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The Ideological Origins of the Fourteenth Amendment

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Most of the vast historical literature about the fourteenth amendment addresses the legislative intent regarding specific issues such as school segregation. Our purpose is broader. Our concern is less with whether the framers believed in school segregation than with how they felt about natural law. What did they regard as the sources of human rights? How did they think those rights related to the Constitution? In what ways did they expect the amendment to change that relationship? How did their ideas about rights relate to their thoughts about citizenship and government, and to the experiences of Civil War and reconstruction? Our goal, then, is an intellectual history of the amendment.

Our thesis is that the fourteenth amendment was based on a coherent theory of government. By the time it attained power in 1861, the Republican party had become identified with a well-articulated theory of rights. This theory was something of a compromise between natural law and legal positivism. Like natural law, it envisioned a body of inherent human rights protected by a social contract. But like positivism, it recognized that a legislature could impose its will regardless of natural law. Natural law and associated concepts like the law of nations provided rules that functioned as law except where they were displaced by positive legislation.

Before the Civil War, this theory enabled the Republicans to condemn slavery as a violation of higher law, to argue that it was illegal in the territories where it lacked express legislative sanction, but at the same time to concede its legality in the South. During reconstruction, this theory continued to provide the

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NOTE: In the interest of readability, footnoting has been drastically reduced. Virtually all references to secondary sources have been eliminated, and many citations to primary sources have been eliminated or combined. Readers who desire further information should consult the "Note on Sources" at the end of the article.

framework for Republican thought. The fourteenth amendment was intended to bridge the gap between positive law and higher law by empowering the national government to protect the natural rights of its citizens.

I

We begin by examining the ideas the Republicans brought with them when they achieved national power in 1861. The Republican party of 1861 was not a monolith; even the antislavery wing had its share of feuds and shifting coalitions. Nevertheless, it is appropriate to speak of the antislavery leadership—men like Sumner, Seward, Chase, and later Lincoln—as a coherent group, united by ideology as well as strong social bonds. Their ideas would become the intellectual basis of the fourteenth amendment.

A

Many of the antislavery leaders had worked together in the Free Soil party before becoming Republicans. They were also connected by a web of social and professional contacts. For example, when Lincoln was in Congress, he lived in the same rooming house as Giddings. Lincoln's law partner corresponded with Sumner, who was in close contact with most of the other major leaders of the antislavery group.

Because antislavery leaders were ostracized by Washington society, which was dominated by Southerners, they were driven together socially. Other forms of Southern antagonism also helped bind the group together. After Sumner was severely beaten on the Senate floor by a Southern congressman, Cameron, Wade, and Chandler entered into a pact to use deadly force if necessary to repel attacks. The antislavery Republicans were not a conspiracy, but neither were they an atomistic collection of unconnected individuals.

Much of what they said about rights sounds naive today. But they were far from being unsophisticated idealists. Sumner, a close friend of Justice Story, wrote a number of law review articles and lectured at Harvard Law School. Despite the "rail-splitter" myth, Lincoln was a shrewd, successful railroad lawyer. Seward, the future Secretary of State, has been called the ablest constitutional authority of the period. A self-educated cobbler, Wilson became a successful manufacturer, a senator, and later an historian. Before becoming governor of Ohio, Chase was a leading Ohio lawyer; later he was to become Chief Justice of the United

States Supreme Court. These were not simply starry-eyed dreamers.

Their views were well-known to the public. Interest in politics was intense, with voter turnouts reaching as high as eighty-four percent of qualified voters. The public followed Senate debates closely. In one year alone, free-state senators distributed 680,000 copies of their speeches. Seward's famous "Higher Law" speech was distributed to 100,000 people. In the 1860 campaign, the Republican party issued large editions of the Lincoln-Douglas debates in order to publicize Lincoln's views. These speeches would not have been circulated so extensively unless politicians were convinced that they would appeal to large portions of the public. Antislavery views were also publicized at public rallies. For instance, Charles Frances Adams once addressed a Philadelphia rally of nearly half the city's voters. The antislavery leaders were highly successful in having their views incorporated into early GOP state platforms and much of their viewpoint was represented in the 1856 and 1860 national platforms. When the North elected Lincoln in 1860, it could hardly have been ignorant of his views and those of many of his party's leaders.

What were their views? Ironically, they favored prohibiting slavery in new territories, where there were few slaves, but opposed intervention in the South, where there were millions.[1] Both parts of this "anti-extensionism" program are significant. Lincoln considered the territorial principle so important that he rejected all proposals to compromise on this issue to avoid civil war. On the other hand, some antislavery Republicans like Adams were willing to support the proposed thirteenth amendment, which would have permanently protected slavery in the states from federal interference.

One reason for opposition to slavery in the territories was racism, which was widespread in the North. For many, the issue was not so much exclusion of black slaves as exclusion of all blacks. Many Republicans found it necessary to reaffirm their

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1. In the debates with Douglas, Lincoln stressed that he had "no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists." THE POLITICAL DEBATES BETWEEN ABRAHAM LINCOLN AND STEPHEN A. DOUGLAS (Part I) 209 (G. Putnam ed. 1913); *see also id.* at 53. As Rep. Hoard said in the debates on Kansas:

> With regard to slavery in the States, we have no difficulty; and the slave-States need entertain no fears of any free-State interference.

CONG. GLOBE, 35th Cong. 1st Sess. App. 275 (1858). *See also id.*, 33d Cong., 2d Sess. App. 318 (1855) (Rep. Giddings) (North will "be purified from the crimes and iniquities of slavery" but "leave the institution with the slave States, untouched by our legislation," thus guarding "all the States in the enjoyment of their privileges.")

disinclination toward miscegenation[2] and their belief in white supremacy.[3] Nevertheless, it is important not to overstate the case. Men such as Adams, Hale, Wilson, Seward and Chase vigorously supported black rights in the North. The antislavery faction used its political leverage in Ohio to gain a repeal of the harsher provisions of the state's Black Code, and strong Republican support existed for black suffrage. Stevens went so far as to direct that he be buried in a black cemetery. Prominent antislavery Republicans, including John Bingham, objected strongly to the exclusion of free blacks from homestead rights in Oregon. While racism played a larger role with the rank-and-file, it was at most a secondary factor influencing the Republican antislavery leadership.[4]

Apart from racism, there was great concern about the effect of slavery on whites. Northern antislavery writers portrayed the South as an economically backward area. They compared decrepit rural Virginia with prosperous New England, and blamed the contrast on slavery. They also compared the ambitious white workers of the North with their less educated and allegedly less motivated counterparts in the South, concluding that slavery produced inferior white workers. In short, they saw slavery as inimical to prosperity. They were particularly anxious to shield the promising new territories of the West from this economic blight.[5]

Slavery was also thought to pose a political threat to whites. As Sumner put it, "laws which oppress the black man, and deprive him of all safeguards of liberty, will eventually enslave the white man." Many believed that the South was controlled by a slave-owning oligarchy known variously as the Slavocracy or the Slave Power. Through its control of the Democratic party, its representation in the Senate, and its over-representation in the House under the three-fifths rule, the Slave Power had supposedly seized control of the country. In the Lincoln-Douglas debates, for example, Lincoln portrayed Douglas as a member of a Southern plot to

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2. This was a constant theme in the Lincoln-Douglas Debates. *See, e.g.*, LINCOLN-DOUGLAS DEBATES, *supra* note 1, (Part I) at 103, 216, 270; (Part II) at 2; K. STAMPP, THE IMPERILED UNION: ESSAYS ON THE BACKGROUND OF THE CIVIL WAR 121 (1980).

3. Within the Free Soil party, racism was strongest among Barnburners (who generally returned to the Democratic party) and weakest amongst former Liberty party members, with the Conscience Whigs in the middle. *See* J. MAYFIELD, REHEARSAL FOR REPUBLICANISM 21-22, 35-36, 47-48, 142, 158 (1980).

4. *See* E. FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 263, 280-95 (1970).

5. Foner develops this point at length. *See* E. FONER, *supra* note 4, at 40-65. Given the common view that God had designed the world in such a way that the naturally good and the utilitarian coincided, this economic critique of slavery actually supported the view that slavery was morally wrong.

extend slavery nationwide.[6] Like conspiracy theories in other periods of the nation's history, the Slave Power theory held that the hour was late and that only immediate action could preserve freedom. This alarmist view drew strength from a number of Southern actions: assaults on first amendment rights, demands for protection of slavery in the territories, attempts to annex Cuba or other parts of Latin American as new slave states, the *Dred Scott* decision, and the Kansas-Nebraska bill.

Moral opposition to slavery was another powerful influence.[7] Lincoln proclaimed that this moral stance was the primary difference between himself and Douglas. For many Republicans, opposition to slavery was religiously based. Hale and others thought slavery was a sin, forbidden by the Word of God, while Giddings called opponents of the Republicans "infidels." Chase declared that "the cause of human freedom is the cause of God." Others believed that slavery was prohibited by the Bible because God gave Adam dominion over the beasts, but not over his fellow men. Many antislavery leaders also based their views on the Declaration of Independence, with its stress on inalienable rights and inherent equality.

Given this moral position, why did the antislavery Republi-

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6. LINCOLN-DOUGLAS DEBATES, *supra* note 1, (Part II) at 160-61 (Lincoln predicts a "second Dred Scott" decision will extend slavery nationwide). In his famous "House Divided" speech, Lincoln summarized his conspiracy theory as follows:

> [W]hen we see a lot of framed timbers, different portions of which we know have been gotten out at different times and places and by different workmen—Stephen [Douglas], Franklin [Pierce], Roger [Taney] and James [Buchanan], for instance—and when we see these timbers joined together, and see they exactly make the frame of a house or a mill, all the tenons and mortices exactly fitting, and all the lengths and proportions of the different pieces exactly adapted to their respective places, and not a piece too many or too few—not omitting even scaffolding—or, if a single piece be lacking, we can see the place in the frame exactly fitted and prepared to yet bring such piece in—in *such* a case, we find it impossible to not *believe* that Stephen and Franklin and Roger and James all understood one another from the beginning, and all worked upon a common *plan* or *draft* drawn up before the first lick was struck.

2 A. SCHLESINGER, HISTORY OF U.S. POLITICAL PARTIES 1226 (1973).

7. *See* LINCOLN-DOUGLAS DEBATES, *supra* note 1, (Part I) at 53 (unlike Douglas, American people view slavery as a "vast moral evil"); *id.* (Part II) at 268 (morality of slavery is "the real issue"). In the 1860 Campaign, Douglas was attacked on this policy by a pro-Lincoln paper, which said that "[t]he conscience of the country will not permit this abnegation of the moral element." H. PERKINS, 1 NORTHERN EDITORIALS ON SECESSION 31 (1942). The *Hartford Evening Press* said during the same campaign that the "chief question at issue is one of conscience, involving high moral obligations." *Id.* at 61. In an editorial entitled "The Last Struggle of Slavery," the *Springfield* (Mass.) *Daily Republican* said it was "the unanimous verdict of Christendom and heathendom alike, our southern states and the [slave trading] kingdom of Dahomey excepted, that the institution of slavery is the worst possible perversion of human relations and the most entire violation alike of natural and divine law." *Id.* at 481. Similar sentiments were expressed by the Dubuque *Daily Times*. *Id.* at 488. *See also id.* at 29-31.

cans devote their energy to the seemingly unimportant question of slavery in the territories? There are two sides to the answer: they thought the territorial issue was important; and they thought slavery in the states was beyond their reach.

They believed the territorial issue was important partly for symbolic reasons, but they were also seriously concerned that slavery might expand westward. It had taken hold in Missouri and might do so elsewhere in the Great Plains, perhaps causing the ultimate economic ruin of this vital area. Moreover, the South had shown an interest in expanding into Latin American and the Caribbean, areas to which the plantation system was well-suited. On the other hand, if slavery were confined, it might be expected to die. Diminishing political power in the national arena would weaken the Slavocracy's power in the South. The mails would be opened to antislavery literature, which would soon enlighten lower class whites about their real interests. Federal patronage might help develop an opposition party in the South. Equally important, without room to expand the South would lack an outlet for its excess population of slaves. Meanwhile, national recognition of the immorality of slavery would undermine the ideology essential to its continuance. Thus, confining slavery would "put . . . [it] in the course of ultimate extinction," as Lincoln put it.[8] Somewhat more graphically, Sumner said slavery would die "as a poisoned rat dies of rage in its hole."[9]

Despite their moral opposition to slavery, the Republicans went to great lengths to disassociate themselves from the abolitionists. Unlike Garrison, they were unwilling to condemn the Constitution as an "agreement with Hell." They rejected both Northern secession and personal withdrawal from government as means of avoiding entanglement with slavery. They also rejected the unrealistic view of some abolitionists that the Constitution prohibited slavery in the states. Thus, Republicans were committed to opposing slavery while supporting a Constitution that shielded Southern slavery. Men like Lincoln believed they were giving away nothing by pledging not to use federal power to abolish slavery in the South, for they believed the federal government lacked this power anyway. As Owen Lovejoy said, being against monarchy didn't mean he favored a naval armament to dethrone Queen Victoria.

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8. *See* LINCOLN-DOUGLAS DEBATES, *supra* note 1, (Part I) at 52-53.
9. D. DONALD, CHARLES SUMNER AND THE COMING OF THE CIVIL WAR 361 (1960).

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To justify their opposition to slavery, the Republicans needed a philosophy that satisfied several requirements. It had to provide a moral frame of reference outside the status quo from which to assess the morality of slavery. Yet it had to leave room for the unchallenged right of the South to remain free of direct Northern interference within the federalist system. The antislavery Republicans were not original thinkers and would not have been capable of inventing such a theory. And, like other reformers in our history, they were anxious to portray themselves as guardians of the original American tradition, not as inventors of a novel ideology.

Fortunately, a system of thought was at hand that satisfied all these requirements. The antislavery Republicans found the intellectual framework they needed in the Enlightenment theories that had formed the ideological basis for the American Revolution.

Locke is the best remembered of these Englightenment thinkers. His *Second Treatise* opens with a discussion of the state of nature, in which men are free from all government but subject to natural law. Among their natural rights are the right to continued life and to any property created by their own labor. All men are equal in the sense of having an equal right to this natural freedom. (The source of these rights is not entirely clear, but seems to be partly theological. Men are obliged to respect each other's rights because all men are God's handiwork; to harm another man is to interfere with God's purposes in creating him.[10]) In the state of nature, each man has the power to punish transgressions of natural law by others. Because this power cannot be effectively exercised by unorganized individuals, men delegate their enforcement powers to governments. These governments possess only the power that was granted through the delegation: the power to protect the natural rights of men. "[T]he law of nature stands as an eternal rule to all men, legislators as well as others."[11] If the government should exceed its powers and turn against the people, nothing remains but an "appeal to Heaven," that is, revolution.

10. For instance, Locke says:

> For men being all the workmanship of one omnipotent and infinitely wise Maker . . . they are his property, whose workmanship they are, made to last during his, not one another's pleasure; and . . . there cannot be supposed any such subordination among us . . . as if we were made for one another's uses. . . .

J. LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT 5 (J. Gough ed. 1946). There seem to be as many interpretations of Locke as there are commentators. Fortunately, the subtle problems which divide these commentators are largely irrelevant for our purposes, since none of the antislavery Republicans were intellectually attuned to technical philosophical issues.

11. *Id.* at 68.

Lockean theory was remarkably congruent with Republican ideology. The vision of the state of nature must have seemed fairly realistic in a frontier society. Locke's labor theory of property accorded well with the Republican stress on free labor in the territories and their generally conservative views on the right to property.[12] More important, although Locke was willing to tolerate slavery under very limited circumstances, his theories provided powerful arguments against it. Fundamentally, ownership of one person by another was inconsistent with their basic equality as creations of God. More specifically, slavery as practiced in America violated Locke's theory in three respects. First, the slave's natural right to life was allegedly not protected under slavery. In some Republicans' view, in any event, the slave was simply at the mercy of the owner. Second, slaves were denied their natural right to property in the fruit of their own labor. Third, slaves were excluded from the social compact.

Although they have been largely forgotten today, three other writers of the natural law school were highly influential in eighteenth and early-nineteenth century America. These were Pufendorf, Vattel, and Burlamaqui. As his major modern commentator says, Pufendorf "is known to American students—when he is known at all—as an obscure German with a funny name who followed Grotius in the early development of international law."[13] His theory stressed man's social nature and his duty to protect his fellow men. He also emphasized human equality and the compact theory of government. Like Pufendorf and Locke, Burlamaqui adopted a compact theory under which government acts in excess of the granted power are invalid. Vattel's work stressed self-defense as a natural right. A nation is obliged to preserve its members and respect their natural right to self-defense. If the sovereign violates these fundamental rights, the populace as a whole can withdraw obedience. Even individuals have a right to resist extreme injustice, for self-preservation is not only a natural right, but also a duty.

These early natural law theorists created two distinct but connected sources of "higher law" thought. One was the "law of nations," a set of legal norms governing the rights and duties of nations. The other was the American version of natural law and compact theories of government, adopted in the eighteenth cen-

12. *See* E. FONER, *supra* note 4, at 11-39.

13. L. KRIEGER, THE POLITICS OF DISCRETION: PUFENDORF AND THE ACCEPTANCE OF NATURAL LAW 1 (1965).

tury. Both lines of thought persisted into the nineteenth century and entered into antislavery Republican ideology.

The law of nations has no exact counterpart today. It was a blend of what we would now call public international law, political theory, conflicts law, and commercial law. It was linked with natural law primarily by the idea that nations have no common sovereign and therefore are in a state of nature with respect to one another. According to Kent, the law of nations derived from "principles of right reason, the same views of the nature and constitution of man, and the same sanction of Divine revelation, as those from which the science of morality is deduced." The law of nations was based on the "general principles of right and justice, equally suitable to the government of individuals in a state of equality, and to the relations and conduct of nations."[14]

The idea of an unwritten international law was characteristic of the legal thought of the time. This was, after all, the age of *Swift v. Tyson* and the "brooding omnipresence" of the common law. In *Swift* itself, Justice Story declared that negotiable-instrument law was, paraphrasing Cicero, not merely "the law of Athens or Rome" but that of the whole commercial world. The extraordinary influence of these ideas can best be seen in *Watson v. Tarpley*.[15] *Watson* was a diversity case brought on a bill of exchange by a Mississippi citizen in the federal circuit court for Mississippi. A Mississippi statute prohibited suit on any bill of exchange until the maturity date, even if the drawee refused acceptance. The Court refused to follow the Mississippi statute because "[a] requisition like this would be a violation of the general commercial law, which a state would have no power to impose, and which the courts of the United States would be bound to disregard."[16] Other Supreme Court decisions apply a similar theory to state insolvency laws, holding them valid in the courts of the legislating state but not in the courts of any other state or of the United States.[17] Thus, the idea of an unwritten law, controlling except when a court was directed otherwise by its own legislature, was deeply embedded in the legal thinking of the time.

The law of nations was not silent on the subject of slavery. Justice Story, beginning with the premise that slavery is immoral,

14. *See* 1 J. KENT, COMMENTARIES ON AMERICAN LAW *2-3.

15. 59 U.S. (18 How.) 517 (1855).

16. *Id.* at 521.

17. Baldwin v. Hale, 68 U.S. (1 Wall.) 223 (1863). *See also* Williamson v. Berry, 49 U.S. (8 How.) 495 (1850) (Court refuses to follow state courts in construing state private law); Gelpke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863) (Court refuses to follow state court in construing state constitution).

argued that it must be prohibited by the law of nations; the prohibition was judicially enforceable unless "waived by the consent of nations." He concluded that a slave ship is guilty of piracy except when the flag state permits the slave trade.[18] Chief Justice Marshall accepted a similar premise:

> That [slavery] is contrary to the law of nature will scarcely be denied. That every man has a natural right to the fruits of his own labour, is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission.

He found, however, that the practice of nations fell lamentably short of this standard and hence that the slave trade did not violate international law.[19] The same ambivalence was reflected in Kent, who declared that although the slave trade was immoral and unjust, it was not piracy unless so declared by treaty or municipal law.[20] The attitudes of these Americans were undoubtedly influenced by a desire not to give support to British claims of a right to visitation of American ships on the high seas.

Unhampered by this consideration, Story was able to say that foreign jurists and tribunals uniformly gave "no effect to the state of slavery of a party, whatever it might have been in the country of his birth or [previous domicile], unless it is also recognized by the laws of the country of his actual domicil [sic], and where he is found, and it is sought to be enforced." Excepting only cases governed by the fugitive slave clause, "the same principle pervades the common law of the non-slaveholding States in America; that is to say, foreign slaves would no longer be deemed such after their removal thither."[21] Many American cases supported the view that slavery could exist only when supported by local, positive law. In cases where slaves had been brought to free states for more than a brief sojourn, even Southern courts generally ruled that they remained free on their return to slave states.[22] The Republicans made strong use of this "slavery local, freedom national" view.[23] Indeed, without it, anti-extensionism would have

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18. United States v. La Jeune Eugenie, 26 Fed. Cas. 832, 846, 847-851 (C.C.D. Mass. 1822) (No. 15,551).

19. 23 U.S. (10 Wheat.) 66, 120-132 (1825).

20. J. KENT, *supra* note 14, at *194-200.

21. J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, § 96 (5th ed. 1857) (citing numerous cases) (footnotes omitted).

22. *See* D. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 50-61, 611-14 (1978).

23. For statements on the local nature of slavery ("slavery local, freedom national") see CONG. GLOBE, 35th Cong. 1st Sess. App. 332, 335 (1858) (Rep. Walton); *id* at App. 79 (Sens. Fessenden and Mason); *id*. at 87-90 (Sen. Clark); CONG. GLOBE, 34th Cong., 1st Sess. App. 938 (1856) (Rep. Brenton); *id*. at 201 (Sen. Trumbull), *id*. 1164 (Rep. Cragin).

been untenable, for the slave relationship would have been automatically transported from Southern states into the territories.

The natural law tradition also entered Republican thought by shaping the ideology underlying the American Revolution. When they adopted the Declaration of Independence as the basis of their platform, the antislavery Republicans were incorporating a synthesis of eighteenth century natural law thought.

Well into the nineteenth century, natural law philosophy continued to play an important role in American law. In *Calder v. Bull*,[24] Justice Chase declared that even without express constitutional limitations, state governments were limited by "certain vital principles in our free Republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power."[25] In *Fletcher v. Peck*, Chief Justice Marshall, not content to rest on the contract clause, also relied on "general principles which are common to our free institutions."[26] A number of state court decisions asserted a similar view in the earlier part of the nineteenth century.[27]

Early nineteenth century commentators also adopted natural law theories. Kent called the rights of personal security, liberty and property "natural, inherent and unalienable." Drawing on natural law writers like Pufendorf, he held that the legislature's power to take private property was limited by principles of natural equity.[28] Other writers like Rawle and Story believed that the people have an inherent right to change governments or to amend their constitutions without regard to constitutional limitations on the amending process. Natural law concepts were also expressed by notable lawyers.

By the 1850's, however, a somewhat diminished degree of belief in natural law became apparent, along with growing skepticism about the reality of the social compact. Increasingly, the

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24. 3 U.S. (3 Dall.) 386-389 (1798).

25. Dean Ely suggests that Chase could not really have been a believer in natural law, since he failed to strike down the state statute in question. Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 26 n.95 (1978). The explanation for Chase's position seems to be, however, that the case was before the Court on writ of error to a state court, giving the Court jurisdiction only over federal constitutional claims. See J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, ANTECEDENTS AND BEGINNINGS TO 1801, 704-07 (1971).

26. 10 U.S. (6 Cranch) 87, 139 (1810).

27. *See* Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth-Century America*, 87 HARV. L. REV. 513, 531-32 (1974).

28. 2 J. KENT, *supra* note 14, at *1, 339. *See also* Dash v. Van Kleeck, 7 Johns 477, 505 (N.Y. 1811) (implicit prohibition on retroactive laws).

compact was seen as a convenient fiction.[29] State courts ruled in this period that they had no inherent power to declare laws void because of conflict with natural law.[30] Growing reliance on express constitutional provisions like the due process clause made reference to natural law superfluous. Jacksonian Democrats were hostile to such assertions of power by judges, while conservatives were increasingly troubled by the potential of natural law theories to encourage secession, rebellion, or civil disobedience.[31] Natural law ideas were still advanced by advocates and still appeared in strongly worded dissents. But the judicial tide appeared to be running against them.

C

Although natural law was losing favor in the courts, it continued to influence antislavery Republicans. In a famous speech, Seward said that "there is a higher law than the Constitution" governing Congress.[32] In the same speech, he declared that slavery was incompatible with natural rights. Similarly, Wade said he would never recognize the right of one man to own another "[u]ntil the laws of nature and of nature's God are changed."[33] For Sumner, the Mexican War was "wrong by the law of nations, and by the higher law of God."[34] Another staunch defender of the higher law was John Bingham, who later played a crucial role in drafting the fourteenth amendment. He replied to criticisms of the "higher law" theory as follows:

> [T]he fathers of the Republic never would have made their Constitution; they never would have borne the sacred ark of liberty through a seven years' war, if they had not believed in a higher law—in the eternal verities of truth and justice. That law is of perpetual and of universal obligation. It is obligatory alike upon individual and collective man; upon the citizen and upon the State.[35]

In a similar vein, Charles Francis Adams said that the "cardi-

29. *See, e.g.* Piqua Branch of State Bank v. Knoop, 57 U.S. (16 How.) 369, 392 (1853) (theory of government not relevant to judicial decisionmaking).

30. *See* Beebe v. State, 6 Ind. 501 (1855); People v. Gallagher, 4 Mich. 244 (1856); Wynehamer v. People, 13 N.Y. 378, 390-92 (1856) (Comstock, J.); *id.* at 411-13 (Johnson, J.); *id.* at 430-433 (Selden, J.); State v. Peckham, 3 R.I. 289 (1838); Lincoln v. Smith, 27 Vt. 328 (1855). *Accord*, T. SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 180-181 (1857).

31. *See* Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 U. PA. L. REV. 1166, 1180 (1972); Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 460, 469-71 (1911).

32. CONG. GLOBE, 31st Cong., 1st Sess. App. 265 (1850).

33. H. TREFOUSSE, BENJAMIN FRANKLIN WADE 36 (1963).

34. D. DONALD, *supra* note 9, at 146.

35. CONG. GLOBE, 36th Cong., 2d Sess. App. 83 (1861).

nal principle of the Revolution" was that "the individual man, whether in or out of the social organization, . . . has certain rights which his fellow-man all over the globe is bound to respect."[36] While arguing a case, Chase gave perhaps the clearest exposition of these principles:

> The provisions of the constitution, contained in the amendments, like the provisions of the ordinance, contained in the articles of the compact, were mainly designed to establish as written law, certain great principles of natural right and justice, which exist independently of all such sanction. They rather announce restrictions upon legislative power, imposed by the very nature of society and of government, than create restrictions, which, were they erased from the constitution, the Legislature would be at liberty to disregard. . . . The Legislature cannot authorize injustice by law; cannot nullify private contracts; cannot abrogate the securities of life, liberty and property, which it is the very object of society, as well as of our constitution of government, to provide; cannot make a man judge in his own case; cannot repeal the laws of nature; cannot create any obligation to do wrong, or neglect duty. No court is bound to enforce unjust law; but, on the contrary, every court is bound, by prior and superior obligations, to abstain from enforcing such law. It must be a clear case, doubtless, which will warrant a court in pronouncing a law so unjust that it ought not to be enforced; but, in a clear case, the path of duty is plain.[37]

Similarly, John Hale argued that a New Hampshire jury was obliged to give no more effect to a law recognizing slavery than it would give a law recognizing ownership of moonbeams.

For moderates like Abraham Lincoln, belief in natural law did not imply immunity from the duties imposed by positive law. For example, Lincoln maintained that if elected to Congress, it would be his duty to pass legislation enforcing the fugitive slave clause. For him, natural law was like the law of nations, interstitial and capable of being displaced by positive law.

Others took a sterner view of the commands of natural law. Of the fugitive slave law, Giddings said, "[l]et no man tell you that . . . there is no higher law than this fugitive slave bill," and he vowed to resist its enforcement.[38] Giddings also thought slaves had the legal and moral right to use force to escape, going so far as to defend an uprising and murder by slaves aboard a slave ship. Ben Wade, later a leading radical Republican, was elected to the Senate on a platform of disobedience to the fugitive slave law.[39] These sentiments were not confined to Congressional debates. In Massachusetts, Ohio, and Wisconsin, there were notable instances

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36. *Id.*, 1st Sess. 2514 (1860).

37. W. PEASE & J. PEASE, THE ANTISLAVERY ARGUMENT 391-92 (1965).

38. R. NYE, FETTERED FREEDOMS: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY, 1830-1860, at 207 (1949).

39. H. TREFOUSSE, THE RADICAL REPUBLICANS: LINCOLN'S VANGUARD FOR RACIAL JUSTICE 53 (1969).

of forcible resistance to the fugitive slave laws, sometimes with the support of the state courts. As Governor of New York, Seward refused to extradite individuals accused of helping slaves to escape, reasoning that stealing slaves cannot be theft because no law can convert men into property.

For many Republicans the "higher law" had a religious basis. For example, the *Rockford Register* said that the equality of man was "a truth not obvious to the senses, but one that is hidden in God, and revealed to those only who in all sincerity approach Him." It went on to say that the basis of human equality is that "when life is all derived from God, no one can have a claim to superiority over another."[40] Lovejoy (brother of the abolitionist editor) expounded upon the biblical passage, "He that stealeth a man and selleth him, . . . he shall surely be put to death." Later in the same speech, Lovejoy admonished Southerners, "Instead of chattering your gibberish in my ear about negro equality, go look the Son of God in the face and reproach him with favoring negro equality because he poured out his blood for the most abject and despised of the human family."[41] Giddings accused Southerners of authorizing the sale of Christ in the person of his followers.[42] He held to the view that "all human governments . . . are subjected to the 'higher law' of the Creator, and authorized to legislate only for the protection of the rights which God has conferred on mankind."[43] Because of these views, the Free Soil party's platform proclaimed slavery a sin. For any Southerners who missed the message, Hamlin warned that "nations, like individuals, must answer to a higher power for the wrongs they perpetrate."[44] The religious beliefs of these men not only provided an intellectual foundation for their antislavery views, but also added an emotional resonance that could hardly have been obtained by quoting Pufendorf or Vattel.

For many Republicans, however, the wellsprings of natural law were to be found with the founding fathers rather than the

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40. 1 H. PERKINS, NORTHERN EDITORIALS ON SECESSION 505, 506 (1942). *See also id.* at 488 (Dubuque *Daily Times*); *id.* at 481 (*Springfield* (Mass.) *Daily Republican*).

41. CONG. GLOBE, 35th Cong., 2d Sess. App. 197, 199 (1859). Despite his strongly anti-slavery stance, Lovejoy enjoyed a high degree of popularity in his district. *See* W. KING, LINCOLN'S MANAGER, DAVID DAVIS 113-14, 117-19 (1960).

42. CONG. GLOBE, 33rd Cong., 2d Sess. App. 33 (1854).

43. CONG. GLOBE, 35th Cong., 1st Sess. App. 65 (1858). Later in the same passage, he said that certain rights are "an element of the human soul; they cannot be alienated by the individual; nor can any association of men, or any earthly power, separate the humblest of the human race from them." *Id.*

44. CONG. GLOBE, 35th Cong., 1st Sess. 1003 (1858). *See also id.* at App. 95 (remarks of Rep. Clark).

biblical patriarchs.[45] The Republicans went to great lengths to demonstrate the antislavery sentiments of the founding fathers.[46] Much reliance was placed on Madison's opposition to the use of the word "slavery" in the Constitution, as showing that the Constitution gave no sanction to slavery. Based on the statements of the framers, the Constitutional debates, and the *Federalist* papers, Seward stated the basic Republican position: "that the Constitution does not recognize property in man, but leaves that question, as between the States, to the law of nature and of nations. That law, as expounded by Vattel, is founded in the reason of things."[47] In two 1858 speeches, Hoard and Hale carefully catalogued antislavery statements by Jefferson, Patrick Henry, and others.[48] Also relying on Jefferson, a Connecticut newspaper stressed his statement that he "trembled for his country when he remembered that God is just."[49] Jefferson's role in excluding slavery from the Northwest territory was also cited, as well as a 1787 declaration that the Americans had fought for "the cause of human nature."[50]

Perhaps the most important source of antislavery Republicanism was the Declaration of Independence. Giddings and Adams both thought it part of the law of nations or American public law. Other Republicans drew lengthy parallels between the actions of the Slavocracy and the list of grievances in the Declaration. Adherence to the Declaration became a kind of touchstone for Republicans. In its 1860 platform, the party officially affirmed its belief:

> That the maintenance of the principles promulgated in the Declaration of Independence and embodied in the Federal Constitution, "That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed," is essential to the preservation of our Republican institutions; and that the Federal Constitution, the Rights of the States, and the Union of the States must and shall be preserved.[51]

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45. *Id.*, 34th Cong., 1st Sess. App. 749 (1856).

46. *See id.* at App. 1170-72 (1856) (Rep. Leiter); *id.* at 124 (Rep. Bingham); *id.* at 393-94 (Sen. Wilson); *id.* at 1160-1163 (Rep. Cragin); *id.*, 35th Cong., 2d Sess. App. 197, 199 (1859) (Rep. Lovejoy).

47. *Id.*, 31st Cong., 1st Sess. App. 264 (1850).

48. *Id.*, 35th Cong., 1st Sess., App. 274 (1858); *id.* at 344. *See also id.* at 315 (remarks of Sen. Hale).

49. 1 H. PERKINS, *supra* note 40, at 62. For other allusions to Jefferson's statement, see CONG. GLOBE, 34th Cong., 1st Sess. App. 750 (Sen. Wade); *id.* at 1203 (Rep. Gilbert); *id.* at 1161 (Rep. Cragin); *id.*, 35th Cong., 2d Sess. App. 197 (1850) (Rep. Lovejoy); *id.*, 36th Cong., 2d Sess. App. 82 (1861) (Rep. Bingham).

50. CONG. GLOBE, 35th Cong., 1st Sess. 1003 (1858) (Sen. Hamlin); *id.*, 34th Cong., 1st Sess. App. 404-05 (1856) (Sen. Seward).

51. 2 A. SCHLESINGER, *supra* note 6, at 1239-40.

This provision was not boilerplate, but instead was adopted out of Parlimentary order when Giddings threatened a walk-out.

This platform comported well with the candidate's views. Lincoln repeatedly stressed the Declaration in the Lincoln-Douglas debates. In one speech, for example, he said:

> I adhere to the Declaration of Independence. If Judge Douglas and his friends are not willing to stand by it, let them come up and amend it. Let them make it read that all men are created equal except negroes. Let us have it decided whether the Declaration of Independence, in this blessed year of 1858, shall be thus amended.[52]

In another debate he argued that " [i]f [the] Declaration is not the truth, let us get the statute book, in which we find it, and tear it out."[53] Lincoln used this attack on Douglas again and again in the debates, perhaps most powerfully in the following passage:

> I believe the entire records of the world, from the date of the Declaration of Independence up to within three years ago, may be searched in vain for one single affirmation, from one single man, that the negro was not included in the Declaration of Independence; I think I may defy Judge Douglas to show that he ever said so, that Washington ever said so, that any President ever said so, that any member of Congress ever said so, or that any living man upon the whole earth ever said so, until the necessities of the present policy of the Democratic party, in regard to slavery, had to invent that affirmation. And I will remind Judge Douglas and this audience that while Mr. Jefferson was the owner of slaves, as undoubtedly he was, in speaking upon this very subject he used the strong language that "he trembled for his country when he remembered that God was just"; and I will offer the highest premium in my power to Judge Douglas if he will show that he, in all his life, ever uttered a sentiment at all akin to that of Jefferson.[54]

Lincoln's views are particularly significant. Because he belonged to the center of the party, he is considered "an ideal party leader to examine in order to measure the thinking of average Republicans."[55]

For Lincoln, as for many others, the most important aspect of the Declaration was its affirmation that "all men are created equal." This stress on equality permeates the speeches of both the Republican leadership and less prominent men. According to Seward, the United States was "founded in the natural equality of *all* men . . . not made equal by human laws, but born equal."[56] In his view, the central idea of the Republican Party was the "equality of all men before human tribunals and human laws,"[57]

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52. LINCOLN-DOUGLAS DEBATES, *supra* note 1, (Part I) at 175.

53. *Id.* at 64.

54. *Id.* (Part II) at 13-114.

55. K. STAMPP, *supra* note 2, at 123; *see also id.* at 134 (Lincoln's position represents "the center of gravity" in the Republican Party).

56. *See* R. NYE, *supra* note 38, at 184 (emphasis in original).

57. E. FONER, *supra* note 4, at 38.

an idea he also thought as native to the Constitution as "the blood . . . is native to the heart."[58] Sumner's passionate belief in legal equality led him to argue, over a century before *Brown v. Board of Education*, that school segregation violated "that fundamental right of all citizens, Equality before the Law," because it branded "a whole race with the stigma of inferiority."[59]

What the Republicans meant by equality was legal equality. Wilson praised his home state as "a commonwealth that throws over the poor, the weak, the lowly, upon whom misfortune has laid its iron hand, the protection of just and equal laws."[60] Wade declared that he stood "upon the Declaration of Independence" in support of the idea that before the law all men are equal.[61] By equality, he apparently meant the qualified legal equality existing in the North.[62] In a similar vein, Bingham said that the "Constitution is based upon the EQUALITY of the human race." Bingham saw in the Constitution several affirmations of the "equality and brotherhood of the human race."[63] As Lincoln observed:

> I have said that I do not understand the Declaration to mean that all men were created equal in all respects. They are not our equal in color; but I suppose that it does mean to declare that all men are equal in some respects; they are equal in their right to "life, liberty, and the pursuit of happiness." Certainly the negro is not our equal in color,—perhaps not in many other respects; still, in the right to put into his mouth the bread that his own hands have earned, he is the equal of every other man, white or black.[64]

The Declaration of Independence rested on a view about the relationship between government and the people that many Republicans were willing to adopt. There was wide agreement among Republicans that governments derived their powers from the consent of the governed. They viewed the federal Constitution as a compact by the people rather than the states. Even on the eve of secession, Bingham conceded that the right of revolution was a "sacred and indefeasible" right, though he argued that the South had no just grounds for rebellion. He also opposed the proposed thirteenth amendment, which would have precluded fu-

58. CONG. GLOBE, 31st Cong., 1st Sess. App. 1023 (1850). In a somewhat similar vein, Rep. Leiter suggested that the drafters of the Declaration "submitted their principles to Almighty God, and received His righteous approval." *Id.*, 34th Cong., 1st Sess. App. 1171 (1856).

59. Oral argument of Charles Sumner in Roberts v. Boston (1849), *quoted in* W. PEASE & J. PEASE, *supra* note 37, at 288.

60. CONG. GLOBE, 34th Cong., 1st Sess. App. 393 (1856).

61. *Id.* at App. 751.

62. *See, e.g.*, H. TREFOUSE, *supra* note 33, at 87.

63. CONG. GLOBE, 34th Cong., 3d Sess. App. 139, 140 (1857) (emphasis in original).

64. LINCOLN-DOUGLAS DEBATES, *supra* note 1, (Part I) at 176. *See also id.* (Part II) at 115.

ture amendments on slavery, because it struck at the "inherent right of the people to alter or amend [the Constitution] at their pleasure."[65] Hale's belief in revolution found expression in praise for Cromwell and the regicides.[66] Belief in popular self-rule did not, however, lead to a belief in unqualified majoritarianism. Giddings believed that governments are "authorized to legislate only for the protection of the rights which God has conferred on mankind."[67] Bingham agreed that government's "primal object must be to protect each human being within its jurisdiction in the free and full enjoyment of his natural rights."[68]

What were these natural rights? The Republicans found it less necessary to address this question than to affirm that some such rights did exist. Nevertheless, there are some useful clues to their thinking on particular rights. In attempting to determine what rights were considered fundamental, we may look to a long period of Republican attacks on the South for denying a variety of human rights. It is also useful to examine the legal literature and cases of the period.

Freedom of speech and religion were clearly among the fundamental rights recognized in the 1850's. Anticipating Alexander Meiklejohn, Kent stressed that free speech concerning governmental officials is essential to the "control over their rulers, which resides in the free people of the United States." He also believed that "civil and religious liberty generally go hand in hand."[69] Rawle agreed that "[t]he foundation of a free government begins to be undermined when freedom of speech on political subjects is restrained"; when such rights are denied, "life is indeed of little value." As to religious freedom, he felt that the first amendment merely restated Congress's lack of power in the area, since no one could reasonably believe that "the general welfare of a nation could be promoted by religious intolerance."[70] Similar views are expressed in the influential work of Francis Lieber, who also supported the right to petition and freedom of association.[71]

The Republicans stressed their agreement with these principles and criticized the South as an enemy of free speech. Gid-

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65. CONG. GLOBE, 36th Cong., 2d Sess. App. 82 (1861).

66. *Id.*, 35th Cong., 1st Sess. 319 (1858).

67. CONG. GLOBE, 35th Cong., 1st Sess. App. 65 (1858). *See also* J. STEWART, JOSHUA GIDDINGS AND THE TACTICS OF RADICAL POLITICS 171-172 (1976).

68. *Id.*, 34th Cong., 3d Sess., App. 139 (1857).

69. 2 J. KENT, *supra* note 14, at *17, 34-35.

70. W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 121, 123 (1829).

71. F. LIEBER, ON CIVIL LIBERTY AND SELF GOVERNMENT 89-99, 124-30, 275-82 (1859).

dings attacked the South for keeping slaves ignorant and restricting freedom of speech in order to enslave the public mind. "No injury to the body," he said, could "bear any comparison to the enslavement of the intellect."[72] Lovejoy accused the South of a despotism like Napoleon's in crushing freedom of speech and the press.[73] These assertions, echoed by other Republican leaders and by the press,[74] had deep historical roots. The antislavery movement gained much of its strength from Northern reaction to Southern attempts to limit first amendment rights.[75]

The Kansas controversy in the late 1850's provided an important occasion for expression of civil liberties views.[76] The proslavery LeCompton government attempted to suppress antislavery speech. Its attempts to do so were bitterly attacked by the Republicans. Wilson accused the LeCompton government of striking down free speech, imposing "[t]est oaths, against which reason and humanity revolt," and reducing the people of Kansas "to the pitiable condition of conquered menials of the slave power."[77] Seward accused the Kansas legislature of making it "a crime to think what one pleased, and to write and print what one thought," thereby borrowing "all the enginery of tyranny, but the torture, from the practice of the Stuarts."[78] "Before you hold this enactment to be law," Bingham proclaimed, "burn our immortal Declaration and our free-written Constitution, fetter our free press, and . . . put out the light of that understanding which the breath of the Almighty hath kindled."[79]

Besides first amendment rights, property rights were also apparently considered fundamental. Protection of property was an important part of early nineteenth century legal thought. Kent viewed property as one of the"natural, inherent and unalienable"

72. CONG. GLOBE, 35th Cong., 1st Sess. App. 66 (1858).

73. *Id.*, 2d Sess., App. 197 (1859).

74. *See* 1 H. PERKINS, *supra* note 40, at 77, 508-09 (editorials by the *Chicago Daily Democrat*); CONG. GLOBE, 31st Cong., 1st Sess., App. 268 (1850) (remarks of Sen. Seward); *id.*, 34th Cong., 1st Sess. App. 751 (1856) (remarks of Sen. Wade); *id.*, 34th Cong., 3rd Sess. App. 91 (1856) (remarks of Rep. Cumback).

75. R. NYE, *supra* note 38, at 40-69; 106-14, 119-20, 137-38. Note that the slogan of the Free Soil party was "Free Soil, Free Labor, *Free Speech*, Free Men." J. MAYFIELD, *supra* note 3, at 119 (emphasis added).

76. The 1856 Republican platform [*reprinted in* 2 A. SCHLESINGER, supra, note 6, at 1203-1205 (1973)] charged that citizens of Kansas had been subjected to test oaths, denied their right to a speedy trial, their right to be free from unreasonable searches, and their rights to freedom of speech and of the press.

77. CONG. GLOBE, 34th Cong., 1st Sess. App. 854 (1856).

78. *Id.*, 35th Cong., 1st Sess. 941 (1858). Similar statements were made by Hale, *id.* at 317.

79. *Id.*, 34th Cong., 1st Sess., App. 124 (1856).

rights.[80] Sedgwick argued that legislation destroying vested rights in land would violate the just compensation clause, the due process clause, and inherent limits on the legislative power. Lieber viewed the unrestricted freedom to acquire and produce property as an important fundamental right. This view of the sanctity of property was shared by many Republicans. Like several other Republicans, Fessenden argued that the true "foundation of the law of property" was divine.[81] Tappan said slaves were not held on "the same ground of natural right" as that by which other property was held.[82] One of the objections to slavery stressed by Lincoln and others was that it deprived slaves of the right to the fruits of their labor.[83] For these reasons, property can plausibly be viewed as a fundamental right.

It is less clear whether the due process clause was thought to provide substantive protection for property. Many state courts rejected substantive due process, the most notable exception being New York's highest court.[84] On the other hand, the 1860 Republican platform adopted the view that the due process clause prohibited Congress from imposing slavery in the territories. This view of due process, which obviously went beyond the merely procedural, was strongly endorsed by Bingham.[85] Having imported at least some substantive content into the clause, the Republicans might have been willing to find protection for other fundamental rights in the same place. The evidence is inconclusive.

It is not easy to tell which rights were considered fundamen-

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80. *See* 2 J. KENT, *supra* note 14, at *1.

81. CONG. GLOBE, 35th Cong., 1st Sess. App. 80 (1858).

82. *Id.* at App. 329 (1858).

83. In one notable passage, Lincoln said that slavery rested on the same principle as "the divine right of kings":

> It is the same spirit that says, "You work and toil and earn bread, and I'll eat it." No matter in what shape it comes, whether from the mouth of a king who seeks to bestride the people of his own nation and live by the fruit of their labor, or from one race of men as an apology for enslaving another race, it is the same tyrannical principle.

LINCOLN-DOUGLAS DEBATES *supra* note 1, (Part II) at 268.

84. The cases are reviewed at length in Corwin, *supra* note 31 at 366, 460 (1911). It should be noted that some of the cases Corwin discusses are from states such as Rhode Island in which the language of the state due process clause limited the clause to criminal cases. Many of the cases also contain fascinating discussions of procedural due process.

85. *See, e.g.*, CONG. GLOBE, 34th Cong., 1st Sess. App. 124 (1856) (remarks of Rep. Bingham). Dean Ely suggests that such references to due process may have meant only the absence of adequate procedures. *See* Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 417 n.76 (1978). The 1860 platform calls for legislation prohibiting slavery as the necessary enforcement of the due process clause, and this seems hard to derive from a purely procedural view of due process, which would seem only to require that individuals be given hearings to confirm their putative owner's title. *See* 2 A. SCHLESINGER, *supra* note 6, at 1240-1241.

tal or the degree to which those rights could be regulated. Free speech and property rights seem to be the clearest candidates for inclusion on a Republican list of fundamental rights. Because so much attention was devoted to slavery, and because slaves had essentially no rights at all, the Republicans had little reason to specify the precise contour of natural rights.

II

The Republican effort to establish a positive law basis for fundamental rights began with the thirteenth amendment, which eliminated the discrepancy between the natural right of personal freedom and positive laws establishing slavery. In the Civil Rights Act, they turned to the problem of providing statutory protection for the rights of the freed slaves. Finally, in the fourteenth amendment, they sought to constitutionalize the higher law.

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Lincoln's conciliatory inaugural address endorsed the proposed thirteenth amendment, which would have guaranteed the legality of slavery in the states. But he also took the position that the Union was perpetual and that secession was unconstitutional.

When the Confederates opened fire on Fort Sumter, the North could hardly have been less well prepared for war. It had virtually no army; it lacked a modern fiscal system with which to finance the war; it had no real bureaucracy with which to organize the war effort. Worse, the President had no clear authority to do anything at all about secession, let alone take the drastic actions required by the situation. Nevertheless, Lincoln did take decisive action. He proclaimed a blockade of Southern ports, dispersed funds to anti-secessionists without legal authorization, suspended the writ of habeas corpus, and hastily mustered an army consisting of volunteers and state militias. Slowly, as Allan Nevins put it, the North lurched to arms.

Lincoln also faced monumental political problems. Northern Democrats were at best unenthusiastic about the War. The border states, which had to be held if the Union was to survive, had strong leanings toward the South and slavery. While attempting to pacify them, Lincoln also had to maintain the support of his own party, which contained strong antislavery forces. The party itself was less than a decade old and had never before held national power. So Lincoln had to fight a war, mold a political party, and create the machinery of wartime government all concurrently.

The relatively even position of the two parties, combined with the need to keep the loyalty of the border states, required Lincoln to take a cautious position on slavery. His position was supported by those politicians who were tied to his administration by patronage and by other political realists. To the antislavery wing of the party, the pro-administration wing seemed conservative. According to recent historians, however, the pro-administration wing shared the antislavery ideology but was more cautious about tactics. During the early stages of the conflict, these conservative and moderate Republicans joined with Democrats in disavowing abolition as a Northern war aim.[86]

Inevitably, however, Republicans came to view emancipation as necessary to preserve the Union.[87] Emancipation began with sporadic, unauthorized actions by army officers. In 1862, Congress took timid steps forward with the Confiscation Act, which provided for the seizure of rebel property including slaves, and with legislation abolishing slavery in the Territories and the District of Columbia. On September 22, 1862, Lincoln issued a preliminary proclamation, which he made final in the Emancipation Proclamation on January 1, 1863. Lincoln was apparently motivated by a combination of tactical considerations and his longstanding antislavery beliefs. The Proclamation applied only in the Confederacy, not in the border states.

By mid-1863, Republicans were ready to end slavery. No longer did they disavow abolition as an independent objective of the War.[88] In their minds, slavery and rebellion had become one.[89] Only a constitutional amendment permanently abolishing slavery could ensure the security of the Union.[90]

The thirteenth amendment prohibits slavery and "involuntary servitude," in language drawn from the Northwest Ordinance of 1787. The amendment was debated in both Houses of Congress in the spring of 1864. It passed the Senate easily but failed

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86. See J. MCPHERSON, THE STRUGGLE FOR EQUALITY 70-71 (1964); H. BELZ, RECONSTRUCTING THE UNION 24-27 (1969); THE RADICAL REPUBLICANS AND RECONSTRUCTION, 1861-1870, at 7 (H. Hyman ed. 1967).

87. H. BELZ, A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN'S RIGHTS, 1861-1866, at 3, 49-50 (1976).

88. J. MCPHERSON, "The Ballot and Land for the Freedmen," in RECONSTRUCTION: AN ANTHOLOGY OF REVISIONIST WRITINGS 132 (K. Stampp & L. Litwack, eds. 1969).

89. *See* CONG. GLOBE, 38th Cong., 1st Sess. 1201 (1864) (remarks of Rep. Wilson); *id.* at 2948 (remarks of Rep. Shannon); *id.* at 2988 (remarks of Rep. Arnold); *id.* at 1313 (remarks of Sen. Trumbull); *id.* at 1321 (remarks of Sen. Wilson); *id.* at 1461 (remarks of Sen. Henderson); *id.* at 2615 (remarks of Rep. Morris).

90. As Senator Trumbull noted, slaves could be emancipated under the war power, but slavery could only be abolished permanently by means of a constitutional amendment. *See* CONG. GLOBE, 38th Cong., 1st Sess. 1314 (1864).

to obtain a two-thirds majority in the House. It then became an issue in the presidential campaign of 1864, with Lincoln vigorously backing the amendment. After Lincoln's victory, the amendment passed in the next session of the House.

The debates on the amendment reveal the continuity of antislavery thought. As before the war, the slave power theory played a major part in the opposition to slavery. In opening the Senate debate, Trumbull attributed all the Union's problems to the failure of slavery to disappear as the framers had expected and to the Slavocracy's demand for control of the nation.[91] Wilson too emphasized the expansionism of the slave power, which had aggressively sought to extend slavery into the territories.[92]

Like the pre-war antislavery Republicans, members of the Thirty-eighth Congress stressed the impact of slavery on the rights of non-slaves. As Trumbull noted in his introductory remarks, slavery had brought about a denial of freedom of speech and the press in half the Union.[93] Senator Wilson cataloged the evils that slavery had caused: violent attacks on abolitionists, gag orders in Congress, seizure of colored seamen in the South, and assaults on those who attempted to defend them.[94]

Once again, Republicans invoked the Declaration of Independence. Listen to Reverdy Johnson, a clear-headed constitutional lawyer not normally given to flights of rhetoric:

> We mean that the Government in future shall be as it has been in the past, . . . an example of human freedom for the light and example of the world, and illustrating in the blessings and the happiness it confers the truth of the principles incorporated into the Declaration of Independence, that life and liberty are man's inalienable right.[95]

Trumbull, another down-to-earth moderate with little penchant for rhetoric, noted the inconsistency between the Declaration, which proclaimed "the equal rights of all to life, liberty, and happiness," and the denial of "liberty, happiness, and life itself to a

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91. *Id.* at 1313 (1864).

92. *Id.* at 1320. Similar views were stated in the House. *Id.* at 2979 (remarks of Rep. Farnsworth); *id.* at 1368 (remarks of Sen. Clark); CONG. GLOBE, 38th Cong., 2d Sess. 138 (1865) (remarks of Rep. Ashley) ("irrepressible conflict").

93. CONG. GLOBE, 38th Cong., 1st Sess. 1313 (1864).

94. *Id.* at 1320-21. In the House, see *id.* at 2978-79 (remarks of Rep. Farnsworth); *id.* at 2984 (remarks of Rep. Kelley); *id.* at 2990 (remarks of Rep. Ingersoll); CONG. GLOBE, 38th Cong., 2d Sess. 138, 143 (1845), (remarks of Rep. Orth). To the same effect, see *id.*, 1st Sess. 1439 (remarks of Sen. Harlan).

95. *Id.* at 1424. Other references to the Declaration can be found in Sen. Henderson's remarks, *id.* at 1461; in Sen. Sumner's remarks, *id.* at 1482-1483; and in Rep. Orth's remarks, *id.*, 2d Sess. 142-143 (1865).

whole race."[96]

There were also more direct appeals to the higher law. Representative Ingersoll, for example, favored the amendment

> because it will secure to the oppressed slave his natural and God-given rights. I believe that the black man has certain inalienable rights. . . . I believe he has a right to live, and live in a state of freedom. . . . He has a right to till the soil, to earn his bread by the sweat of his brow, and enjoy the rewards of his own labor. He has a right to the endearments and enjoyment of family ties.[97]

Another legislator maintained that no "constitution can legalize the enslavement of men."[98] A third argued that

> the municipal act upon which the right to property in man is predicated is in contravention to the law of natural justice, and cannot establish a claim which 'white men are bound to respect.' Theft and robbery, though sanctioned by legislative authority, cannot absolve man from his allegiance to that law which is supreme and infallible.

He denied "that any assembly of human law-makers ever possessed the power to create a right of property in man which we, as men, or citizens of the Republic, are bound to respect."[99]

The longest discussions of natural law came in response to arguments made by opponents to the amendment. Some opponents argued that the amendment clause of the Constitution did not extend to slavery. For example, one opponent argued that the proposed amendment struck at property, which the government lacked the right to destroy. Abolition of slavery, he claimed, would violate the natural law of property.[100]

A few of the amendment's supporters answered that the amendment's power was simply not limited by natural law.[101] But the more common response was that the amendment did not destroy a vested property right because slavery itself violated natural law.[102] One supporter argued that God gave man no right to property in man, only in things. Another contended that property in slaves "exists only by the laws of the States" in which it is found, but "has no warrant in nature; it finds no sanctions in the enumeration of the subject of property over which dominion was given to man by the Creator. . . . [I]ts origin is human and not

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96. *Id.*, 1st Sess. 1313 (1864).

97. *Id.* at 2990 (remarks of Rep. Ingersoll).

98. *Id.*, 2d Sess. 138 (1865). For other general references to natural law, see *id.* at 142-43 (remarks of Rep. Orth), *id.* at 154-55 (remarks of Rep. Davis).

99. *Id.* at 484.

100. *Id.*, 1st Sess. 2940-41 (1864). *See also id.* at 2952 (remarks of Rep. Coffroath); *id.*, 2d Sess. 151 (remarks of Rep. Rogers).

101. *See id.*, 1st Sess. 2943 (1864) (remarks of Rep. Higby); *id.* at 2980 (remarks of Rep. Thayer).

102. *Id.* at 2978.

divine."[103]

The amendment's opponents also taunted Republicans with the question whether the Constitution could be amended to establish slavery in free states.[104] This drew heated responses. Representative Broomall gave this answer:

> [T]here are some things that are not within the limits of human legislation. It is not within the limits of human laws to legislate away the soul of man; we cannot deprive him, by any process of legislation, constitutional or otherwise, of his free agency; we cannot legislate away his liberty. No man can sell himself. Hence no man can empower his Government to sell him.[105]

A colleague admitted that such an amendment would be a law but, being "opposed to the inalienable rights of the people of the United States," it would be "if I may use a contradictory expression, an unlawful law, a law which you could not enforce, a law contravening the inalienable rights of the citizens of this country."[106] To the same effect, others said that it would violate the higher law, and, as one put it, "any human law that conflicts with the laws of God should be pronounced of no binding force by our courts."[107]

These debates reveal the continued adherence of large segments of the Republican party to higher law doctrines. They viewed slavery as a violation of fundamental rights, which at last they had the power to correct through positive legislation. Obviously they hoped that after abolition of slavery these fundamental rights would no longer be suppressed. Events were to show, however, that abolition did not suffice to bring true freedom for blacks. Congress was then faced with providing protection for the fundamental rights whose existence they had already recognized.

B

Reconstruction began when the army found it necessary to govern conquered areas in the South. In December, 1863, Lincoln established a procedure for Southern states to reenter the Union. New state governments would be organized when ten percent of the voters had taken a loyalty oath and adopted a state constitution renouncing secession and accepting emancipation. Congress

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103. CONG. GLOBE, 38th Cong., 2d Sess. 484 (1865) (Rep. Smithers); *id.* at 217. A similar natural law view of property was expressed by Senator Harlan. *See id.*, 1st Sess. 1437 (1864).

104. *See, e.g.*, *id.*, 2d Sess. 222 (1865) (remarks of Rep. Pendleton).

105. *Id.* at 220 (1865).

106. *Id.* at 222. (remarks of Rep. Thayer).

107. *Id.* at 486.

would retain only the power to decide when to seat Southern representatives.

Congress responded with the Wade-Davis Bill, in which it attempted to gain greater control of reconstruction. The bill required more stringent loyalty oaths and placed additional restrictions on the new state constitutions as a condition on representation in Congress. Although Lincoln pocket-vetoed the bill, Congress continued to assert its authority in reconstruction matters. It created the Freedmen's Bureau to provide protection for blacks and other refugees in the South, and declined to seat representatives of the Banks government in Louisiana.

When the war ended, Republicans were confident that restoration of the Southern states could be achieved without any national guarantees other than the thirteenth amendment. Even the assassination of Lincoln did not immediately dim their optimism. For when Andrew Johnson assumed office he was not viewed as an implacable foe of the Congressional Republicans.[108]

When Johnson announced his reconstruction plan, however, it became clear that he would take an extremely conservative position. The Republican euphoria of the immediate postwar period began to wane with the implementation of Johnson's program. The governments created under the plan were dominated by leading rebels.

Even more disturbing were the widely publicized reports of the proposed Southern black codes. These codes prohibited blacks from renting land, provided for the seizure of those who breached labor contracts, prohibited servants from leaving their masters' premises, and authorized the hiring out of black children and of blacks unable to pay vagrancy fines. The codes also made certain conduct criminal only when done by blacks. Republicans considered the codes attempts to deprive the North of the fruits of victory by reimposing slavery in a more subtle form. Republicans now believed that additional guarantees were needed.

When the Thirty-ninth Congress convened, the moderate Republicans who were in control immediately began to devise a reconstruction plan that they thought would be acceptable to Johnson and the public. Congress established a Joint Committee on Reconstruction to coordinate consideration of the issue. The most immediate fruit of the Republican consensus regarding the

108. Indeed, at that time, even the radical wing of the Party appears to have viewed him as an ally. *See* K. STAMPP, ERA OF RECONSTRUCTION (1965); M. BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863-1869, at 219-20 (1974).

need for federal protection of blacks and loyal Southern whites was passage of the second Freedmen's Bureau Bill and the Civil Rights Bill. The primary purpose of the Freedmen's Bureau Bill was to extend the bureau's life. It also made some attempt to provide land for the freedmen as well as protection for their civil rights.

President Johnson shocked moderates with his veto of the Freedmen's Bureau Bill. His veto message denied Congress's power to pass any such bill in peacetime and seemed to indicate that peace had arrived. Congressional moderates were now under intense pressure to take some action to get reconstruction moving again. Their response was to push through the Civil Rights Bill.[109]

When the Civil Rights Bill first came up for debate, section 1 contained four provisions. First, blacks were declared to be citizens of the United States. Second, the bill prohibited "discrimination in civil rights or immunities among the inhabitants of any State or territory" on account of race. Third, all inhabitants were to have the same rights to contract, to sue, and to engage in various real estate and personal property transactions. Fourth, all inhabitants were to have "full and equal benefit of all laws and proceedings for the security of person and property" and were to be subject to the same punishments.[110] As amended, the bill passed the Senate on February 2, 1866.

The most important subsequent change took place at the initiative of Representative Bingham. On March 8, he moved to have the general prohibition on "discrimination in civil rights or immunities" struck from the bill. He believed that Congress lacked power to pass the bill. His proposed changes would leave the bill invalid but make it "less objectionable." Essentially, his argument was that the term "civil rights" was too vague.[111] On March 13, when the House resumed consideration of the bill, Representative Wilson agreed on behalf of the committee to strike the general no-discrimination clause. He explained that the change did not materially affect the bill, but "some gentlemen were apprehensive that the words we propose to strike out might give warrant for a latitudinarian construction not intended."[112] The committee had previously made several other amendments,

109. On these events, see M. BENEDICT, *supra* note 108, at 155-56, 162.

110. *Id.* at 148.

111. CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866).

112. *Id.* at 1366.

the most important of which was to limit the bill's protections to citizens.

President Johnson vetoed the Civil Rights Bill, contending that it invaded the exclusive jurisdiction of the states.[113] Although Johnson had retained some party support after vetoing the Freedmen's Bureau Bill, the reaction was far more severe when he vetoed the Civil Rights Bill. In a mood of great emotionalism, Congress overrode the veto.

The debates over the Civil Rights Bill and the Freedman's Bureau Bill are couched in different terms from the earlier arguments about the thirteenth amendment. While many Republicans observed that the bills were designed to protect natural rights belonging to all human beings, they more often referred to these rights as belonging to United States citizens.[114] Republicans continued to believe that all men possessed natural rights. But they had always distinguished between whether a state was violating natural law and whether the federal government had the power to do anything about it. In adopting the Civil Rights Bill, what Republicans needed was not a source of human rights, but a justification for federal intervention to protect those rights against state abridgement.[115] Many cited the thirteenth amendment, on the theory that the rights set forth in the bill were inherent in the freedom guaranteed by the amendment.[116] Opponents replied that the thirteenth amendment only authorized Congress to abolish slavery.[117] In turn, the Republicans responded by arguing that

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113. *Id.* at 1679.

114. References to natural rights can, however, still be found in the debates. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 474-76 (1866) (remarks of Sen. Trumbull); *id.* at 1124 (remarks of Rep. Cook); *id.* at 1159 (remarks of Rep. Windom); *id.* at 1157 (remarks of Rep. Thornton); *id.* at 1832-33 (remarks of Rep. Lawrence); *id.* at 632 (remarks of Rep. Moulton); *id.* at 744 (remarks of Sen. Sherman).

Some two years later, Congress considered a bill relating to expatriation. The legislative history is replete with natural law references. *See* CONG. GLOBE, 40th Cong., 2d Sess. 968, 1130 (1868) (remarks of Rep. Butler); *id.* at 969 (remarks of Rep. Judd); *id.* at 1100-01, 1159 (remarks of Rep. Baker); *id.* at 1101 (remarks of Rep. Ashley); *id.* at 1105 (remarks of Rep. Clarke); *id.* at 1130-31 (remarks of Rep. Woodbridge); *id.* at 1797-1798, 2316 (remarks of Rep. Banks); *id.* at 1797 (preamble of bill: "right of expatriation is a natural and inherent right of all people"); *id.* at 1800-1804 (remarks of Rep. Van Trump); *id.* at 4211 (remarks of Sen. Howard); *id.* at 4233-4234 (remarks of Sen. Morton).

115. The Freedmen's Bureau Bill could be justified as an exercise of the war power. As Belz says, the controversies in passing the Civil Rights Act were not over the content of rights, which Republicans agreed on, but over whether rights should be protected by the state or federal government. *See* H. BELZ, *supra* note 87, at 162, 166 (note that Belz's list of rights includes the family and religion).

116. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 41 (1866) (remarks of Sen. Sherman); *id.* at 39 (remarks of Sen. Wilson); *id.* at 475 (remarks of Sen. Trumbull); *id.* at 1124 (remarks of Rep. Cook); *id.* at 1152 (remarks of Rep. Thayer).

117. Whether the thirteenth amendment in fact provided authority to pass the Civil

all governments have the duty, and therefore the inherent power, to protect the fundamental rights of their citizens.

In considering this arguments, it is important to keep in mind the changes the Civil War had made in constitutional thinking. The Constitution, after all, said nothing about secession, or about waging civil war, or about reconstructing a defeated South. Strict constructionists believed that the North was powerless to do any of these things.[118] But fortunately, the Republicans were not strict constructionists. During the war they had come to believe that the national government's powers were congruent with the nation's needs.[119] The Civil War had called for unprecedented actions by the President and Congress. By the end of the war, Republicans were accustomed to being able to find some source of constitutional authority for whatever actions they thought necessary.

The Civil War also drastically changed prevailing views about the relationship between the individual citizen and the national government. Before the war, the states were primarily responsible for meeting the basic needs of American citizens, while the national government had little impact on the daily lives of most Americans. Consequently, state citizenship was considered paramount. From this premise, it was a small step to the conclusion that allegiance to the state came before allegiance to the federal government. But such concepts obviously could not survive the Civil War, a war for the primary allegiance of the citizen.[120]

Both the expansion of national power and the growing significance of national allegiance became evident early in the war. In the *Prize Cases*,[121] the Supreme Court was required to determine

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Rights Bill is a much mooted question. It does appear that Republicans optimistically believed that the abolition of slavery would bring about a state of freedom for blacks.

118. *See* D. POTTER, THE IMPENDING CRISIS, 1848-1861, 520 (1976). If he had been on the scene, Raoul Berger presumably would have taken this position. Berger argues that limits on the states can be imposed only if there is a "clear showing" of a specific intention in the Constitution, *see, e.g.*, R. BERGER, GOVERNMENT BY JUDICIARY 17-18, 137 n.17 (1977), and he generally believes that the Constitution should be limited strictly by its framers' specific intent. *See* R. BERGER, DEATH PENALTIES 27-28; 77-79, 89, 102 n.117 (1982). Since the Constitution nowhere expressly prohibits a state from seceding and nowhere expressly authorizes the federal government to resist secession, Berger seems logically committed to the position that the North wrongfully fought the Civil War.

119. As Fessenden said about the Freedmen's Bureau bill, "the power may be found when the positive necessity of the thing is apparent." CONG. GLOBE, 39th Cong., 1st Sess. 366 (1866). This theme was prevalent throughout the war. For examples during debates over the Confiscation Act of 1862, see CONG. GLOBE, 37th Cong., 2d Sess. 2293 (1862) (remarks of Rep. Wallace); *id.* at 1075 (remarks of Sen. Morrill).

120. *See* Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 41; J. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP: 1608-1870, at 334-42 (1978).

121. 67 U.S. (2 Black) 635 (1862). The quoted passages are found in *id.* at 669, 674 and 673, respectively.

not only the president's power to impose a blockade, but also the relationship of Southerners to the federal government after the outbreak of war. The Court strongly affirmed presidential power to react to the emergency without waiting for congressional approval or a declaration of war. When war broke out, "[t]he President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact." As to the status of citizens in the South, the Court said, "[t]hey have cast off their allegiance and made war on their Government, and are none the less enemies because they are traitors." In an affirmation of nationalism, the Court also said that citizens owe "supreme allegiance" to the federal government and only "qualified allegiance" to their state.

Congress was also greatly concerned about questions of citizenship and allegiance. The 1862 Confiscation Act provided a new punishment for treason and created the lesser crime of giving aid to the rebellion. Throughout the debates Republicans characterized the rebels as traitors who could be punished for their "broken allegiance." One senator noted that the leading rebels, "having betrayed, are no further entitled to the protection of the Government"; another said that only "those who were true to their allegiance" were entitled to property rights.[122] The importance attached to citizenship and allegiance is also evidenced by the frequent resort to loyalty oaths, particularly in the Confiscation Act and the Wade-Davis Bill. The Wade-Davis Bill also stripped certain classes of Confederate office-holders of their United States citizenship. Finally, Congress itself provided that Southern congressmen-elect would have to take an iron-clad oath of past loyalty to the Union.

Given the emotional significance of allegiance and the expansion of national power during the war, it is not surprising that Republicans used the concept of national citizenship to justify their support of the Civil Rights Bill. They had little difficulty connecting the natural rights they sought to protect with national citizenship. Indeed, they argued that the comity clause in the original Constitution had already established this connection. Article IV, section 2 provides that "the citizens of each State shall be entitled to all Privileges and Immunities of citizens in the several States." Republicans interpreted the clause as if it said, "the citi-

122. CONG. GLOBE, 37th Cong., 2d Sess. 2299 (1862) (remarks of Rep. Blair); *id.* at 1077; *id.* at 1881.

zens of each state shall be entitled to all the privileges and immunities of citizens [of the United States] in the several states."

They found support for this reading in some pre-Civil War cases, notably *Corfield v. Coryell*.[123] In *Corfield*, Justice Washington had said that the comity clause protects "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states. . . ." Among these rights were "[p]rotection by the goverment; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole."

There are several examples of this interpretation of the comity clause in the debates on the thirteenth amendment,[124] and it also figured prominently in the debates on the Civil Rights Bill. Senator Trumbull referred to the comity clause to demonstrate that

> the rights of a citizen of the United States were certain great fundamental rights, such as the right to life, to liberty, and to avail one's self of all the laws passed for the benefit of the citizen to enable him to enforce his rights; inasmuch as this was the definition given to the term as applied in that part of the Constitution, I reasoned from that, that when the Constitution had been amended and slavery abolished, and we were about to pass a law declaring every person, no matter of what color, born in the United States a citizen of the United States, the same rights would then appertain to all persons who were clothed with American citizenship.[125]

In the House, Representative Wilson argued that the rights protected in the bill were not new because they were already contained in the comity clause as construed in *Corfield*. That clause represented a "general citizenship" which "entitles every citizen to security and protection of personal rights." He argued that the bill protected rights belonging to "citizens of the United States, as

123. 6 Fed. Cas. 546 551-552, (C.C.E.D. Pa. 1823) No. 3,230; *see also* Douglas v. Stephens, 1 Del. Ch. 465, 469-74, 477-78 (1821); J. KETTNER, *supra* note 120, at 258-260, 323, 348. *Corfield* is close to the Supreme Court's current view of the comity clause, which also uses a fundamental rights analysis. *See* Hicklin v. Orbeck, 437 U.S. 518 (1978); Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978); J. NOWAK, R. ROTUNDA & N. YOUNG, CONSTITUTIONAL LAW 300-06 (2d ed. 1983).

124. *See* CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864) (remarks of Rep. Wilson) (right of free speech belongs to every American citizen and is protected by the comity clause); *id.*, 2d Sess. 139 (1865) (remarks of Rep. Ashley). Prominent Republicans had relied on the comity clause as a grant of rights of national citizenship even earlier. *See* H. BELZ, *supra* note 87, at 27-29, 119-20, 164-65.

125. CONG. GLOBE, 39th Cong., 1st Sess. 600 (1866). *See also id.* at 476 (bill protects "fundamental rights belonging to every man as a free man"). Trumbull used somewhat similar language in connection with the Freedman's Bureau Bill. *See id.* at 319, 322.

such."[126] Representative Lawrence responded to the President's veto with a lengthy defense of the bill. He maintained that Congress had the power to secure citizens "in the enjoyment of their inherent right of life, liberty, and property," and "to enforce [the comity clause] and the equal civil rights which it recognizes or by implication affirms to exist among citizens of the same State." After a discussion of some of the cases and writers dealing with the comity clause, he concluded that it embodies "equal fundamental civil rights for all citizens."[127]

Another concept also played an important role in the debates. Natural law and law-of-nations thinkers had stressed that citizens owe allegiance to their government in exchange for the government's grant of protection to them. Thus, one of the most important rights of citizenship is the right to receive such protection. Early in the debates on the Civil Rights Act, Senator Johnson raised this argument:

> If I am right . . . that we can authorize [blacks] to sue, authorize them to contract, authorize them to do everything short of voting, it is not because there is anything in the Constitution of the United States that confers the authority to give to a negro the right to contract, but it is because it is a necessary, incidental function of a Government that it should have authority to provide that the rights of everybody within its limits shall be protected, and protected alike.[128]

He concluded that it "would have been a disgrace to the members of the [Constitutional] Convention" if they had foreseen the abolition of slavery and "had denied to the Congress of the United States the authority to pass laws for the protection of all the rights incident to the condition of a free man."

A similar argument was made in the House by Representative Broomall. He first noted that it was a "strange" view that the government could protect its citizens abroad but not at home. He found such a power in the general welfare clause and in the necessary and proper clause. Then he made a more sweeping argument:

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126. *Id.* at 1117-18, 1294.

127. *Id.* at 1835-1836. *See also id.* at 1263 (remarks by Rep. Broomall) (listing free speech as one of the "rights and immunities of citizens"); *id.* at 1266 (remarks of Rep. Raymond) (listing "right to bear arms" as a right of citizens); *id.* at 1293-1294 (remarks of Rep. Shellabarger) (right of petition is an "indispensable" right of citizenship). Another purported source of rights was the fifth amendment. *See id.* at 1152, 1270 (remarks of Rep. Thayer); *id.* at 1294 (remarks of Rep. Wilson). *Cf. id.* at 1157 (remarks of Rep. Thornton); *id.* at 340 (remarks of Sen. Cowan). There were also citations to the thirteenth amendment. *See, e.g., id.* at 1152 (remarks of Rep. Thayer); *id.* at App. 157 (remarks of Rep. Wilson).

128. *Id.* at 530. See also Johnson's expostulation in response to a contrary argument by Senator Henderson, *id.* at 572, as well as Senator Morrill's statement, *id.* at 570 (allegiance and protection the essential elements of citizenship).

> But throwing aside the letter of the Constitution, there are characteristics of Governments that belong to them as such, without which they would cease to be Governments. The rights and duties of allegiance and protection are corresponding rights and duties. . . . [Wherever] I owe allegiance to my country, there it owes me protection, and wherever my Government owes me no protection I owe it no allegiance and can commit no treason.

Broomall attacked the idea that such protection could be left to the states, inasmuch as "everybody knows that the rights and immunities of citizens were habitually and systematically denied in certain States to the citizens of other States: the right of speech, the right of transit, the right of domicile, the right to sue, the writ of *habeas corpus*, and the right of petition." He also argued that the necessity for the bill was not limited to the black man, since loyal whites were being denied their basic rights in the South.[129]

Representative Wilson made one of the most forceful arguments based on the duty to protect. In his view, the rights protected by the Civil Rights Bill were "simply the absolute rights of individuals" or "the natural rights of man." He contended that the bill did not establish new rights, but instead protected and enforced those which already belonged to every citizen. In his opinion, the comity clause entitled every citizen to federal protection of personal rights:

> I reassert that the possession of these rights by the citizen raises by necessary implication the power in Congress to protect them. If a citizen of the United States should go abroad, and while within the jurisdiction of a foreign Power be despoiled of his rights of personal security, personal liberty, or personal property contrary to the due course of law of the nation inflicting the wrong, this Government would espouse his cause and enforce redress even to the extremity of war.
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> . . . Well, if all the terrible powers of war may be resorted to for the protection of the rights of our citizens when those rights are disregarded and trampled on beyond our jurisdiction, is it possible that our Constitution is so defective that we have no power under it to protect our citizens within our own jurisdiction through the peaceful means of statutes and courts?
>
> . . . .
>
> Under this broad principle I rest my justification of this bill. I assert that we possess the power to do those things which Governments are organized to do; that we may protect the citizen of the United States against a violation of his rights by the law of a single State; . . . that this power permeates our whole system, is a part of it, without which the States can run riot over every fundamental right belonging to citizens of the United States; that the right to exercise this power depends upon no express delegation, but runs with the rights it is designed to protect. . . .[130]

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129. *Id.* at 1263-64.

130. *Id.* at 1117-19. Wilson reiterated essentially the same argument, *id.* at App. 157 and *id.* at 1294. *See also, id.* at 1293 (remarks of Rep. Shellabarger). In a similar vein, see *id.* at 632 (remarks of Rep. Hubbard on the Freedman's Bureau Bill); *id.* at 654 (remarks of Rep. McKee).

After President Johnson's veto, Trumbull made a major speech in the Senate defending the bill against Johnson's charges. He asserted that

> [t]o be a citizen of the United States carries with it some rights; . . . They are those inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights enumerated in this bill, and they belong to them in all the States of the Union. The right of American citizenship means something.

Trumbull stated that citizens are entitled to protection within the States as well as abroad. He contended that the rights of life, liberty and property are "inalienable rights, belonging to every citizen of the United States, as such, no matter where he may be;" American citizenship "would have little worth" if it did not carry protection with it.

> How is it that every person born in these United States owes allegiance to the Government? Everything that he is or has, his property and his life, may be taken by the Government of the United States in its defense . . . and can it be that . . . we have got a Government which is all-powerful to command the obedience of the citizen, but has no power to afford him protection? Is that all that this boasted American citizenship amounts to? . . . Sir, it cannot be. Such is not the meaning of our Constitution. Such is not the meaning of American citizenship. This Government, which would go to war to protect its meanest—I will not say citizen—inhabitant . . . in any foreign land whose rights were unjustly encroached upon, has certainly some power to protect its own citizens in their own country. Allegiance and protection are reciprocal rights.[131]

Senator Johnson responded to Trumbull's arguments with a line of reasoning that probably would have been regarded as convincing prior to the Civil War. Trumbull's theory, he contended, begged the question—it was the business of the federal government to protect its citizens, but only with respect to matters within federal jurisdiction.[132]

In the House, Representative Lawrence responded to the President's veto by asserting that the bill protected rights "recognized by the Constitution as existing anterior to and independently of all laws and all constitutions." It was, he maintained, "idle to say that a citizen shall have the right to life, yet to deny him the right to labor, whereby alone he can live." More, "[i]t is worse than mockery to say that men may be clothed by the national authority with the character of citizens, yet may be stripped by State authority of the means by which citizens may exist." In his view, "Congress has the incidental power to enforce and protect the equal enjoyment in the States of civil rights which are

131. *Id.* at 1757.

132. *Id.* at 1777.

inherent in national citizenship."[133]

Although Senator Johnson's argument was technically stronger, his opponents' arguments were politically irresistible. The nation had fought a civil war to establish the primary allegiance of citizens to the federal government. In fighting that war, the government had sent thousands of men, many of them draftees, to their deaths. The South was still essentially an occupied territory. A government that had required such sacrifices from its citizens could not be denied the power to protect their most fundamental rights.

C

Section 1 of the fourteenth amendment, despite its enormous importance today, was the subject of relatively little debate in Congress. This has always puzzled scholars. Some have concluded that the brevity of the debate indicates that the amendment was designed to create only an extremely narrow set of rights. We believe, on the contrary, that the debates were short because the fourteenth amendment was intended to create no rights at all. Republicans generally believed that fundamental rights already existed, at least as a matter of natural law and the law of nations, and that Congress probably already possessed the power to protect these rights. The fourteenth amendment was merely designed to perfect that protection. It would ensure a secure constitutional basis for congressional action and provide a self-executing restraint on the states. The nature and source of these rights had been discussed by Republicans since the party was formed in the 1850's, and had received intensive consideration in Congress at least since the debates on the thirteenth amendment. Congressmen felt little need to reiterate what had already been discussed for so many years.[134]

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133. *Id.* at 1832-35. 2 J. BLAINE, TWENTY YEARS OF CONGRESS 177-178 (1886), quotes an impassioned speech by Trumbull:

> It cannot be that we have constituted a government . . . which is all-powerful to command the obedience of the citizen but has no power to afford him protection. . . . Tell it not, sir, . . . to the father whose son was starved at Andersonville, or the widow whose husband was slain at Mission Ridge, or the little boy who leads his sightless father through the streets of your city, or the thousand other mangled heroes to be seen on every side of us to-day, that this Government, in defense of which the son and the husband fell, the father lost his sight and the others were maimed and crippled, had the right to call these persons to its defense, but now has no power to protect the survivors or their friends in any rights whatever in the States. Such, sir, is not the meaning of our Constitution; such is not the meaning of American citizenship. Allegiance and protection are reciprocal rights.

134. *See* H. BELZ, *supra* note 87, at 172.

Before the House took up the Civil Rights Bill, it had considered a proposed constitutional amendment of Representative Bingham's, which provided:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.[135]

Bingham called attention to the fact that the proposal used existing constitutional language except for the portion conferring power on Congress. The remainder, he said, was in the comity clause and the due process clause of the fifth amendment. The majority view among Republicans was that Congress already had the power to protect these rights. Bingham, however, disagreed. He believed that under the original Constitution, enforcement rested solely with state officers, who were obligated by their oaths to protect these rights. In a later speech, he made it clear that the amendment was intended to protect loyal white citizens whose property had been confiscated in the South, and also to apply to "other States . . . that have in their constitutions and laws to-day provisions in direct violation of every principle of our Constitution."[136]

Debate on Bingham's proposal was brief. Its supporters argued variously that the national government already had the power to defend the rights of citizens but that the amendment would remove any doubts; that it would give Congress the power to enforce only the original comity clause; and that it merely gave Congress power to protect "the natural rights which necessarily pertain to citizenship."[137]

Bingham denied that the provision deprived any state of its rights. Rather, it simply would arm Congress with the power to enforce "the bill of rights as it stands in the Constitution to-day." He then quoted the comity clause and the fifth amendment. He derided the notion that any state had reserved to itself the power to deny these rights, which he said were "universal and independent of all local State legislation" and "belong, by the gift of God," to all. He found it anomalous that the federal government had power to vindicate the rights of citizens abroad, but not the power in peacetime to enforce those rights at home. In response to an attack by Representative Hale, Bingham seemed unclear about

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135. CONG. GLOBE, 39th Cong., 1st Sess. 1033-34 (1866). *See also id.* at 1292.

136. *Id.* at 1065.

137. *Id.* at 1062-63 (remarks of Rep. Kelley); *id.* at 1066 (remarks of Rep. Price); *id.* at 1088 (remarks of Rep. Woodbridge).

whether his proposal would give Congress the police power or merely power to ensure that states treated all their citizens alike with respect to protection of fundamental rights.[138]

Representative Hotchkiss then took the floor. He explained that he would vote to postpone consideration of the amendment until it could be modified. In his view, Congress might someday fall into the control of the former rebels. Basic rights should not be wholly relegated to Congressional control but should also be directly protected by the Constitution:

> This amendment provides that Congress may pass laws to enforce these rights. Why not provide by an amendment to the Constitution that no State shall discriminate against any class of its citizens; and let that amendment stand as a part of the organic law of the land, subject only to be defeated by another constitutional amendment. We may pass laws here to-day, and the next Congress may wipe them out.[139]

Representative Conkling then moved to postpone consideration of the measure, and this passed with virtually all Republicans (including Bingham) voting in favor.

On April 9, 1866, the House overrode the president's veto and the Civil Rights Bill became law. On April 21, Representative Stevens placed before the Joint Committee a reconstruction plan proposed by Robert Owen. One aspect was a proposed constitutional amendment. After some maneuvering in committee, Bingham was successful in having the original language of the proposal replaced by his own formulation:

> No state shall make or enforce any law which shall abridge the privileges or immunities of the 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 equal protection of the laws.

This language was quite similar to that contained in Bingham's earlier proposal. The significant difference was that the earlier proposal was couched as a grant of congressional power; the new one was phrased as a limitation on state power. Bingham said

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138. *Id.* at 1088-94. Bingham's ambivalence on this issue was shared by many others. While the moderate Republicans who sponsored the fourteenth amendment understood the need to make some modifications in federalism, they had not lost their respect for the autonomy of the states. *See, e.g.*, H. BELZ, *supra* note 87, at 158-59. They assumed that the state governments would protect the fundamental rights of some citizens, at least the most favored classes of whites. Thus, if only the states would furnish the same protection to the rights of others, such as blacks, there would be no need for federal intervention. *See* Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J. AM. HIST. 65, 78-83 (1974); BELZ, *supra*, at 164-65, 167. When federal intervention did take place, it would be limited to the protection of fundamental rights. Thus, they hoped, federal intervention would be only occasional and limited in its scope. H. BELZ, *supra*, at 131-34, 173-74.

139. CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).

that the change was motivated by his reading of Chief Justice Marshall's opinion in *Barron v. Baltimore*.[140] He explained that the privileges and immunities he had in mind were largely defined in the first eight amendments to the Constitution.[141]

Most of the debate on the fourteenth amendment concerned the now-forgotten provisions of sections 2 and 3. Moderate Republicans were apparently not yet prepared to mandate black suffrage. As a substitute, they proposed a three-part solution to the problem of protecting the blacks. Section 1 would ensure protection for fundamental civil rights, presumably excluding suffrage. Section 2 would reduce Southern representation in the House to the extent that Southern states denied blacks the right to vote. Section 3 would compensate for a possible lack of black suffrage by imposing political disabilities on Confederate supporters.

Despite the focus on other sections, some significant statements were made about section 1 in the House. In opening the debate, Representative Stevens noted that the provisions of section 1 were "all asserted, in some form or other, in our DECLARATION or organic law." But the Constitution had limited only the power of Congress rather than that of the states; this amendment supplied the missing limitation.[142] Representative Garfield, the next supporter of the amendment to speak, expressed regret that it did not provide for suffrage, for he believed "that the right to vote, . . . is so necessary to the protection of . . . natural rights as to be indispensable, and therefore equal to natural rights."[143] The next speaker noted that the amendment merely brought into the Constitution "what is found in the bill of rights of every State of the Union" and incorporated the principle of the Civil Rights Act into the Constitution.[144] Several others noted that they had supported the Civil Rights Act and believed it to be constitutional, but were supporting the amendment to remove any possible doubts.[145] Some referred to the Declaration of Independence as

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140. 32 U.S. (7 Pet.) 243 (1833).

141. *See* J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 104-06 (1956).

142. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (capitals in original). Similarly, in a speech made while the amendment was before the county, Representative Schenck said it put into the Constitution "those principles of liberty and equality which were understood to be in the Constitution . . . by those who framed it." Cincinnati Commercial, Aug. 20, 1866, at 2, col. 5. In another such speech, Gen. Rutherford Hayes spoke of the duty of the United States, in return for the allegiance of the citizen, "to hold up before him the broad shield of the Constitution." *Id.*, Sept 8, 1866, at 2, col. 4.

143. CONG. GLOBE, 39th Cong., 1st Sess. 2462 (1866).

144. *Id.* at 2465.

145. *Id.* at 2498 (remarks of Rep. Broomall); *id.* at 2468 (remarks of Rep. Kelley); *id.* at 2502 (remarks of Rep. Raymond); *id.* at 2511 (remarks of Rep. Eliot).

the source of the rights protected by the amendment.[146]

Near the close of the debates on section 1, Representative Bingham took the floor. He explained that the purpose of the amendment was to give Congress power "to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person in its jurisdiction."[147] As before, he maintained that the amendment took from the states no power that had ever been rightfully theirs. Shortly afterwards, the House passed the joint resolution proposing the constitutional amendment.

On May 23, the Senate began consideration of the proposed amendment. Since the Senate Chairman of the Joint Committee was ill, the joint resolution was presented by Senator Howard. As to the privileges and immunities clause, he said it would be "a curious question to solve what are the privileges and immunities of citizens of each of the States in the several States." He then quoted at length from Justice Washington's opinion in *Corfield v. Coryell*, which had given a fundamental rights interpretation to the comity clause. Howard then continued that these privileges and immunities "are not and cannot be fully defined in their entire extent and precise nature. . . ." To those undefined privileges and immunities under the comity clause, he said, must be added the rights guaranteed by the first eight amendments of the Constitution, which he enumerated. He noted, for example, that the restriction against taking private property without just compensation applied only to Congress, not to the states. Under the existing Constitution, Congress had no power to enforce the Bill of Rights. The proposed amendment would provide an affirmative source of power to protect these rights. Howard spoke only briefly about the equal protection clause, saying it would abolish all "class legislation in the States and [do] away with the injustice of subjecting one caste of persons to a code not applicable to another."[148]

After the Senate debate on May 23, Republican senators met in caucus about the proposed constitutional amendment. The joint resolution came before the Senate again on May 29. As a result of the caucus, amendments were made to sections 2 and 3, and the citizenship clause was added to section 1. Senator Howard explained that in his view the fourteenth amendment was

146. *See id.* at 2510 (remarks of Rep. Miller); *id.* at 2539 (remarks of Rep. Farnsworth).

147. *Id.* at 2542.

148. *Id.* at 2765-66.

"simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States."[149]

After the caucus amendments were passed by party vote, significant Senate debate virtually ended, apparently because Senate Republicans had resolved their differences in secret caucus. At various points in the brief remaining debate, references were made to the reciprocal nature of allegiance and protection, as well as to the fundamental rights protected by the comity clause.[150]

The most important question raised by the debates is what rights the amendment was to protect. The legislative history shows that these rights at least included those fundamental rights described in the *Coryell* opinion and protected by the Civil Rights Bill. It was, after all, one purpose of the amendment to make the constitutionality of the Civil Rights Bill clear. On the other hand, the right to vote was probably not protected by section 1, though many of the amendment's supporters would have liked to grant such protection.[151] The major speeches by Bingham and Howard suggest that the Bill of Rights was incorporated into the fourteenth amendment. Quite likely, these were the men to whom members of Congress would have turned for an interpretation of the amendment.[152]

Howard's speech also suggests that to some extent the content of the privileges and immunities clause was to be left to later judicial interpretation.[153] As Representative Patterson had noted in the debates on the thirteenth amendment, "the English definition of justice and liberty in the Twelfth Century is not the definition of the Nineteenth Century. Our interpretation of these terms in the future of our history will vary with education and local prejudices."[154] So perhaps the framers realized, as Bickel maintained, that the amendment's precise content in some sense was in

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149. *Id.* at 2890.

150. *See, e.g., id.* at 2918 (remarks of Sen. Willey); *id.* at 2919 (remarks of Sen. Davis); *id.* at 2892-93 (remarks of Sen. Conness); *id.* at 2896 (remarks of Sen. Howard); *id.* at 2961 (remarks of Sen. Poland); *id.* at App. 219 (remarks of Sen. Howe); *id.* at 3031-35 (remarks of Sen. Henderson). *See also, id.* at App. 256 (remarks of Rep. Baker); *id.* at App. 293 (remarks of Rep. Shellabarger).

151. *See* R. BERGER, GOVERNMENT BY JUDICIARY, *supra* note 118, at 52-68.

152. *See* Ely, *Constitutional Interpretavism: Its Allure and Impossibility*, *supra* note 85, at 428-433.

153. Howard said that the privileges and immunities "are not and cannot be fully defined in their entire extent and precise nature" and cited *Corfield* to "gather some intimation of what probably will be the opinion of the judiciary." CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866).

154. CONG. GLOBE, 38th Cong., 2d Sess. 484 (1865).

the hands of future generations. In any event, thirty years of debate since *Brown* have failed to produce any consensus on the exact rights the framers had in mind; we see little point in continuing the attempt to discern clues about their precise views on a subject which they discussed so inattentively.[155]

The entire theory behind the amendment argues against giving it an unduly crabbed interpretation.[156] Recall that the basic theory of the Civil Rights Act was that the federal government had at least as much power to protect its citizens at home as it did when they were abroad. Our government would presumably protest if American citizens abroad were punished for their political or religious beliefs, had their property seized without compensation, or were subjected to unfair trials or cruel and unusual punishments. The general theory of the Civil Rights Act was that Congress had the same power to protect citizens at home. Those like Bingham, who thought that Congress did not yet have such power, believed that the fourteenth amendment supplied the missing authority to protect basic human rights.[157]

III

In reading the voluminous statements of the Republicans, both in the 1850's and during the Civil War and reconstruction, it is often difficult to determine the precise import of their remarks to legal issues of interest today. The search to find a specific, clear

155. The main thesis of Raoul Berger's work is that the privileges and immunities clause included *only* the rights listed in the Civil Rights Act. *See* R. BERGER, GOVERNMENT BY JUDICIARY, *supra* note 118, at 20-36. For some responses by critics, see Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds* 80 MICH. L. REV. 462 (1982); Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979); and for Berger's rebuttal arguments, see Berger, *Paul Dimond Fails to 'Meet Raoul Berger on Interpretivist Grounds'*, 43 OHIO ST. L.J. 285 (1982); Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat* 42 OHIO ST. L.J. 435 (1981). We have no desire to enter into what now appears likely to become an interminable and increasingly intemperate debate. Instead, we would offer two brief observations. First, Berger's argument seems to be strongest when he attempts to demonstrate a specific intent to *exclude* certain specific rights such as voting, though even here the point is at least subject to dispute. *See* Van Alstyne, *The Fourteenth Amendment, the 'Right' to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33. Second, we have shown that, from well before the Civil War until after 1866, the Republicans clearly considered a number of other rights to be fundamental. Berger does not, in our view, carry the burden of demonstrating an intent to exclude these other fundamental rights from the coverage of the Amendment.

156. For a strong argument in favor of giving a broad reading to the fundamental-rights guarantee of the fourteenth amendment, see R. Kaczorowski, The Nationalization of Civil Rights (Univ. of Minn. Ph.D. thesis, 1971).

157. The equal protection clause and due process clause refer to "persons" rather than "citizens," thus providing aliens with at least some degree of protection.

legislative intent on all the various problems of interpretation of the fourteenth amendment is doomed to failure. But while specific intentions may have remained unclear, the overall Republican theme from 1856 to 1866 is unmistakable. Their mission, beginning even before the formation of the Republican party itself and continuing through reconstruction, was to bridge the gap between their views on human rights and the realities of the American legal system. Moderates and radicals were divided, not by disagreement on this basic goal, but by considerations of tactics and strategy.

Antislavery Republicans came to power with a well developed theory of human rights. In their view, human rights derived from natural law and its offshoot, the law of nations. As a result of the social compact, government was under an obligation to protect certain human rights. Among these rights were property and freedom of speech.[158] The antislavery Republicans recognized, however, that a state might violate this obligation by enacting legislation contrary to natural law. They did not contest the legal validity of such legislation within the state's own boundaries. They did maintain that such legislation was entitled to no respect outside those boundaries, except as required by some other positive law such as the fugitive slave clause. In short, they recognized that a gap could exist between higher law and an actual legal system.

After the Republicans came to power, they sought to narrow this gap. In the thirteenth amendment, they vindicated the natural rights of slaves by giving them freedom. In the Civil Rights Act, they exercised what they believed to be the inherent power of the federal government under the law of nations to protect the fundamental rights of its citizens. Finally, in the fourteenth amendment, they sought to constitutionalize this protection in two ways. First, they sought to embody the protection in a self-executing constitutional provision. Second, they intended to remove any possible doubts about congressional power to protect fundamental rights.

One of the great achievements of the Republicans in the early reconstruction period was to establish the meaning of American citizenship. Before the Civil War, American citizenship was an

158. Belz confirms that freedom of speech was considered a civil rather than a political right. H. BELZ, *supra* note 87, at xii-xiii, 157-58. According to Benedict, family relationships were also consistently considered fundamental rights by Republicans. *See* Benedict, *Equality and Expediency in the Reconstruction Era*, 23 CIVIL WAR HISTORY 328 (1977); H. HYMAN & W. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, at 302 (1982).

ill-defined and largely insignificant concept. For most purposes, state citizenship was far more significant. The Civil War changed all that by establishing that a citizen's primary allegiance was to the federal government. Thus, the concept of national citizenship became triumphant. But it was not enough simply to proclaim the existence of citizenship, it was also necessary to give content to that citizenship.

After the Civil Rights Act and the fourteenth amendment, citizenship would mean more than the right to an American passport when traveling abroad. Instead, American citizenship would be linked to the possession of fundamental rights, protected against violation by any level of government within the United States. The creation of American citizenship was one of the great accomplishments of the fourteenth amendment. This accomplishment was not the result of pure political philosophy. Rather it arose from a complex interaction between the exigencies of reconstruction and Republican political thought, which itself was a delicate accommodation between higher-law theories and political realism.

Today, of course, the most significant question is the identity of the fundamental rights protected by the fourteenth amendment. History gives no clear answer. The framers were providing a mechanism to protect rights rather than creating new rights; thus, they had little reason to focus carefully on the identity of the rights involved. We know they considered freedom of speech to be fundamental, and they may well have had at least some other parts of the Bill of Rights in mind. While the specifics are unclear, there can be no doubt of their general intent. As a Supreme Court Justice was to put it almost a century later, the fourteenth amendment was intended "to embrace those rights which are *fundamental*; which belong to the citizens of all free governments, for the purposes of securing which men enter into society."[159] Before the Civil War, these rights were largely entrusted to the protection of the states. The fourteenth amendment commemorated a new social compact. For the first time, the federal government claimed the exclusive allegiance of its citizens, in return for its commitment to protect their fundamental rights.

159. Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (emphasis in original; internal brackets, citations and quotation marks omitted).

A NOTE ON SOURCES

The original version of this article contained rather exhaustive documentation. In the interest of readability—and at the cost of great mental anguish—we have pared the original 512 footnotes down to 159. Readers who would like to consult the original, more fully documented version, are invited to write either the authors or the editors for copies of the original manuscript and footnotes.

Instead of the original complete documentation, we have decided to present a brief discussion of the sources which we found most helpful. We began, of course, with the classic fourteenth amendment studies of tenBroeck, Bickel, James, and Fairman. But we also gave close attention to numerous other sources.

On the pre-Civil War period, we relied heavily for background on D. Potter's IMPENDING CRISIS (1976) and A. Nevins's ORDEAL OF THE UNION (1947) and EMERGENCE OF LINCOLN (1950). P. MILLER, LIFE OF THE MIND IN AMERICA (1965), helped set the intellectual stage. A number of recent works have intensively studied the origins and rise of the Republican party. E. Foner's FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY (1970), was the single most useful source for our purposes. We also found excellent material, however, in J. MAYFIELD, REHEARSAL FOR REPUBLICANISM (1980); K. STAMPP, IMPERILED UNION: ESSAYS ON THE BACKGROUND OF THE CIVIL WAR (1980); R. SEWELL, BALLOTS FOR FREEDOM (1976); H. TREFOUSSE, THE RADICAL REPUBLICANS (1968); E. FONER, POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR (1980); and F. BLUE, THE FREE SOILERS (1973). Additional useful material on Republican views was provided by H. PERKINS, NORTHERN EDITORIALS ON SECESSION (1942).

Some of the best, as well as the most readable, material on this period is found in biographies. Among the most useful for our purposes were H. TREFOUSSE, BENJAMIN FRANKLIN WADE (1963); G. VAN DEUSEN, WILLIAN HENRY SEWARD (1967); D. DONALD, CHARLES SUMNER AND THE COMING OF THE CIVIL WAR (1960); R. SEWELL, JOHN P. HALE AND THE POLITICS OF ABOLITION (1965); J. STEWART, JOSHUA GIDDINGS AND THE TACTICS OF RADICAL POLITICS (1976); D. FEHRENBACHER, PRELUDE TO GREATNESS (1962); and D. DONALD, LINCOLN'S HERNDON (1948). We also found useful material in R. NYE, WILLIAM LLOYD GARRISON (1955); F. FESSENDEN, WILLIAM PITT FESSENDEN (1907); H. MILLER, THADDEUS STEVENS (1939); H. COMMAGER, THEODORE PARKER (1936); M. DUBERMAN, CHARLES FRANCIS ADAMS (1961); A. HART, SALMON PORTLAND CHASE (1899); W. KING, LINCOLN'S MANAGER (1960); C. Riggs, *The Ante-Bellum Career of John Bingham* (1958) (unpublished Ph.D. thesis); and S. BEMIS, JOHN QUINCY ADAMS AND THE UNION (1956).

There are a number of excellent recent books on ante-bellum legal thinking. D. Fehrenbacher's THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978), and R. Cover's JUSTICE ACCUSED (1978), played a prominent role in our thinking. We also found useful material in W. WIECEK, SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA (1977); P. PALUDAN, A COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUALITY IN THE CIVIL WAR ERA (1975); R. NYE, FETTERED FREEDOMS (1949); R. BRIDWELL & R. WHITTEN, THE CONSTITUTION AND THE COMMON LAW (1977); as well as Swisher's extraordinarily good volume on the Taney Court in the Holmes Devise History of the Supreme Court. We also consulted treatises by Kent, Story, Sedgwick, Wheaton, Rawle and Lieber. As background, we sampled the literature on the social contract theorists and natural law theory prior to the American Revolution, but we certainly claim no expertise in this area.

On the role of natural law thinking in American law, the classic references are C. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS (1930); B. WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW: A STUDY IN THE HISTORY OF POLITICAL THOUGHT (1931); and Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911). Nelson's articles, including his study of the impact of antislavery thought on styles of judicial reasoning, 87 HARV. L. REV. 513 (1974), are also quite useful.

The literature on reconstruction is enormous. We relied primarily on the following works: M. BENEDICT, A COMPROMISE OF PRINCIPLE (1974); H. HYMAN, NEW FRONTIERS OF AMERICAN RECONSTRUCTION (1966); L. COX & D. COX, POLITICS, PRINCIPLE, AND PREJUDICE, 1865-1866 (1963); E. MCKITTRICK, ANDREW JOHNSON & RECONSTRUCTION

(1960); K. STAMPP, THE ERA OF RECONSTRUCTION (1965); K. STAMPP & L. LITWACK, RECONSTRUCTION (1969); H. BELZ, RECONSTRUCTING THE UNION: THEORY AND POLICY DURING THE CIVIL WAR (1969); T. WILSON, THE BLACK CODES OF THE SOUTH (1965); H. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION (1973); H. Belz, A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN'S RIGHTS, 1861 TO 1866 (1976); H. BELZ, EMANCIPATION AND EQUAL RIGHTS; POLITICS AND CONSTITUTIONALISM IN THE CIVIL WAR ERA (1978); D. DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN (1970); H. HYMAN & W. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875 (1982); and H. HYMAN, RADICAL REPUBLICANS AND RECONSTRUCTION (1967). Helpful background was provided by J. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870 (1978); M. KELLER, AFFAIRS OF STATE (1977); and C. FAIRMAN, RECONSTRUCTION AND REUNION (1971).

The foregoing does not include all the works we consulted, let alone the excellent writings we undoubtedly overlooked, or the unpublished source materials we ignored entirely. It is a sobering thought that this list merely scratches the surface.