1866, at 2, col. 2.

47. *Raleigh Sentinel*, May 2, 1866, at 2, col. 1.

48. *Wadesboro Argus*, Oct. 11, 1866, at 1, col. 2. The following commentary illustrates the concern that conservatives repeatedly voiced:

If there be any feature in the American system of freedom which gives to it practical value, it is the fact that a municipal code is provided under the jurisdiction of each State, by which all controversies as to life, liberty or property,

Since the only federal court in the state sat in Raleigh, black plaintiffs could force those against whom they complained to travel far from their homes. "What is this," asked one critic, "but consolidation and the destruction of the great principle of Republican liberty that the municipal government of every State shall dispense justice in the neighborhood of the parties litigant . . . ?"<sup>49</sup> These critics thus understood that section 1 constituted "a radical departure from the organic character of the government."<sup>50</sup>

Proponents of the amendment downplayed these fears. They insisted that the privileges and immunities of citizenship included only those rights enumerated in the Civil Rights Bill: the rights to contract, sue, and hold property.<sup>51</sup> These were civil rights, and proponents sharply distinguished these from political and social rights. They repeatedly assured voters, for example, that the fourteenth amendment did not enfranchise blacks.<sup>52</sup> They emphasized that the equal protection clause simply insured blacks equal treatment before the law. Thus, for example, the criminal law could not impose stiffer penalties on blacks than on whites.<sup>53</sup>

Holden advocated ratification from the beginning, and his views are entitled to great weight because he was the principal spokesman for the amendment in North Carolina. Through his Raleigh newspaper, he insistently urged ratification. On the hustings, he whipped up support for the amendment. Holden dominated the debate so thoroughly that opponents invariably cited his statements whenever they summarized the argument for ratification.

Holden himself restated and summarized that argument in a sixteen-page pamphlet published in Raleigh on September 20, 1866. Holden concentrated on the general proposition that approval was essential to resto-

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except in the now limited field of Federal jurisdiction, are determined by a jury of the county or neighborhood where the parties reside and the contest arises; but, if Congress is hereafter to become the protector of life, liberty and property, in the States and the guarantor of equal protection of the laws; and by appropriate legislation to declare a system of rights and remedies, which can be administered only in the Federal Courts, then the most common and familiar officers of justice must be transferred to the few points in the State where these courts are held, and to judges and other officers, deriving and holding their commissions, not from the authority and people of the State as heretofore, but from the President and Senate of the United States.

Greensboro Patriot, Nov. 23, 1866, at 1, col. —.

49. Wadesboro Argus, Oct. 11, 1866, at 1, col. 2.

50. See Raleigh Sentinel, Apr. 26, 1866, at 2, col. 1; see also *id.*, May 2, 1866, at 2, col. 1.

51. See, e.g., Old North State, Oct. 6, 1866, at 2, col. 1 (Congress wants to insure freedmen in the protection of their civil rights); Western Democrat, May 1, 1866, at 3, col. 3 (§ 1 prohibits discrimination "as to the civil rights of persons").

52. See Raleigh Sentinel, Aug. 14, 1866, at 2, col. 2 (no negro suffrage in Howard amendment). Holden did not declare himself in favor of negro suffrage until January 1, 1867, when he spoke at the African Church in Raleigh. Asheville Pioneer, Sept. 26, 1867, at 1, col. 1.

53. See Wilmington Daily Herald, Jan. 24, 1866, at 2, col. 1 (blacks cannot be sold into servitude for an offense because laws must treat blacks and whites equally).

ration and that only those loyal to the Union could effect restoration. He did, however, analyze "the Congressional plan," which he characterized as "generous and merciful" and "similar in principle and nearly the same in detail" as the President's plan.<sup>54</sup> He devoted but one paragraph to the first section:

This plan, after recognizing, as the President's plan does, the existence of the States as States, proposes, first, that a colored man from Massachusetts shall have the same liberty in North Carolina that he possesses in his own State, and that a colored man from North Carolina shall have the same liberty in Massachusetts which he possesses at home. It provides that no State shall abridge the privileges or immunities of a citizen of the United States, or deny to any person life, liberty, or property or the equal protection of the law. Who objects to that? I am sure President Johnson does not; for the civil rights bill, now in existence as a law, and which will in no event be repealed, makes the same provision for the colored race, and the objection of the President was not to this feature of that law, but to that part of it which, as he thought, improperly subordinated the State Courts to the Courts of the United States. If it be said that there is some concealed purpose in this provision hereafter to force negro suffrage on the States as the only means of securing to colored people the "privileges or immunities" referred to, the answer is that this cannot be so, for the reason that a subsequent section in the amendment leaves the question of suffrage, wholly and solely with the States.<sup>55</sup>

Like most proponents of the amendment, Holden interpreted section 1 as "constitutionalizing" the Civil Rights Bill. Recent events in North Carolina had demonstrated the need to put such guarantees beyond the reach of legislative majorities. In the same pamphlet, for example, Holden lamented the fact that "any future convention" could abrogate the recent ordinance permitting blacks to testify.<sup>56</sup> He rejected the contention that the privileges and immunities guarantee included the right to vote.<sup>57</sup> His rejection reinforced the argument that the first section simply protected *civil* rights because the right to vote had always been considered a *political* rather than a civil right. Moreover, he argued that the second section explicitly left the question of negro suffrage to the states.

Holden's analysis is as interesting in what it omitted as in what it included. He ignored the argument that the national government could assert its authority under section 5 to define the privileges and immunities of citizenship and thereby supplant state powers. He glided elliptically over the argument that federal courts might entertain claims that whites had denied blacks their civil rights. Holden naturally downplayed those interpretations that aroused concern and yet could not be dismissed (as could the negro suffrage argument) as erroneous. That explanation

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54. W. HOLDEN, *THE UNION THE PARAMOUNT GOOD* 10, 12 (1866).

55. *Id.* at 8-9.

56. *Id.* at 14-15. Cf. Raleigh Daily Standard, Feb. 9, 1866, at 2, col. 4.

57. W. HOLDEN, *supra* note 54, at 9.

cannot, however, explain his failure to discuss the due process guarantee. Holden could easily have rebutted any argument that the due process guarantee contained "some concealed purpose" to incorporate the Bill of Rights by repeating the standard interpretation of the draftsmen's intent. He did not, for one reason: no one had even hinted that the due process clause might be read as a shorthand statement of those rights.

As the campaign wound down, the conservatives sensed victory. Although freed, blacks still could not vote. Consequently, the decision was left to propertied white North Carolinians. Encouraged by President Johnson to believe that northerners would repudiate the radical platform (i.e., the fourteenth amendment) in the fall elections above the Mason-Dixon line, most southern whites saw no reason to accept it themselves. The *Sentinel* boasted that "less than twenty 'Howard men'" would disgrace the new legislature.<sup>58</sup> The legislature's vote on December 13, 1866, confirmed that boast. Only eleven delegates voted to ratify. The House rejected the amendment by a vote of ninety-three to ten. The Senate rejected it by a vote of forty-five to one.<sup>59</sup> Conservatives gloated: "By an almost unanimous rejection of the Howard amendment . . . in the face of terrible uncertainties and threats North Carolina has spurned an offer to purchase amnesty and restoration at the expense of honor."<sup>60</sup>

The Report of the Joint Select Committee, upon whose recommendations the legislature had acted, reiterated the now standard conservative objection to the privileges and immunities guarantee:

Whether reference is had only to such privileges and immunities as may be supposed now to exist, or to all others which the Federal Government may hereafter declare to belong to it, or may choose to grant to citizens, is left in doubt, though the latter construction seems the more natural, and is one which that Government could at any time insist upon as correct and entirely consistent with the language used. With this construction placed upon it, what limit would remain to the power of that Government to interfere in the internal affairs of the States?<sup>61</sup>

The committee answered its question with an example almost too awful to contemplate. The national government might declare the right to marry a privilege and immunity of citizenship. In that event, the North Carolina law forbidding interracial marriage would abridge a citizen's privileges and immunities. The national government would therefore forbid enforcement of the law. Miscegenation would be lawful. Apparently, the "bare possibility" of such an interpretation was sufficiently horrifying

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58. See *Raleigh Sentinel*, Nov. 27, 1866, at 2, col. 1.

59. There may have been somewhat greater support for the amendment than the final votes indicate. Six senators had promised Senator Harris that they would vote with him in favor of ratifying the amendment. In the House, 15 members had voted against adopting the negative Committee Report. J. HAMILTON, *supra* note 6, at 187.

60. *Wilmington Journal*, Feb. 15, 1867, at 2, col. 1.

61. JOINT SELECT COMM. ON FED. RELATIONS, REPORT ON THE PROPOSED AMENDMENT AS THE FOURTEENTH ARTICLE OF THE CONSTITUTION OF THE U.S. TO THE N.C. GEN. ASSEMBLY OF 1866, at 7-8 (1866).

that the Committee saw no need to discuss the possible impact of the due process or equal protection clauses.

## II. POLITICAL DEBATE OVER THE FOURTEENTH AMENDMENT UNDER MILITARY RECONSTRUCTION

The legislature's rejection of the fourteenth amendment scarcely settled the matter. Congress, reacting to the South's defiant refusal to ratify it, imposed military Reconstruction. Under the military supervision of Generals Sickles and Canby, blacks were enrolled to vote and disloyal whites were struck from the voter rolls. In the ensuing election for delegates to the convention charged with framing a new constitution, the Unionists, who had organized themselves into a State Republican Party, triumphed. These delegates drafted a constitution acceptable to both military authorities and the now greatly broadened electorate. This electorate also sent an overwhelming majority of Republicans to the first session of the state legislature that met under the new constitution. It immediately and enthusiastically ratified the fourteenth amendment.

As these events unfolded in the year and a half between January 1867 and July 1868, the fourteenth amendment receded in importance as a topic of public debate. Because it no longer stated all the terms of restoration, the public turned its attention to the Reconstruction Acts and the military decisions that implemented them. The amendment never disappeared entirely from discussion, however. Whatever else Congress might demand, it still demanded compliance with the terms of the amendment. Since the reconstructed South was to mirror the society envisaged by the drafters of section 1, many decisions made during this period revealed how the concepts embodied in that section of the amendment were understood.

The Southern Compromise Amendment,<sup>62</sup> introduced early in 1867 by southern conservatives, revealed their understanding of the relatively narrow scope of section 1 in general and the privileges and immunities clause in particular. These leaders concocted the amendment in order to forestall the more radical Reconstruction that the Republican sweep in the fall elections in the North foreshadowed.<sup>63</sup> While they left out the hated disqualification clause, they included in section 3 a privileges and immunities clause that paralleled section 1 of the fourteenth amend-

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62. Lewis Hanes, a prominent North Carolina conservative, apparently drafted the amendment in consultation with select cabinet members, several Southern governors, a few other leading Southern conservatives, and several Northern generals. *See generally* James, *Southern Reaction to the Proposal of the Fourteenth Amendment*, 22 J. S. Hist. 477, 494-96 (1956). Dr. Speed introduced the amendment into the North Carolina Senate on Feb. 15, 1867, but it was not approved by committee. SENATE JOURNAL 388-89 (1867). The Sentinel speculated that the radicals pushed reconstruction to forestall adoption of the compromise amendment. Raleigh Sentinel, Feb. 12, 1867, at 1, col. 1. A copy of the amendment may be found in 1 W. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 239 (1906).

63. *See* Charlotte Tri-Weekly Bulletin, Jan. 13, 1867, at 2, col. 4.

ment.<sup>64</sup> Although some former critics still found that guarantee "objectionable,"<sup>65</sup> most now found it "inoffensive." The editor of the *Sentinel* explained why:

We are told, that it simply means and is intended to mean, that no State shall make or enforce any law which shall abridge the privileges or immunities of any citizen of the United States, i.e. any privilege or immunity secured to citizens of the United States by the Constitution and laws of the same. It has no reference to privileges or immunities guaranteed to persons as citizens of any of the States.<sup>66</sup>

Political expediency alone may well explain this remarkable turnabout. A more likely explanation is that the drafters of the Southern Compromise Amendment either knew that the privileges and immunities clause had a limited scope or believed that its scope would be kept limited so long as its interpretation and enforcement were entrusted to reliable (i.e., state) bodies. Moreover, the focus of these observers on the privileges and immunities clause showed what little substance they attributed to the due process and equal protection guarantees.

The organization of a Republican Party in the state—a major political development during this period—revealed much about the contemporary understanding of the equal protection concept. Meeting in Raleigh in March 1867 to establish the party, these Unionists-turned-Republicans declared themselves "in favor of complete equality for the blacks."<sup>67</sup> Six months later, when the party convened again, it published a formal address "to the people of North Carolina" in which it reaffirmed its commitment to equal rights:

The principles sought to be established upon the sound basis of popular sentiment, as preliminary to reconstruction, may be fully summed up in two propositions, viz:

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2. Civil and political equality among all citizens, irrespective of race or color, and the protection of white and colored alike in all the rights, privileges and immunities of citizenship.<sup>68</sup>

What was the equality that these Republicans endorsed? Daniel Goodloe, a moderate Unionist, answered that question this way:

The enemies of freedom, for a century past, have labored to confound the ideas of equality before the law, and equality of moral, intellectual,

64. See *Western Democrat*, Feb. 12, 1867, at 2, col. 1.

65. See, e.g., *Carolina Daily News*, Feb. 7, 1867, at 2, col. 2.

66. *Raleigh Sentinel*, Feb. 7, 1867, at 2, col. 1.

67. *Raleigh Standard*, Apr. 3, 1867, at 3, col. 4. The convention was composed of 147 delegates, 101 of whom were white and 46 of whom were black. The conservative press alternately excoriated and ridiculed the assemblage.

68. *Raleigh Register*, Nov. 8, 1867, at 1, col. 1.



and social conditions. Seizing upon the phrase in the Declaration of Independence, "that all men are created equal," which is explained by the context to mean only that all men have equal rights, these sophists affect to understand the proposition to be, that all men are born with equal endowments of intellect, beauty, strength, fortune and aptitude for virtue; and they then proceed elaborately to prove the contrary, and to jump to the conclusion that because men are not thus equally blessed by nature and by circumstances, therefore they should not have equal rights before human tribunals.<sup>69</sup>

Equality meant equality of opportunity under the law, not equality of condition, circumstance, or capacity.<sup>70</sup> Holden clarified this point for those who persistently misstated the concept of equality espoused by Republicans:

The *Sentinel* assails the colored people because they evince a natural and laudable disposition to acquire property. It says they think they can not be the "equals" of the white man until they possess property too: and that they reason thus: "If I am the equal of the white man, I ought of course to own houses and lands, and horses and cattle, like the white man." Well, do they now own such things? Did not the colored people before the rebellion own such things? It is not true that colored people "reason" as the *Sentinel* says they do. They insist upon the right to own property of all kinds, just like the white man, or the red man, or the tawny man, but they expect to get this property honestly. That is all.—No two men can be exactly alike in the amount of property they own, but they can be alike in the right to own property.<sup>71</sup>

Admittedly, Republicans had also come to understand that blacks needed the vote to protect themselves:

The right of suffrage is the shield and buckler of poverty. It commands respect from those who make the laws, and from all those who aspire to a leading post in society. Without the ballot there is no real freedom and safety to the poor. Even with it, they are often victimized by the cunning ambition of the wealthy and the powerful.<sup>72</sup>

Republicans never suggested, however, that the pending fourteenth amendment contained that guarantee.<sup>73</sup> Rather, they included it in their

69. Raleigh Register, July 2, 1867, at 2, col. 2.

70. *Id.*, Aug. 6, 1867, at 2, col. 1. "Now, fellow citizens, what do we want of government? We want a government that shall secure to every citizen of North Carolina equal rights before the law, and especially equal protection before the courts." *Id.*

71. Raleigh Standard, Dec. 14, 1867, at 2, col. 4. At the Republican Convention in Raleigh in September 1867, Holden reiterated these views. See Asheville Pioneer, Sept. 26, 1867, at 1, col. 1.

72. Raleigh Register, July 2, 1867, at 3, col. 2. See also Asheville Pioneer, May 21, 1868, at 1, col. 1 ("To abrogate or abridge the right of the people to a voice in their own government is to leave them to the same extent subject to the rule and will of the one-man power—a tyrant or a potentate . . .").

73. In fact, Holden needed the conservatives on that very point when they complained about Reconstruction. See, e.g., Raleigh Standard, Jan. 8, 1867, at 2, col. 4 (if the 14th amendment had been passed, the state could have determined for itself who voted). In

new, broader demand for political equality in addition to the civil equality previously demanded.<sup>74</sup>

Republicans did limit their demands to civil and political equality. They never demanded social equality. Indeed, they emphasized that equality did not and could not extend to social relationships:

It does not follow, because any man is free, and entitled to all the civil and political rights that others enjoy, that he is thereby made the equal of any other man socially; and no portion of our people understand this better, or observe it with more propriety than our colored friends.<sup>75</sup>

Black leaders themselves reassured whites that blacks did not wish to socialize with them.<sup>76</sup>

While Republicans generally agreed that the state could not enforce social equality, they disagreed among themselves about whether the state could encourage or discourage social interaction. The debate over the right of blacks to use public carriers dramatized these differences. This problem was before the public constantly because General Sickles had issued an order that required that blacks be permitted to sit on juries and that forbade discrimination in public facilities. The order "aroused strong resentment."<sup>77</sup> In an extended discussion of "the social problem," one newspaper editor argued that blacks and whites need not "be forced into social contact" even though publicly owned or licensed businesses had "no right to exclude any class of citizens from equal accommodations and equal privileges."<sup>78</sup> Separate but equal facilities were the answer to the social problem. At the same time, another newspaper editor insisted that blacks had a right to ride in the same cars. He poked fun at those whites who thought such contact might contaminate them:

The Chief Justice of the United States, foreign Ministers, and members of Congress ride in the same public coach in Washington City with colored people, and with all kinds of people; and we have yet to learn that the *Sentinel* and its followers are better than the distinguished

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his inaugural address, Governor Holden specifically stated: "Instead of defining or restricting suffrage permanently, it [Congress] has left it with the respective States, to be determined and settled as they may choose; and this State, following in full measure the example of the national government, has made suffrage free to all." Greensboro Patriot, July 9, 1868, at 2, col. 2.

74. Greensboro Patriot, July 9, 1868, at 2, col. 2.

75. Raleigh Standard, Dec. 14, 1867, at 2, col. 4; see also *id.*, Apr. 21, 1868, at 3, col. 2 (blacks want civil and political equality; they are not interested in mixing socially); Raleigh Register, July 2, 1867, at 2, col. 1 ("[The doctrine of equality] has nothing whatever to do with social relations.").

76. A. DeMunro, "We are men"—Black Reconstruction in North Carolina, 1865-1870, at 16 (1979) (unpublished masters thesis, University of North Carolina). *Contra* Bernstein, *The Participation of Negro Delegates in the Constitutional Convention of 1868 in North Carolina*, 34 J. NEGRO HIST. 391, 394-406 (1949).

77. Morrill, *North Carolina and the Administration of Brevet Major General Sickles*, 42 N.C. HIST. REV. 291, 296-97 (1965).

78. See Raleigh Register, Jan. 14, 1868, at 3, col. 1.

persons referred to.<sup>79</sup>

Although such jibes angered conservatives,<sup>80</sup> the 1867 election campaign was less rancorous than either the preceding or succeeding election, largely because the conservatives were disorganized, divided, and dispirited.<sup>81</sup> Under the Reconstruction Acts, southern states were obliged to revise their electoral rolls and then hold elections for constitution conventions. A group of conservatives did meet in Raleigh in late September 1867, but the group did not adopt a platform. Although conservatives stood for election in almost every county, "their canvass was listless."<sup>82</sup> In November, the voters approved the convention call by a three-to-one margin, and Republican candidates swamped their conservative opponents.<sup>83</sup>

Deliberations at the constitutional convention, which met in Raleigh on January 14, 1868, shed further light on the contemporary understanding of the equality principle.<sup>84</sup> The Declaration of Rights sounded the

79. Raleigh Standard, Dec. 14, 1867, at 2, col. 4.

80. Worth exploded in exasperation: "Of all the parties the Devil has ever set up to afflict good men, he has brought his work nearest to perfection in the present Republican party." Letter to J.M. Coffin (Nov. 6, 1867), reprinted in 2 CORRESPONDENCE OF JONATHAN WORTH, *supra* note 19, at 1074.

81. Raleigh Sentinel, Feb. 26, 1867, at 2, col. 1. Compare New Bern Daily Journal of Commerce, Feb. 12, 1867, at 2, col. 3 (South should pursue a policy of "masterly inactivity") with Salisbury Tri-Weekly Banner, Mar. 6, 1867, at 2, col. 3 (inaction by whites will give radical whites and blacks an opportunity to form "dispicable government"). In a series of letters to his wife, Senator Leander Gash, who served in the special 1866 session and the subsequent regular session in 1867, poignantly revealed the despair that immobilized conservatives. He said that "Congress seems demented," Letter from Leander Gash to Mrs. Leander Gash (Dec. 9, 1866) (available in Leander Gash's Papers, N.C. Archives, Raleigh, N.C.), and that "the radicals are more crazy and blood-thirsty than ever," Letter from Leander Gash to Mrs. Leander Gash (Dec. 11, 1866) (available in Leander Gash's Papers). Although he spoke hopefully of compromise, Letter from Leander Gash to Mrs. Leander Gash (Feb. 7, 1867) (available in Leander Gash's Papers), he finally advised his wife to "prepare for the worst" as the "political storm of fanaticism" swept over them, Letter from Leander Gash to Mrs. Leander Gash (Mar. 1, 1867) (available in Leander Gash's Papers).

82. J. HAMILTON, *supra* note 6, at 251. The Sentinel, however, urged whites to vote for conservative delegates lest the convention be dominated by men who believed in "negro supremacy." Raleigh Sentinel, Nov. 15, 1867, at 2, col. 2. Throughout this period, conservatives plaintively asked themselves: "What ought the South to do?" See, e.g., *id.*, Feb. 26, 1867, at 2, col. 1.

83. In the November election, 93,006 voted for the convention, while 32,961 voted against it. Of the 120 delegates, only 13 were conservatives. The 107 Republicans included 18 "carpetbaggers" and 15 blacks. J. HAMILTON, *supra* note 6, at 253. The figures belie Hamilton's assertion that the carpetbaggers "absolutely" dominated the convention. A contemporary critic impliedly admitted that native North Carolinians were responsible for the new constitution when he urged rejection of "this damnable abortion . . . adopted by the monkey-smelling-tan-on-ring-striped and stupid scalawags of North Carolina." Charlotte Daily Bulletin, Mar. 23, 1868 (Supplement) at 1, col. 1. Of course, the paper had viewed convention prospects pessimistically from the beginning: the southern states would be reduced to "Congressional satraps or negro provinces." *Id.*, Jan. 13, 1868, at 2, col. 4. Six months later, the Greensboro Patriot carried "[t]he radical alphabet" in which "X" stood for "the ten African States we must make." Greensboro Patriot, July 23, 1868, at 1, col. 4.

84. The Sentinel predicted that the convention would remove "all limitations and ob-

general theme by incorporating the grand principles of the Declaration of Independence and the first section of the fourteenth amendment.<sup>85</sup> More specifically, the delegates decided that negroes could vote, hold office, sit on juries, and serve in the militia.<sup>86</sup> The latter two decisions distressed conservative whites, who raged against the humiliating spectacle of a black juror sitting in judgment of a white defendant or a black officer commanding a white militiaman.<sup>87</sup> These decisions convinced the conservatives that the convention intended to go beyond the fourteenth amendment and the Reconstruction Acts and impose social equality.<sup>88</sup>

At the convention itself, conservative delegates maneuvered to smoke out the Republican majority on the issue of social equality. When the convention took up the report on the militia, Mr. Graham of Orange County moved to add the following language: "But white and colored persons shall be organized into separate commands, and no white man shall ever be required to obey a negro officer."<sup>89</sup> When Mr. Jones, a Republican delegate, sought to sidestep the question by suggesting that it was for the legislature rather than the convention to decide, Mr. Durham said it was a test question:

The reconstruction acts do not prevent the passage of this resolution, declaring the superiority of the white man. We claim that the white man has some rights left him, even under the reconstruction acts. But it is the evident intention of this Convention to go beyond the reconstruction acts, and thereby not only give civil and political equality, but to force upon the people of the State social equality. I want the people to know who are the men that are endeavoring to perpetrate such an outrage upon them.<sup>90</sup>

While some Republicans agreed with Mr. Jones that the question was best left to the legislature, other Republicans accepted the conservative dare and declared themselves in favor of social equality. And one delegate, a black, tweaked the conservative nose by proposing that any white

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stacles to the free intercourse . . . of the black and white races," would admit "negro voters to the jury box and to office," and would open "the doors of the University, the common schools, and all other public institutions of learning . . . to black and white [people] alike." *Raleigh Sentinel*, Feb. 4, 1868, at 2, col. 1. The *Sentinel* and other conservative papers consistently derided the "convention so-called." *Id.*, Feb. 18, 1868, at 2, col. 2. The Convention did expel one reporter because it objected to his reports of the proceedings. He had filed reports like this one:

Manager Cowles' [the Convention chairman] Museum!

Wonderful Performances in Natural History!

The Cowles' Museum contains Baboons, Monkeys, Mules, Tourgees [a "carpet-bagger"], and other Jackasses.

J. HAMILTON, *supra* note 6, at 257 n.1.

85. N.C. CONST. art. I, §§ 1, 17 (1868).

86. JOURNAL OF THE CONST. CONVENTION OF N.C. 175 (1868).

87. Greensboro Times, Feb. 13, 1868, at 2, col. 3.

88. Raleigh Sentinel, Feb. 18, 1868, at 2, col. 1.

89. Wadesboro Argus, Feb. 20, 1868, at 1, col. 3.

90. *Id.*

man who had mulatto children should be placed in the same company as his children.<sup>91</sup> In the end, the convention overwhelmingly rejected the Graham Amendment.

Similarly, the convention refused to require separation of the races in public schools.<sup>92</sup> It refused to include a prohibition against interracial marriage in the Declaration of Rights.<sup>93</sup> Yet at the same time it passed a resolution recommending separate schools and condemning interracial marriage.<sup>94</sup> The convention rejected its own committee suggestions that the constitution bar any person of African descent from ever holding executive office.<sup>95</sup> It also rejected a suggestion that the constitution forever bar a negro from having a white apprentice or ward.<sup>96</sup>

The campaign in the spring of 1868 necessarily focused on the new constitution.<sup>97</sup> During this bitter and ugly campaign, conservative whites, who had recovered from their doldrums of the previous year,<sup>98</sup> denied that they wanted to build a white man's party.<sup>99</sup> Nevertheless, they appealed to the basest racism:

If you would save your State from Negro rule, the DAUGHTERS of our poor white people from being forced into social equality with negro BOYS at school, and yourselves from being forced into the ranks of the Militia with negroes and under negro officers, who will be empowered to hold Court Martials over and punish you for what they might call delinquency . . . , attend the Mass Meet.<sup>100</sup>

Repeatedly, conservative candidates asked three questions: Do you want negro or white rule? Do you want school integration? Do you want interracial marriage?<sup>101</sup> On election eve, the conservative press exhorted

91. *Id.*

92. JOURNAL OF THE CONST. CONVENTION OF N.C. 343 (1868).

93. *Id.* at 216.

94. *Id.* at 473.

95. *Id.* at 162.

96. *Id.* at 483.

97. H. Raper, *supra* note 20, at 244-45.

98. One student of the period argues that conservatives:

only roused themselves into political activity when it became clear that the Republican party was out to do far more than merely enfranchise Negroes. And the Conservative-Democratic party blossomed not in response to racial considerations but mainly out of a concern that if unimpeded a revolution could take place, a revolution which would leave conservative men with progressively less and less power and influence.

E. McGee, *supra* note 12, at 375. He adds: "White supremacy was raised as *the* issue, *the* principle because of its obvious appeal to the white electorate and because it reduced a complex set of problems to a level that penetrated the thickest skull." *Id.*

99. Compare Raleigh Sentinel, June 29, 1867, at 2, col. 1 (criticizes call for a white man's party) with Greensboro Patriot, June 25, 1868, at 2, col. 1 (calls on white men to organize a party in order to defeat "negro supremacy"). Some Southerners predicted that blacks would vote for conservative candidates. See, e.g., New Bern Daily Journal of Commerce, May 21, 1867, at 2, col. 3; Wilmington Journal, Oct. 25, 1866, at 4, col. 1; Greensboro Patriot, Feb. 15, 1866, at 2, col. 2.

100. Asheville News, Mar. 12, 1868, at 2, col. 3.

101. R. Hoffman, *The Republican Party in North Carolina 1867-1871*, at 51 (1960)

whites:

If you would not be placed beneath the heel of negro domination,  
VOTE.

If you would not be placed on a level with the negro in the schools  
and the militia, VOTE.

If you would not have the marriage relation degraded, VOTE!<sup>102</sup>

As the campaign degenerated into demagoguery, rational discussion of the new constitution, whose Declaration of Rights, particularly section 17, tracked the pending fourteenth amendment, disappeared. Even though everyone realized that a Republican legislature would ratify the fourteenth amendment, neither candidates nor newsmen talked about its specific provisions.

The Republicans won. The voters approved the constitution, elected Holden governor, and returned overwhelming Republican majorities in both the House and Senate.<sup>103</sup> The Conservatives complained: "Take away the negro Radical vote, and Conservatives would have swept the whole election."<sup>104</sup> Regardless, the triumphant Republicans poured into Raleigh to organize themselves and the new legislature.<sup>105</sup> They saw no need to study the still-pending fourteenth amendment any further. Long committed to its adoption, they made its ratification the first order of business.

On the Senate floor, the conservatives spoke against it one last time.<sup>106</sup> Senator Robbins rose and in a lengthy talk rehashed the already standard objections. Congress lacked the authority to promulgate the amendment so long as it excluded the southern states. The amendment

(unpublished masters thesis, University of North Carolina).

102. Raleigh Sentinel, Apr. 20, 1868, at 2, col. 2. This welter of words drowned out the few moderate conservative voices. See, e.g., Letter from Chief Justice R.M. Pearson (July 20, 1868) addressed to his conservative friends, admonishing them: "[W]e must submit to the political, not the social (for that is a thing under our own control) equality of the freedmen. This is 'the situation'—the question is, shall we go on, and again make bad worse, or shall we try to make the best of it?"

103. Over 80% of the 196,872 persons eligible to vote voted. Across the state, 93,084 voted for the constitution; 74,015 voted against it. Since less than 80,000 blacks were enrolled, they alone could not have accounted for the majority in favor of the constitution. The Senate elected had a 41-9 Republican majority; the House elected had a 82-38 Republican majority. J. HAMILTON, *supra* note 6, at 286.

104. Raleigh Sentinel, July 4, 1868, at 2, col. 1. Whether the conservatives would have swept the elections if all of them had been allowed to vote is questionable. First, no one knows how many whites were disfranchised. Governor Worth guessed that 15,000 to 20,000 had been excluded. Letter to the Editors of the New York World (May 14, 1868), reprinted in 2 CORRESPONDENCE OF JONATHAN WORTH, *supra* note 19, at 1201. General Canby reported that 11,686 had been removed from the rolls. S. EXEC. DOC. NO. 53, 40th Cong., 2d Sess. 5 (1868). Second, whatever the precise figure, "the number of . . . [people excluded] was too small to affect the outcome except in the closest races." Trelease, *Republican Reconstruction in North Carolina: A Roll-Call Analysis of the State House of Representatives 1868-1870*, 42 J. S. HIST. 319, 320 (1976). But see J. HAMILTON, *supra* note 6, at 286.

105. The Greensboro Times, May 21, 1868, at 2, col. 1, predicted that the radicals would try to impose negro rule.

106. Raleigh Sentinel, July 4, 1868, at 2, col. 1.

unfairly disqualified thousands of her "best sons." It unwisely changed the basis of congressional representation. It conferred unprecedented power on the national government. In this litany of complaints, Senator Robbins did not recite any specific objections to section 1. He did reiterate his opposition to negro suffrage, which he recognized was commanded by the new constitution. Although he mouthed a desire to promote the "real welfare" of blacks, he feared for any society which extended them equal rights. Presumably, he objected to section 1 because it promoted that end. After Senator Robbins sat down, the question was called, and the Senate joined the House in approving the amendment. North Carolina thus fittingly observed Independence Day two days early by ratifying an amendment that embodied the fundamental principle upon which America had been founded: "that all men are created equal; that they are endowed with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness."<sup>107</sup>

In his inaugural address, Governor Holden praised the triumph of these "free principles" and called for "absolute civil and political equality" between the races.<sup>108</sup> His specific recommendations showed how he understood that command. He urged creation of a militia, but added:

It is not proposed, nor is it required by the Constitution, that the two races should be mustered and drilled in the same companies and regiments. Following the example of the government of the United States, they may be divided into separate companies and regiments; but it is due to the colored race that they should have, whenever they desire it, officers of their own color for their own companies and regiments.<sup>109</sup>

He favored general education for all, but added: "It is believed to be better for both, and most satisfactory to both, that the schools for the two, thus separate and apart, should enjoy equally the fostering care of the State."<sup>110</sup> Thus did the staunchest defender of the fourteenth amendment in North Carolina and the leading spokesman for radicalism in the state explain his understanding of the equality principle.

The legislature's actions in the short July term and the succeeding November term indicate that a majority of its members interpreted the fourteenth amendment as did their governor. Committed to its principles, which they had so recently enshrined in their own state constitution, the Republican legislators tried to reform the state according to its commands. Delegates introduced numerous bills about black rights, and on nine separate occasions the legislature voted on bills involving black rights.<sup>111</sup> These bills ranged from measures that reaffirmed the legal equality of blacks<sup>112</sup> to a resolution that upheld the House Speaker's ejection

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107. The Declaration of Independence para. 1 (U.S. 1776).

108. Greensboro Patriot, July 9, 1868, at 2, col. 2.

109. *Id.* Holden had expressed similar views two years earlier. Raleigh Standard, Apr. 21, 1866, at 3, col. 2.

110. Raleigh Standard, Apr. 21, 1866, at 3, col. 2.

111. Trelease, *supra* note 104, at 319, 330.

112. *Id.*

tion of a journalist for stigmatizing blacks.<sup>113</sup> They included measures allowing blacks to testify as witnesses,<sup>114</sup> to ride on public conveyances,<sup>115</sup> and to attend public schools.<sup>116</sup>

The Republican party almost unanimously favored bills intended to insure the legal equality of blacks.<sup>117</sup> The legislature's failure to enact some bills that guaranteed blacks legal rights did not necessarily prove that the majority thought blacks unentitled to those rights. For example, Representative Leary questioned the wisdom of passing any law about color.<sup>118</sup> He argued that the new constitution nullified all existing statutes that discriminated on the basis of race. If the legislature began repealing these old laws, he warned, it would cast doubt on the validity of the constitutional proscription and presumably would validate any unrepealed statutes.<sup>119</sup>

Republican unanimity dissipated, however, when the legislature voted on bills intended to promote desegregation (and which therefore might lead to social equality). Whatever implications may be drawn, for example, from the legislature's failure to repeal Chapter 107 of the 1854 Revised Code, which referred to slaves, free Negroes, and persons of color,<sup>120</sup> one fact is clear. Only a small minority of the Republicans favored an egalitarian society in which the government enforced social as well as civil and political equality. Senator Eppes introduced a bill in March 1869 to protect the rights of all citizens traveling on public conveyances. Representative Sykes introduced a similar bill in the House in February 1870. Representative Robbins introduced a bill in December 1869 to prevent discrimination on steamboats. None of the bills passed.<sup>121</sup> The debates on school legislation revealed a sense that the fourteenth amendment did not necessarily command integration. Even the black delegates generally took the view that "social mixing should be allowed but not forced."<sup>122</sup> Thus, Senator Galloway answered a proposal that the galleries be segregated by suggesting instead that each race should have a side with a middle section kept open for both.<sup>123</sup>

The debate on the militia bills confirmed the apparently widespread belief that separate but equal treatment would insure blacks the equal protection of the laws. In August 1868, legislation for the reorganization

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113. HOUSE JOURNAL 45-47 (1868).

114. Trelease, *supra* note 104, at 319, 330.

115. *Id.*; HOUSE JOURNAL 122 (1869-70).

116. Trelease, *supra* note 104, at 319, 330.

117. *Id.* at 323.

118. Balanoff, *Negro Legislators in the North Carolina General Assembly, July 1868-February 1872*, 49 N.C. HIST. REV. 22, 41 (1972); SENATE JOURNAL 41-42 (1868).

119. SENATE JOURNAL 41-42 (1868). Representative Sweat supported Leary's argument. Raleigh Standard, Feb. 12, 1869, at 3, col. 1.

120. The bill was referred to the Judiciary Committee, where it died. HOUSE JOURNAL 42-43 (1868-69). See Raleigh Standard, Dec. 1, 1868, at 2, col. 6.

121. Balanoff, *supra* note 118, at 41.

122. *Id.* at 40.

123. SENATE JOURNAL 41-42 (1868).



of the state militia was introduced.<sup>124</sup> It passed, despite the fact that Representative Leary opposed the bill because section 3 called for racially separate militia and because section 13 of a substitute bill promised that white and black members would not have to serve together.<sup>125</sup> Indeed, seven of the ten black representatives voted for it, and all three black senators voted for the bill.<sup>126</sup> Some black delegates doubtless compromised their insistence on equal treatment in order to secure protection against the reign of terror that the Klan had already begun to inflict upon blacks and their friends.<sup>127</sup> That blacks had to make that concession in order to obtain police protection from a legislature sympathetic to their needs only dramatized how narrowly those who favored equal protection viewed its scope.

### III. CONCLUSION

North Carolinians thus scrutinized the fourteenth amendment for over two years. They dissected it section by section, clause by clause. They questioned the intentions of those who framed it, debated the implications that might be drawn from its language, and pondered the consequences that would follow its adoption. Although their intense study did not produce an agreed understanding on all points, it did yield a voluminous public record from which some conclusions about their understanding of section 1 may be drawn.

Perhaps the most striking conclusion—in view of the Supreme Court's present interpretation of section 1—is that no one hinted, much less contemplated, that it might incorporate the Bill of Rights. In fact, no one ever discussed the due process clause. That omission is scarcely surprising. North Carolinians, concerned about the substantive rights that the amendment guaranteed, did not worry about a clause that apparently guaranteed nothing more than procedural regularity. If the conservatives had suspected that the due process clause was a Trojan horse for the Bill of Rights, they would have attacked it venomously. After all, they speculated endlessly about the evil ends that the framers had allegedly concealed in other provisions of the amendment. Consider just one example. The second amendment guarantees the right to bear arms. If the conservatives had suspected that section 1 guaranteed blacks that right, they would have protested angrily because armed blacks terrified them. The

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124. Earlier, in late July, Representative Lafin had introduced a resolution asking the national government to send two regiments to protect Negroes against terrorism. *Wilming-ton Journal*, July 31, 1868, at 1, col. 1.

125. *HOUSE JOURNAL, SPECIAL SESSION 142 (1868); SENATE JOURNAL, SPECIAL SESSION 181 (1868)*. See *Raleigh Standard*, Aug. 10, 1868, at 2, col. 1.

126. Balanoff, *supra* note 121, at 44.

127. See generally A. TRELEASE, *WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION* (1971). See also E. McGee, *supra* note 12, at 349-76. McGee penetratingly analyzes the relationship between the Klan and the conservative Democratic leadership and concludes that the Klan was perceived by conservative leaders as "a god-send" because it "reduced the number of Negro voters through intimidation" and "[drew] out a larger and more unified white vote." *Id.* at 370.

silence of conservative opponents about the due process clause proves that no one believed that it protected any substantive rights, let alone all those contained in the Bill of Rights.

The privileges and immunities clause did protect substantive rights. Argument raged about which particular substantive rights it protected. Both proponents and opponents repeatedly tried to categorize the rights included within its ambit. None, however, ever stated that it was a short-hand version of the Bill of Rights. Politicians, who needed to explain the amendment in terms that their constituents could understand, would not have overlooked such an explanation. No one thought to explain the privileges and immunities guarantee in those terms because no one even considered that interpretation.

While the record thus excludes the possibility that North Carolinians equated the privileges and immunities of citizenship with the Bill of Rights guarantees, it does not conclusively establish an affirmative understanding of the clause. All did agree that it protected civil rights: the rights to contract, to hold property, and to sue. This understanding precludes any suggestion, which some conservatives began to make in the latter stages of the debate, that the clause guaranteed only those rights peculiar to national citizenship. The latter suggestion is equally inconsistent with their oft-repeated fear that Congress would define privileges and immunities too broadly. Whether the privileges and immunities of citizenship included political rights such as the right to speak freely and to assemble and petition for the redress of grievances was not discussed. Unfortunately, no proponent ever exhaustively cataloged all the privileges and immunities of citizenship. However, proponents did frequently assert that section 1 reflected the principles of the Declaration of Independence.<sup>128</sup> In that view, privileges and immunities might protect natural or fundamental rights, including some that contemporaries would have described as political.

Whatever political rights the privileges and immunities clause may have comprehended, it did not guarantee the one fundamental political right: the right to vote. One cannot credit conservative alarms that it did. The debate on this issue demonstrates the wisdom of that canon of construction that rejects the fevered imaginings of opponents as a safe guide to meaning. Conservatives, pandering to the negrophobia prevalent among whites, ranted about negro suffrage because that prospect alone induced many to vote against the amendment. While the amendment was

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128. *Raleigh Standard*, Apr. 2, 1867, at 2, col. 3. In the succeeding issue, the same paper reported the resolutions adopted by the party. They included praise for Congress' "persistent and heroic devotion to the great principles of human rights enunciated in the Declaration of Independence." The resolutions also endorsed "the great measures of Civil Rights and Impartial Enfranchisement without any property qualifications, conferred without distinction of color" and stated that "we are ready to unite in the early practical attainment of these inestimable privileges." *Id.*, Apr. 4, 1867, at 3, col. 4.

William Coleman, addressing the Union Republican Club in Charlotte, stressed that through the 14th amendment Congress had "pledged itself to the immortal principles of the Declaration." *Id.*, Oct. 5, 1867, at 2, col. 1.

designed to encourage the extension of the franchise to blacks, it left that decision to the states. Advocates of the amendment, many of whom had initially opposed giving blacks the vote, continually reassured the people that voting was not a privilege and immunity of citizenship. When they later urged negro suffrage, they never based their arguments for it on the text of the fourteenth amendment.

Rather, they based their argument on equality principles, and that reliance raises questions about how North Carolinians understood the equal protection clause of the fourteenth amendment. Did the injunction against any state denying a person within its jurisdiction the equal protection of the laws reflect the broad equality principle that at least some Republicans ultimately embraced, or did it reflect a somewhat narrower concept? Answering that question is difficult for three reasons. First, equal protection was a relatively new legal concept. It lacked the historical pedigree of privileges and immunities and due process. Consequently, the community could not rely on traditional usage as a guide to meaning. Second, proponents and opponents occasionally treated the privileges and immunities and equal protection clauses as if they protected the same set of rights. By confusing these two separate clauses, the discussants sometimes obscured the independent meaning they may have attributed to equal protection. Third, the discussants usually concentrated on concrete, specific problems. Because politicians geared their analysis to the particular concerns of their constituents, they seldom articulated any comprehensive understanding of equal protection. That understanding must necessarily be inferred from their discussion of particular issues like public conveyances, the militia, common schools, and intermarriage.

As with privileges and immunities, one can confidently conclude what was included in and what was excluded from the equal protection guarantee only at the margin. At a minimum, the clause guaranteed equal treatment before the courts. Supporters frequently cited differential punishments and the ban on negro testimony as violations of the equal protection principle. More broadly, supporters condemned all laws that discriminated against blacks solely on account of their race. According to this view, the equal protection clause would proscribe laws that imposed harsher penalties on blacks or subjected them to different legal procedures. A miscegenation statute would not come within that proscription, however, because it did not discriminate against blacks. It affected whites and blacks identically.<sup>129</sup>

Although supporters of the amendment could thus plausibly deny charges that it guaranteed the right to marry regardless of race, oppo-

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129. The record in North Carolina thus contradicts the Chief Justice's assertion in *Brown v. Board of Educ.*, 347 U.S. 483, 489-90 (1954), that the status of public education in the South made the history of the amendment on that point inconclusive. While common schools were admittedly not widespread, few questions were more widely debated in North Carolina than the right of blacks to attend public schools. Though different opinions were expressed, a clear consensus emerged: segregated schools were both desirable and constitutionally permissible.

nents continuously decried the dangers of mongrelization. However, no evidence—other than their own anxieties—supports the proposition that the equal protection clause guaranteed social equality. Those incidents that supporters of the amendment gave as examples of proscribed conduct invariably involved some identifiable state action. No one supposed that the state could or should dictate social mores. Opponents recognized this fact. Their arguments on this point amounted to a warning, not an interpretation. If blacks were admitted to civil and political equality with whites, conservatives reasoned, blacks would inevitably intermingle socially with whites. One ought not to confuse sociological prediction with constitutional interpretation.<sup>130</sup>

Between equality before the law, which the clause included, and social equality, which the clause excluded, its perceived scope is unclear from the public record in North Carolina. Perhaps the safest conclusion is that North Carolinians initially attributed a somewhat narrower meaning to the equal protection clause than they gave to the more general equality principle that Republicans later advocated. This conclusion would explain why the 1868 legislature acted as if it retained some discretion to regulate relationships between the races. Under this view, a state could cleanse its statutes of any reference to race and impose a color-blind public order. Alternatively, a state could preserve some racial classifications so long as it did not disadvantage one race. The legislature could choose from among these competing policies. The fourteenth amendment by its own terms commanded neither but, rather, permitted either. The state legislature retained this discretion, however, only until and unless Congress acted.

All North Carolinians understood that Congress and the federal courts had the power to determine how any ambiguities would be resolved. This final and important conclusion emerges from the most cursory review of the debate. Opponents naturally emphasized the authority that section 1, combined with section 5, conferred on the national government. Before the war, belief in states' rights had been an article of political faith among most southern whites, and a majority zealously clung to it after the war. Moreover, many whites doubtlessly wished to preserve state power as a check against radical Congressional legislation. Thus, they covered their naked racism with the fig leaf of states' rights. When conservatives invoked the spectre of negro suffrage or social equality, the Republicans immediately denounced them and refuted their claims.

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130. The editor of the *Register* made a very different sociological prediction: There has existed, from the foundation of the government, the most perfect political equality between all classes of white men in this country; and yet no one will pretend that social equality has been seen anywhere. Every village and hamlet has its aristocracy, its middle class, and its inferior class, whose bounds are rarely passed. Aristocratic politicians have known how to conciliate and to secure the votes of the humbler whites without admitting them into the charmed circle of the family; and they will have far less difficulty in settling their political relations with their black fellow citizens.

*Raleigh Register*, July 2, 1867, at 2, col. 1.

When conservatives invoked the spectre of consolidation, Republicans said nothing. They conceded the argument. After all, they had come into office under the protective cloak of national authority, and they knew that they would survive only if the national government continued to protect them.<sup>131</sup> The fourteenth amendment federalized questions about individual rights and deprived the states of any exclusive or final authority on those questions. Political propriety, rather than constitutional power, would henceforth dictate whether, when, and how the national government protected individual liberty.

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131. See, e.g., the prophetic views of the much maligned Albion Tourgee in Olsen, *A.U. Tourgee: Carpetbagger*, 40 N.C. HIST. REV. 434 (1963):

He [Tourgee] opposed the Reconstruction Acts precisely because they lacked effective federal implementation and were dependent upon southern Republican strength, and in 1867 he predicted that the mass of poor, uneducated, and inexperienced Negro and white Republicans would not long succeed against the wealth, ability, and power which opposed them.

*Id.* at 441.

APPENDIX

## CHRONOLOGY OF EVENTS 1865-1868

1865

April	Lee surrenders; Raleigh is captured; civil government in North Carolina collapses
May	President Johnson issues Reconstruction Proclamation and appoints W.W. Holden provisional governor of North Carolina
August	Governor Holden orders election of delegates to a state convention to enact laws insuring the state's restoration to the Union
October	State Convention meets in Raleigh, abrogates the secession ordinances, adopts ordinances prohibiting slavery and repudiating the war debt, and provides for state and Congressional elections
November	People approve anti-secession and anti-slavery ordinances, elect Worth over Holden for governor, but return a majority of Holden supporters to the legislature
November/ December	Legislature meets, ratifies the 13th amendment, declines to enact any laws with respect to the freedmen

1866

January	Legislature meets in special session, and enacts legislation entitling freedmen "to the same rights and privileges" and subjects them "to the same disabilities as free persons of color prior to general emancipation"
April	Congress passes Civil Rights Bill over President's veto
May/June	State Convention meets and drafts a new constitution
June	Congress submits the 14th amendment to the states
August	People of North Carolina reject proposed constitution; Democrats meet in Philadelphia to endorse President's policy (delegation from North Carolina attends)

- September Unionists meet in Raleigh, nominate Alfred Dockery governor, and recommend approval of the 14th amendment. Southern Loyalists meet in Philadelphia (delegation from North Carolina attends)
- October/  
November Republicans sweep state and Congressional elections in the North
- December North Carolina legislature refuses to ratify the 14th amendment. Thaddeus Stevens introduces a bill for the reconstruction of North Carolina that Holden and other North Carolina radicals had drafted

1867

- January Southern leaders propose "Compromise Amendment"
- March Congress passes Reconstruction Acts over President Johnson's veto. General Sickles assumes command of Second District (the Carolinas); Republicans organize party in North Carolina; General Sickles issues Order 32 providing that blacks may sit in juries and that they may not be excluded from public conveyances
- August Registration of voters begins under the supervision of military authorities
- September Republican party meets in Raleigh and reaffirms its commitment to equal rights for blacks and to Congressional reconstruction. Conservatives meet in Raleigh, denounce earlier Republican convention but adopt no platform
- October General Canby declares registration completed and sets date for election of Convention delegates
- November People elect an overwhelming majority of Republicans to the state Constitutional Convention

1868

- January/  
February Constitutional convention meets in Raleigh and drafts new constitution
- February Conservatives meet in Raleigh, nominate Ashe for governor; Republicans meet in Raleigh, nominate Holden for governor

1984]

*FOURTEENTH AMENDMENT*

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April

People approve new constitution and give  
Republicans large majorities in the state House  
and Senate

July

Legislature meets and ratifies 14th amendment



