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# The Constitution and Nonracial Discrimination: Alienage, Sex, and the Framers' Ideal of Equality.

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Proponents of judicial activism often find themselves walking a difficult, uncertain line regarding the intentions of the framers of the Constitution. On one hand, most contemporary judicial activists are disdainful of attempts to tie constitutional interpretation to the specific intentions of the drafters.[1] On the other, they are uneasy about totally divorcing themselves from the drafters' understanding, perhaps cognizant of the effect that such a course would have on the plausibility of their theories.

One popular resolution of this dilemma has been to associate judicial activism with general concepts that activists see embodied in the Constitution.[2] "Equality" is the concept that is perhaps most often mentioned. While conceding that the drafters of the fourteenth amendment were primarily concerned with racial discrimination, activists argue that courts may appropriately extrapolate from this concern a broad, open-ended theory of equality that can be implemented through protection of a wide variety of groups. Thus, for example, Laurence H. Tribe argues that the constitution-

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1. *See, e.g.*, Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 378 (1982) (originalism is "increasingly without defenders, at least in the academic legal community.")

2. *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY 133-37 (1977) (constitutional provisions define general concepts rather than specific conceptions); Sedler, *The Legitimacy Debate in Constitutional Adjudication*, 44 OHIO ST. L.J. 110, 122 (1983) ("[m]any of the limitations on governmental power designed to protect individual rights that are contained in the Constitution are broadly phrased and open ended, and these majestic generalities directed toward the protection of individual rights are a part of our constitutional tradition"). *See generally* J. ELY, DEMOCRACY AND DISTRUST (1980) (deriving "representation-reinforcement" theory of constitutional adjudication from perceived preference for democracy in Constitution).

alization of a general principle of "antisubjugation" is "faithful to the historical origins of the Civil War Amendments,"[3] while Michael John Perry contends that a general focus on the "moral relevance" of classifications is simply an "elaboration" of the framers' specific intentions.[4]

Such arguments rest on two related premises. The first is that the framers' expressed concern with racial discrimination was simply intended to be a paradigm for a more generally applicable theory of equality. The second is that this paradigm was group-based—that is, that the framers' primary concern was that groups possessing particular characteristics not be discriminated against by government.[5]

The difficulty with such arguments is that they rely on a one-sided appraisal of the framers' world view. The desire to protect blacks from unjust discrimination was certainly one aspect of that world view, but so was a conviction that the states should be left free to make certain other types of classifications. If one wishes to extrapolate to general principles, both sides of the equation must be taken into account.

This article will explore this point by focusing on discrimination on the bases of alienage and sex. These issues were chosen for two reasons. First, the Supreme Court has scrutinized both types of classification closely in recent years. Second, the historical record contains substantial evidence of the framers' views on the propriety of discrimination on the basis of alienage and sex.

This article will briefly describe the Supreme Court's present approach to alienage and sex discrimination, followed by a summary of the commentators' response to the Supreme Court's approach. The article will then address the historical record, arguing that the framers accepted classifications based upon sex and alien-

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3. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1515-16 (2d ed. 1988).

4. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COL. L. REV. 1024, 1065-67 (1979).

5. Group-based theories should be distinguished from a general distaste for "class legislation"—laws that deprive *any* small group of vested rights. At the time the fourteenth amendment was adopted, such legislation was considered inconsistent with the concept of due process of law. *See, e.g.*, The Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 581-82 (1819) (argument of Daniel Webster); Ervine's Appeal, 16 Pa. 256, 268 (1851); James V. Reynolds, 2 Tex. 250, 251-52 (1851); T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 351-59 (1st ed. 1867); R. MOTT, DUE PROCESS OF LAW: A HISTORICAL AND ANALYTICAL TREATISE OF THE PRINCIPLES AND METHODS FOLLOWED BY THE COURTS IN THE APPLICATION OF THE CONCEPT OF THE "LAW OF THE LAND" 259-74 (1926). The drafters of the fourteenth amendment clearly believed that they were outlawing class legislation. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

age. The article will conclude by discussing the relevance of these findings for equal protection theory generally.

## I

In the post-Warren era, the Court has developed an unusually complex doctrinal structure for addressing constitutional challenges to laws that differentiate between aliens and citizens. *Graham v. Richardson*[6] established the general rule that strict scrutiny would apply to discrimination against lawfully-admitted aliens by *state* governments. Subsequently, *Sugarman v. Dougall* recognized an exception to this rule, adopting the rational basis test to evaluate laws excluding aliens from voting; holding elective office or important nonelective executive, legislative, and judicial positions; or becoming officers who participate directly in the formulation, execution, or review of broad public policy.[7] The Court has relied upon the *Sugarman* exception to reject challenges to state laws forbidding aliens to serve as policemen,[8] teachers,[9] and probation officers.[10] The basic principle established in *Graham* remains intact, however.[11]

Discrimination against lawfully admitted aliens by the federal government presents an even more complicated picture. Where the challenged statute deals solely with an insular possession or the District of Columbia, the *Graham/Sugarman* principles apply.[12] By contrast, nationwide discrimination initiated by Congress or the President is subject only to the rational basis test.[13] Finally, nationwide discrimination by an administrative agency will face an intermediate standard of review.[14]

Discrimination against aliens who are *not* lawfully admitted presents different problems. The Court has not established a general principle that discrimination against this class is subject to heightened scrutiny. Nonetheless, in *Plyler v. Doe*,[15] the majority applied intermediate level scrutiny to strike down a Texas statute that denied a free public education to aliens who had not been lawfully admitted.

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6. 403 U.S. 365 (1971).
7. Sugarman v. Dougall, 413 U.S. 634, 647-48 (1973).
8. Foley v. Connelie, 435 U.S. 291 (1978).
9. Ambach v. Norwick, 441 U.S. 68 (1979).
10. Cabell v. Chavez-Salido, 454 U.S. 432 (1982).
11. Bernal v. Fainter, 467 U.S. 216 (1984).
12. Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero, 426 U.S. 572 (1976).
13. Mathews v. Diaz, 426 U.S. 67 (1976).
14. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).
15. 457 U.S. 202 (1981).

The formal standard of review for cases involving sex discrimination is more easily described. After some initial disarray, in *Craig v. Boren*[16] a majority held that such discrimination was unconstitutional unless substantially related to an important governmental interest. This substantial relationship test continues to govern the Court's treatment of sex discrimination issues. In practice, the application of that standard has invariably led the Court to strike down laws that a majority of the Justices view as discriminating against women. By contrast, the Court has been unwilling to closely scrutinize discrimination on the basis of pregnancy[17] or classifications that have only the *effect* of placing women at a disadvantage.[18] Further, the pattern of decisions on statutes that facially disadvantage men defies easy characterization. Since *Boren*, the Court has invalidated statutes that imposed alimony obligations on husbands but not wives;[19] that allowed natural mothers of illegitimate children to veto adoption but denied that right to the fathers of those children;[20] and that denied males entrance to a nurse-training program.[21] At the same time, however, the Court has left standing some statutes that differentiate between the rights of natural mothers and fathers;[22] a statutory rape law that punished only males;[23] and a federal statute that exempted women from registering from the draft.[24] In any event, it is clear that the modern Court has attacked sex discrimination far more actively than in earlier eras.

Commentators generally support the application of searching judicial scrutiny to most alienage-based classifications.[25] They often see the application of strict scrutiny as a logical extrapolation of the

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16. 429 U.S. 190 (1976).

17. Geduldig v. Aiello, 417 U.S. 484 (1974).

18. Personnel Administrator v. Feeney, 442 U.S. 256 (1979).

19. Orr v. Orr, 440 U.S. 268 (1979).

20. Caban v. Mohammed, 441 U.S. 380 (1979).

21. Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).

22. *E.g.*, Lehr v. Robertson, 463 U.S. 248 (1983); Parham v. Hughes, 441 U.S. 347 (1979).

23. Michael M. v. Superior Ct. of Sonoma County, 450 U.S. 464 (1981).

24. Rostker v. Goldberg, 453 U.S. 57 (1981).

For differing views on the nature of the dynamic that created this pattern of decisions, *compare* Maltz, *The Concept of the Doctrine of the Court in Constitutional Law*, 16 GA. L. REV. 357, 374-97 (1982) (arguing pattern reflects interaction between different doctrinal approaches of various Justices) *with* Freedman, *Sex Equality, Sex Differences and the Constitution*, 92 YALE L.J. 913 (1983) (arguing that pattern reflects oscillation between two different theories about the nature of sex differences, both of which are fundamentally flawed).

25. *E.g.*, J. ELY, *supra* note 2, at 161-62; E. HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 29-53 (1985); L. TRIBE, *supra* note 3, at 1552-53; Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 44, 46 (1977); Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?* 75 MICH.

framers' general theory of equality. For example, Kenneth Karst

L. REV. 1092 (1977); Rosberg, *The Protection of Aliens from Discriminatory Treatment by the Federal Government*, 1977 SUP. CT. REV. 275.

Many commentators are uncomfortable with the implications of the Court's equal protection analysis. They prefer to rely on the structural/supremacy clause argument that was the basis of Toll v. Moreno, 458 U.S. 1 (1982) and an alternative analysis in *Graham*, *supra* note 6. *See, e.g.*, L. TRIBE, *supra* note 3, at 1550-51 n. 57; Perry, *supra* note 3, at 1059-1060.

Even if accepted as a sound basis for the analysis of discrimination against aliens, a supremacy based approach could not explain all of the results reached by the Court in the alienage cases. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), is the clearest example. There the Court struck down a federal Civil Service Commission regulation that barred aliens from the competitive service. Since in that case the challenged discrimination was mandated by a federal agency, the result obviously cannot be justified by reference to the need to maintain the supremacy of the federal government over state authorities.

Plyler v. Doe, 457 U.S. 202 (1981), fares no better under a supremacy clause analysis. In that case the plaintiffs—illegally present in the United States—had in essence forced themselves not only on a reluctant state government, but also an unwilling federal government. While perhaps not to be treated as outlaws, entirely outside the protection of government authority, their claim to that protection is minimal at best. Certainly it seems anomalous to infer that the federal interest in the plaintiffs' welfare extends to interference with traditional state authority to distribute educational resources when by law the primary federal goal is to remove them not only from the state, but also from the territorial limits of federal power altogether.

A focus on the structural/supremacy clause approach could, however, explain some of the more puzzling aspects in the equal protection analysis of alienage classifications. First, supremacy-based analysis justifies a difference in the standard of review for state and federal classifications, respectively. Obviously, if the true source of suspicion of alienage classifications is the need to maintain the supremacy of the federal government, classifications by state governments should be subject to greater scrutiny than their federal counterparts.

The failure to impose strict scrutiny on exclusions of aliens from suffrage and policy-making positions also fits comfortably into supremacy-based analysis. Preventing the states from interfering with the delegated powers of the federal government is an important value in the constitutional scheme; at the same time, however, maintaining the status of the states as quasi-sovereign entities is also an important structural value of the same system. While determining the manner in which government benefits such as welfare are distributed is an intrusion on that status, dictating the structure of state government is a much greater intrusion. Indeed, the power to determine the structure of government is the very essence of sovereign authority. Thus a structural argument might well infer a federal intention to force states to provide aliens with equal access to government benefits, but not to the governing process itself.

The major difficulty is that the premises of the supremacy clause justification for enhanced scrutiny are fatally flawed. Any analysis must begin by recognizing that federal limits on the authority of the states to determine the distribution of benefits within the territory under their control are the exception rather than the rule; in general, the constitutional scheme presumes that the local governments are free to determine who are to receive those benefits. This presumption can only be overcome by the presence of some overriding federal interest.

On its face, the simple decision to grant an alien admission to the Untied States does not embody such an interest. The impact of such a decision is primarily negative; it simply provides that (unlike aliens who are not lawfully admitted), the legally admitted alien is not subject to deportation. If a special federal interest in the welfare of aliens exists, its sources must be found elsewhere.

Admittedly, in certain limited circumstances, federal statutes do reflect such an interest. For example, 42 U.S.C. § 1982 (1870)—the codification of the 1870 anti-discrimination act—guarantees to aliens the ability to enjoy a set of specified rights. Some commentators have suggested that sec. 1982 is simply an example of a general federal policy that aliens and citizens should be accorded equal treatment. The overall pattern of federal action, however,

sees the amendment as embodying a general principle of "equal citizenship" that is broad enough to be applied appropriately to aliens.[26] Elizabeth Hull reaches an even stronger conclusion by different reasoning. She contends that the concept of citizenship "was [not] granted more than a minimal and vague role in [the fourteenth amendment.]"[27] Thus, she concludes, even the *Sugarman* exception "vests citizenship with a significance that is at variance with the language and history of the Constitution."[28]

Academic commentary on the Court's sex discrimination jurisprudence is if anything even more emphatic. Although the Burger Court was more hostile to sex discrimination than any Supreme Court in history, most commentators argue that the Court should be even more activist. These commentators make one or more of a number of different claims: that the Justices have been insufficiently hostile to laws that (on their face at least) discriminate against men;[29] that the Court should not concentrate solely on discriminatory intent, but instead should closely scrutinize all laws having disparate impacts;[30] and that the Court's refusal to treat discrimination on the basis of pregnancy as sex discrimination is indefensible.[31] Like the commentators on the alienage cases, a number of those taking this position seek to tie their argument to

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clearly reflects the view that the distinction between alienage and citizenship can appropriately be taken into consideration in a variety of contexts.

The reaction of the executive branch to the *Hampton* decision provides a particularly striking example. The majority opinion in *Hampton* clearly suggested that action by Congress or the President explicitly barring aliens from the Civil Service might well survive constitutional scrutiny. President Ford acted quickly to accept the implicit invitation, issuing an Executive Order that in essence reinstated the regulation that the Court had found constitutionally infirm. The United States Court of Appeals for the Seventh Circuit rejected an attack on the Executive Order, and the Supreme Court denied certiorari. Vegara v. Hampton, 581 F.2d 1281 (7th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979). As *Mathews* demonstrates, the federal government denies other benefits to aliens as well.

Of course, in certain circumstances it does guarantee specified rights to all or some aliens; the Civil Rights Act of 1870 is a prime example. The point is that there is no *general* federal policy in favor of granting the same benefits to aliens that citizens receive. Thus the most logical solution is to retreat to the normal presumption—in the absence of some specific federal pronouncement, states should be free to distinguish between aliens and citizens in the distribution of benefits, just as they are generally free to distinguish between different classes of citizens. The only plausible reason for departing from the analysis is based on some sort of equal protection analysis.

26. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 44-46 (1977).

27. E. HULL, *supra* note 25, at 45.

28. *Id.* at 46.

29. *See, e.g.*, Kanowitz, *"Benign" Sex Discrimination: Its Troubles and Their Cure*, 31 HAST. L.J. 979 (1980).

30. *See, e.g.*, Freedman, *supra* note 24.

31. *See, e.g.*, Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 and n.207 (1984), and sources cited therein.

the framers' general intention in adopting section one of the fourteenth amendment. For example, Judith A. Baer argues that the dominant Republicans intended to constitutionalize a "lavish grant of liberty and equality" in the fourteenth amendment—a grant which she claims has since been under-enforced through lack of judicial and congressional action.[32] Similarly, Karst again relies on the sweeping concept of equal citizenship.[33] Both Baer and Karst rely on the general principle of equality to justify more extensive judicial intervention against laws that discriminate on the basis of sex.[34]

As the remainder of this article will demonstrate, an examination of the historical record reveals a very different picture. Whatever principles the framers intended to incorporate into the fourteenth amendment were simply not broad enough to justify general prohibitions on discrimination on the basis of either alienage or sex. I will first consider the historical record relating to alienage, and then turn to sex discrimination.

## II

Hull is demonstrably incorrect when she suggests that citizenship was essentially an irrelevancy to the drafters of the equal protection clause. The idea of national citizenship was in fact central to the political theory that shaped the fourteenth amendment.

The concept of citizenship figured prominently in the sectional dispute that ultimately culminated in the Civil War. Arguments over citizenship arose in two contexts. One set of questions dealt with the status of free blacks. Other, more general citizenship-related issues were even more central to the controversy that generated the war.

For free blacks, the question of citizenship was critical in a number of different areas. Two of the most prominent involved the Negro Seamen's Acts, which severely limited the freedom of black seamen in some southern ports, and prohibitions on black immigration into a number of free as well as slave states. Free blacks and their advocates argued that these discriminatory enactments violated the privileges and immunities clause of article IV—the comity clause—which limits the right of states to discriminate against so-

32. J. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT 105 (1983).

33. Karst, *supra* note 26, at 44.

34. *See* J. BAER, *supra* note 32, at 121-26, 143-49; Karst, *supra* note 26, at 53-55; Karst, *Woman's Constitution*, 1984 DUKE L.J. 447.

journers from other states.[35] The difficulty is that the comity clause protects only *citizens*. Thus, unless blacks could claim that status, the comity clause was of no use to them.

The pro-slavery position on this point was clear—free blacks were not citizens of the United States, and thus were not protected by the comity clause. Therefore, the Negro Seamen's Acts and exclusionary enactments were entirely consistent with the Constitution. This position was ultimately adopted in Chief Justice Taney's opinion in *Dred Scott v. Sandford*.[36]

In the antebellum era, Republican opinion was more divided on this point. Some maintained that all free blacks were citizens of the United States.[37] Other Republicans, fearful of Democratic charges that they favored "racial equality," adopted more moderate positions on the issue. For example, in the Lincoln-Douglas debates Abraham Lincoln faulted *Dred Scott* only because it deprived the states of the authority to define citizenship. At the same time, however, Lincoln stated that his personal view was that blacks should not be considered citizens.[38]

As the Civil War progressed, the Republican position on the citizenship issue hardened. In 1864, Edward Bates, Lincoln's Attorney General, issued an official opinion which concluded that free blacks were in fact citizens of the United States.[39] By the end of the war, all but the most conservative Republicans adhered to this position. At the same time, Democrats continued to charge that this view reflected the Republican belief in total racial equality.

The concept of citizenship was also central to the debate over state sovereignty, the political theory underlying the secessionist position.[40] Advocates for state sovereignty argued that state citizenship was primary and national citizenship only derivative

35. *See, e.g.*, J. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870 ch. 10 (1978); Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 A.J.L.H. 305, 339-42 (1988).

36. 60 U.S. (19 How.) 383 (1857). For excellent discussions of *Dred Scott* and its aftermath, see FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS *passim* (1978); P. FINKELMAN, AN IMPERFECT UNION: SLAVERY, COMITY AND FEDERALISM chs. 8-10 (1981).

37. *See, e.g.*, CONG. GLOBE 35th Cong., 1st Sess. 984 (1859) (remarks of Rep. Bingham).

38. THE LINCOLN-DOUGLAS DEBATES OF 1858 at 51 (R. Johannsen ed. 1965).

39. 10 Op. Att'y Gen. 382 (1864).

40. Contemporary discussions of the theory of state sovereignty include State v. Hunt, 9 S.C. 1, 1-210 (1834), and John C. Calhoun's famous Fort Hill address, reprinted in 11 THE PAPERS OF JOHN C. CALHOUN 413-440 (C. Wilson & E. Hemphill eds. 1978). For more modern analysis, see W. FREEHLING, PRELUDE TO CIVIL WAR ch. 5 (1966), and Bestor, *State Sovereignty and Slavery: A Reinterpretation of Proslavery Constitutional Doctrine, 1846-1860*, 54 J. ILL. STATE HIST. SOC'Y 148 (1961).

therefrom; the Union position, by contrast, rested on the view that citizens' allegiance to the national government was paramount.[41]

The Union victory in the Civil War firmly established the preeminence of national citizenship. This development did not destroy the concept of states' rights as an important element in American political ideology. It did, however, lead to a new emphasis on the reciprocal obligations between citizens and the federal government. Given the prominence of the citizenship question in the disputes that underlay the Civil War, it is not surprising that the issue should reemerge strongly in the debates over Reconstruction. The idea of national citizenship figured prominently in the discussions of both the Civil Rights Act of 1866 and section one of the fourteenth amendment itself.

As initially proposed by Lyman Trumbull on January 5, 1866, section one of the Civil Rights Bill of 1866 did not deal with citizenship at all. Instead, the Bill provided that:

> There shall be no discrimination in civil rights or immunities among the *inhabitants* of any state or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right to make and enforce contracts, to sue, to be parties and to give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefits of all laws and proceedings for the security of persons and property and shall be subject to like punishment, pains and penalties, and to none other . . . .[42]

Congressional power to pass the proposal in this form could only be found in the enforcement clause of the thirteenth amendment. Reliance on this constitutional provision posed substantial problems. First, one had to conclude that the thirteenth amendment went beyond mere dissolution of the master/slave relationship and granted Congress the authority to protect rights inherent in the status of freedman. Substantial evidence supports the conclusion that this position was consistent with the intent of the drafters of the thirteenth amendment;[43] nonetheless, from the language of the amendment, the grant of such power is far from clear.

Moreover, even if the thirteenth amendment vested power in Congress to protect certain rights, the Civil Rights Bill might have been considered to go too far. Some Republicans believed that the section two authority extended only to those rights which were essential to the status of a freedman. Put another way, if one could be

41. Maltz, *Reconstruction Without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment*, 24 HOUS. L. REV. 221, 232 (1986).

42. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

43. *See* Maltz, *supra* note 41, at 238-48.

a freedman without a particular right, then Congress could not rely on thirteenth amendment authority to protect that right. Although aliens, for example, were clearly not slaves, they had historically been limited in their right to own real property and to inherit intestate. Thus, one could be deprived of those rights and yet not have the status of a slave.[44] Nonetheless, both rights were protected by Trumbull's proposal.

To address this problem, even before the Bill was debated in the full Senate, Trumbull moved an amendment to provide that "all persons of African descent born in the United States are hereby declared to be citizens of the United States." Trumbull argued that the naturalization clause as well as the thirteenth amendment gave Congress authority to confer citizenship on free blacks. He further contended that the power to create citizens necessarily implied a power to protect the inherent rights of citizenship. These rights he defined by reference to judicial decisions interpreting the comity clause.[45] Other prominent Republicans argued that the comity clause itself conferred authority on Congress to protect the "privileges and immunities" of all citizens.[46] Thus the relationship between the citizens of the United States and the federal government became the anchor to which the Civil Rights Bill was attached.

Democrats attacked the citizenship provision, contending that blacks should not be made citizens and that, in any event, *Dred Scott* could only be overruled by a constitutional amendment.[47] Republicans generally rejected these arguments. At the same time, however, they showed considerable concern about the proper limitations on "the inestimable privilege" of American citizenship[48] and the rights appurtenant to that status.

The status of American Indians became a matter of particularly intense debate. James H. Lane of Kansas wished to have Indians who had taken allotments of land within their home state to be declared citizens of the United States.[49] While some Republicans such as John B. Henderson of Missouri were willing to go even further and confer citizenship on all Indians,[50] others preferred the grant to be more limited. George H. Williams of Oregon, for example, feared that declaring Indians to be citizens would automatically

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44. *See* CONG. GLOBE, 39th Cong. 1st Sess. App. 158 (1866).

45. CONG. GLOBE, 39th Cong., 1st Sess. 475, 499-500, 600 (1866).

46. *See, e.g., id.* at 1117-18 (remarks of Rep. Wilson); *id* at 1835-37 (remarks of Rep. Lawrence).

47. *E.g., id.* at 500 (remarks of Sen. Johnson); *id.* at 1120 (remarks of Rep. Rogers).

48. *Id.* at 527 (remarks of Sen. Ramsey).

49. *Id.* at 506.

50. *Id.* at 573.

invalidate a variety of restrictive laws.[51] Ultimately a compromise was reached; the Senate adopted language providing that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."[52]

One more citizenship-related change was necessary before passage of the Civil Rights Bill. Even after the addition of the citizenship clause, the Bill prohibited discrimination between the "inhabitants" of the states with respect to designated rights. In the Senate debate, Democrat Reverdy Johnson of Maryland complained that this language would prohibit states from discriminating against aliens with respect to property ownership.[53] The House Judiciary Committee addressed the problem by changing the language from "[t]here shall be no discrimination among the *inhabitants* of the United States . . ." to "[t]here shall be no discrimination among the *citizens* of the United States." As explained by James F. Wilson, floor manager of the Civil Rights Bill and chairman of the House Judiciary Committee, the amendment was adopted to obviate the possibility that the protections of the proposed Civil Rights Act would be extended to aliens.[54] Thus the dominant Republicans clearly understood that aliens might appropriately be granted fewer rights than citizens.

Citizenship-related issues also played a prominent role in the discussions of the fourteenth amendment. The definition of citizenship was the only part of section one that engendered extensive debate. Senate Democrats and their allies raised the same concern over the status of Indians that had generated so much consternation during the drafting of the Civil Rights Act.[55] Bound by the discipline imposed in the party caucus, however, Senate Republicans easily rebuffed efforts to change the language.[56]

The centrality of the idea of citizenship to the Republican concept of rights is demonstrated even more clearly by the remainder of section one. After the criteria for citizenship are defined, states are prohibited from denying the "privileges and immunities" of citizenship to citizens of the United States. All *persons* are then guaranteed equal protection and due process. The logical implication is that citizens are guaranteed a broader class of rights than other residents.

51. *Id.*
52. *Id.*
53. *Id.* at 505.
54. *Id.* at 1115.
55. *See id.* at 2890-97.
56. *Id.* at 2897.

Raoul Berger suggests that the difference in phraseology was inadvertent.[57] The presentation of Senator Jacob Howard of Michigan—floor manager of the fourteenth amendment—belies this claim. Howard begins with a discussion of the privileges and immunities clause which he explicitly notes "relates to . . . citizens of the United States as such, and as distinguished from all other persons not citizens of the United States."[58] His presentation proceeds with a detailed analysis of the question of who in fact is a citizen, followed by an extended discourse on the content of the "great mass of privileges and immunities" that are to be guaranteed by the clause.[59] Only then does Howard discuss the due process and equal protection clauses. These clauses, Howard notes, apply "not merely [to] a citizen of the United States, but to any person."[60] He dismisses the rights guaranteed to non-citizens in a single paragraph, focusing primarily on the problem of unequal criminal laws. The implication is clear: Republicans viewed citizens as entitled to substantially more rights than noncitizens.[61]

The concept of citizenship came once more into focus in 1869 during the Senate consideration of the proposed fifteenth amendment. In the Senate, one of the most hotly-debated issues was the question of whether all racial groups should be guaranteed the right to vote. A number of proposals were offered which would have had the effect of excluding resident Chinese from the protection of the proposed constitutional amendment. Jacob Howard of Michigan, for example, would have changed the proposed amendment to provide that "[c]itizens of the United States of African descent shall have the same right to vote and hold office . . . as other citizens. . . ."[62] George Williams of Oregon took a slightly different tack; he would have limited the protections of the proposed amendment to *native-born* citizens.[63] Since the Chinese were immigrants, states would have been left free to exclude them from voting.

All of these proposals were defeated, largely because many Republicans were unwilling to allow any racial discrimination between citizens with respect to suffrage. For example, George Edmunds of Vermont noted that while enfranchising blacks, the

57. R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 216-19 (1977).

58. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

59. *Id.*

60. *Id.* at 2766.

61. The importance of the concept of citizenship in the development of the Civil Rights Act of 1866 and the fourteenth amendment is also discussed at length in E. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869 (1990).

62. CONG. GLOBE, 40th Cong., 3rd Sess. 1008 (1869).

63. *Id.* at 938.

Howard proposal left "the native of every other country under the sun, the descendant of every race under the sun, entirely to the mercy of the States." He asserted that "it is little less than an outrage upon the patriotism and good sense of a country like this, made up of the descendants of all nations, to impose upon them an amendment of that kind."[64] Addressing a different proposal, Lyman Trumbull took a similar view, contending that when enfranchising blacks, it seemed "paradoxical" to exclude the Chinese, "citizens of the oldest empire of the earth."[65] Ultimately, the Edmunds/Trumbull position prevailed.

The result was quite different when radical Charles Sumner of Massachusetts proposed a change in language which would have prohibited *all* racial discrimination in voting rights, rather than simply discrimination among citizens.[66] The proposal would have had little impact on the rights of blacks, almost all of whom had been granted citizenship by section one of the fourteenth amendment. Most Chinese, however, were immigrants and ineligible to become citizens under federal naturalization law. Thus the Sumner proposal had a potentially profound effect on their rights. At the very least, they would have become enfranchised in states such as Michigan and Indiana, which did not condition the suffrage on citizenship.[67] Some senators worried that the proposal would require the enfranchisement of all Chinese, even in those states which had heretofore allowed only citizens to vote.[68]

This possibility caused great consternation among Republican senators. Frederick T. Frelinghuysen of New Jersey asserted that "I feel that he [*sic*] should not introduce into this country hordes of pagans and heathen. I think we are under every obligation to give our own people equal, unrestricted rights. I do not feel that obligation toward the people of Asia."[69] Oliver Morton of Indiana,[70] who had also strongly opposed the Howard formulation, attacked the Sumner proposal and argued that Chinese should not be given access to naturalization; he contended that if granted the right to vote, "[t]hey will some time come to understand their power, and when they are in the majority will rise up and seize it . . . there ought to be some provisions made against a catastrophe of that kind."[71]

64. *Id.* at 1009.
65. *Id.* at 1036.
66. *Id.*
67. *Id.* at 1030 (remarks of Sen. Trumbull).
68. *Id.* at 1033 (remarks of Sen. Morton).
69. *Id.* at 1034.
70. *Id.* at 1308.
71. *Id.* at 1034.

Stunned by the intensity of the reaction to his proposal, Sumner simply withdrew it without a vote.[72]

These discussions reflect once again the importance of citizenship in the Republican world-view. Republicans were not only willing to allow states to restrict the right to vote to citizens generally; states were deliberately left free to discriminate *on the basis of race* among noncitizens. Such action is hardly consistent with the view of those who argue that Reconstruction-era Republicans were unconcerned with the concept of citizenship.

The relationship between citizenship and property rights was reaffirmed by implication in 1870. Spurred by the mistreatment of Chinese immigrants in California, in that year Congress adopted a provision—patterned on the Civil Rights Bill of 1866—which granted aliens the same status as "white citizens" with respect to certain specified rights.[73] Repeatedly, Senator William Stewart of Nevada, the sponsor of the provision, asserted that the proposal would guarantee to aliens their fourteenth amendment right to equal protection.[74] Yet the 1870 proposal was actually less sweeping than the 1866 bill, leaving aliens without a federally protected right to buy, sell, and hold real property. The implicit message was clear: the rights guaranteed by the fourteenth amendment to persons generally were viewed as less sweeping than those guaranteed to citizens.[75]

In short, the historical background of the Reconstruction amendments is clearly inconsistent with a general rule that subjects classifications based on alienage to close judicial scrutiny. The framers clearly believed that aliens were entitled to *some* rights; at the same time, however, they carefully noted and preserved the distinction between aliens and citizens. Thus, their theory of equality cannot have encompassed a general belief that the concept of citizenship should be viewed as irrelevant to state action.

The framers' treatment of aliens calls into serious question the entire idea that their theory of equality was group-based. On one hand, the framers explicitly guaranteed to aliens a certain set of rights; on the other, they refused to grant other rights to aliens and deliberately structured the fourteenth amendment to discriminate between aliens and citizens. Such a pattern would be inexplicable under a group-based theory of equality.

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72. *Id.* at 1035.

73. Civil Rights Act of 1870 § 16, 16 Stat. 140, 144 (1869-71).

74. CONG. GLOBE, 41st Cong., 2d Sess. 323, 1536, 1678, 3658 (1870). *See* Runyon v. McCreary, 427 U.S. 160, 198-200 (1976).

75. *See* CONG. GLOBE, 41st Cong., 2d Sess. 1536 (1879) (colloquy between Sen. Pomeroy and Sen. Stewart).

The pattern fits far more comfortably with what I have described elsewhere as the theory of "limited absolute equality"—the idea that all men were equally entitled to a certain quantum of rights, and that all citizens were equally entitled to a somewhat greater quantum of rights.[76] Under this theory, the problem with the degraded status of free blacks was not that racial discrimination *per se* was bad, but rather that they were being denied rights which no man (and later citizen) could be denied for any reason. The choice to use the rights of whites as a touchstone in the Civil Rights Act of 1866 and 1870 was merely a matter of convenience and federalism.[77] The basic problem remained, in the words of one prominent antebellum Republican, "a question of manhood, not race."[78]

Republican treatment of aliens in the early Reconstruction era reflects just such a theory. The fourteenth amendment and the Civil Rights Act of 1870 guarantee the natural rights of aliens; by contrast, both Civil Rights Acts and the fifteenth amendment withhold from aliens protection for rights that Republicans viewed as closely tied to citizenship. The theory of limited absolute equality best explains this pattern of treatment.

If in fact the framers were committed to the concept of limited absolute equality, commentators who seek to tie constitutional analysis to the framers' general theory of equality must take a different tack. Rather than concentrating on the characteristics that entitle groups to special protection, the commentators must focus their attention on the rights that the framers believed belonged to all citizens. Determining the extent of these rights is beyond the scope of this article; what is clear, however, is that generalized protection from discrimination for groups such as women and illegitimates is not within the scope of the framers' general theory. Thus, an effort to faithfully implement that theory would drastically reorient modern constitutional jurisprudence.

Even a reorientation, however, would not fully reflect the framers' basic worldview. A theory of equality was not the only idea that influenced the drafting of the fourteenth amendment; the drafters were constrained by other basic concepts as well. The contemporary discussions of sex discrimination bring this point into sharp relief.

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76. *See* Maltz, *Reconstruction Without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment*, 24 HOUS. L. REV. 221, 224-25 (1987).

77. *Id.* at 256-57.

78. *See* E. FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 290 (1970).

## III

The legal position of women in the nineteenth century reflected the widely-shared belief that women were in many ways less competent than men to participate in public affairs. Those defending this belief relied on two related but different types of argument. Some claimed that women were generally inferior to men:

> How did woman first become subject to man, as she now is all over the world? By her nature, her sex, just as the negro is and always will be, to the end of time, inferior to the white race, and therefore doomed to subjection; but happier than she would be in any other condition, just because it is the law of her nature.[79]

Others relied on the theory of "separate spheres," the idea that while men were naturally dominant in public life, women were better suited to provide an appropriate atmosphere for family life

> Woman was created to be a wife and mother; that is her destiny. To that destiny all her instincts point, and for it nature has specially qualified her. Her proper sphere is home, and her proper function is the case of the household, to manage a family, to take care of children, and to attend to their early training. For that she is endowed with patience, endurance, passive courage, quick sensibilities, a sympathetic nature, and great executive and administrative ability. She was born to be a queen in her own household, and to make home cheerful, bright, and happy.[80]

Women were generally denied direct political power, and the economic rights of married women in particular were often sharply limited.

By 1866, however, many sex-based restrictions were under attack from the growing feminist movement of the period.[81] Not surprisingly, many Republicans were sympathetic to at least some of the goals of feminism. The Republican party was the most important mainstream progressive political movement of the era; moreover, in the antebellum era feminism had been closely tied to the abolitionist movement, which in turn had close ties to the radical wing of the party.[82] Republican support for improvement of the legal position of women was therefore to be expected.

Not surprisingly, members of the radical wing of the party often supported feminist aspirations (albeit not unanimously).[83] In

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79. *Editorial*, N.Y. Herald, September 12, 1852, in UP FROM THE PEDESTAL: SELECTED WRITINGS IN THE HISTORY OF AMERICAN FEMINISM 190 (A. Kraditor ed. 1968).

80. Orestes A. Brownson, *The Woman Question*, in *id.* at 193.

81. *E.g.*, M. GURKE, THE LADIES OF SENECA FALLS: THE BIRTH OF THE WOMAN'S RIGHTS MOVEMENT (1974).

82. *See, e.g.*, M. BUHLE & P. BUHLE, THE CONCISE HISTORY OF WOMAN SUFFRAGE: SELECTIONS FROM THE CLASSIC WORK OF STANTON, ANTHONY, GAGE & HARPER ch. 2 (1978).

83. *See, e.g.*, Letter from W.G. S. To The Right Way, in National Anti-Slavery Standard, April 28, 1866, at 3, col. 4; H. TREFOUSSE, THE RADICAL REPUBLICANS: LINCOLN'S VANGUARD FOR RACIAL JUSTICE 26-28 (1969).

addition, however, the cause of women's rights at times also found support from members of other Republican factions. An example of this support came from a contributor to *The Nation*, a centrist Republican journal. After analogizing the legal status of women to that of slaves in the antebellum South, the author continued:

> The . . . traditions, which reduce woman to the condition of an inferior caste, are in conflict with the whole tone and purport of American institutions. They constitute what lawyers call a "discrepancy," an irreconcilable discord, in our whole social life. Let us begin with recognizing true and liberal principles, and trust to the logic of society to work out legitimate and beneficent results. Let us not dispute whether women shall, if special vocation call them, walk in hitherto untrodden paths, or shall be confined to such rude "small chores" as lofty manhood scorns to stoop to; let us not, like the bee, feed one human larva to be a worker, one a mother, and another a drone; but let us administer to both sexes, in every condition of life, that generous intellectual, moral and physical nutrimaent [sic] which will enable each to develop most perfectly the powers and facilities of the material and moral organization.[84]

By 1872, Republican support for the women's rights movement was sufficiently strong that the party platform explicitly recognized the feminist movement.[85]

For a variety of reasons, however, support for women's rights was not translated into federal action during the Reconstruction era. First, some prominent Republicans continued to believe that the law should be adapted to the "natural" differences between men and women. For example, addressing the issue of women's suffrage, Republican Senator Lot Morrill embraced the concept of separate spheres. Morrill argued that granting women the right to vote:

> Associates the wife and mother with policies of state, with making, interpreting, and executing the laws, with police and war, and necessarily disservates her from purely domestic affairs, peculiar care and duties of the family; and, worst of all, assigns her duties revolting to her nature and constitution, and wholly incompatible with those which spring from womanhood.[86]

In addition, other factors limited Republicans' willingness to take federal action to alleviate the condition of women. One of the most important of these factors was the continuing influence of the ideology of federalism on Republican thought. Condemnations of the idea of centralized federal authority reverberated throughout the Reconstruction debate. For example, even arch-radical Wendell Phillips declared "I love State Rights; that doctrine is the cornerstone of individual liberty."[87] Less radical elements of the Republican party were even more concerned with the problem of

84. THE NATION, July 8, 1866, at 166.
85. 1 D. JOHNSON, NATIONAL PARTY PLATFORMS 47 (1978).
86. CONG. GLOBE, 39th Cong. 2d Sess. 40 (1866).
87. National Anti-Slavery Standard, May 15, 1865, at 2, col. 2.

centralization. Thus, *The Nation* described the "Lessons of War" in the following terms:

> [O]ur institutions of local freedom are but so many roots to feed and strengthen our common nationality . . . a nation thus vitalized . . . cannot be compressed into a centralized power even under the stupendous weight of war. [The watchword is] sovereignty without centralization."[88]

In opposing a proposal for federal action to prevent the spread of cholera the following year, the influential Senator James W. Grimes of Iowa was even more explicit:

> During the prevalence of the [Civil War] we drew to ourselves here as the Federal Government authority which had been considered doubtful by all and denied by many of the statesmen of this country. That time, it seems to me, has ceased and ought to cease. Let us go back to the original condition of things, and allow the States to take care of themselves as they have been in the habit of taking care of themselves.[89]

Concerns such as these had a strong influence on the form and scope of Congressional action on civil rights. For example, an early draft of section one of the fourteenth amendment was rejected because of fears that it would vest too much authority in the federal government.[90] Similarly, the Civil Rights Act of 1866 was modified to ensure that it would not cut an unduly broad swath through areas that were hitherto exclusively under state control.[91]

Of course, during the Reconstruction era, some problems were so critical to Republicans that they extended federal control over previously untouchable areas of state authority. The legal status of blacks is the most obvious example. Equal rights for women did not, however, have the same urgency for most Republicans. As Eric Foner has noted, "[a] Civil War had not been fought over the status of women, nor had thirty years of prior agitation awakened public consciousness on the issue."[92] From a Republican perspective, aggressive advocacy of federal protection for the rights of

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88. THE NATION, July 13, 1865, at 39.

89. CONG. GLOBE, 39th Cong., 1st Sess. 2446. *See also*, HARPER'S WEEKLY, November 10, 1866, at 706; Open Letter from Carl Schurz to William Fessenden, Cincinnati Commercial, May 18, 1866, at 2; Springfield Republican, April 5, 1866, at 4; H. HYMAN, A MORE PERFECT UNION 300-01, 393-96 (1973).

90. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1063-64 (1866) (remarks of Rep. Hale); *id.* at 1095 (remarks of Rep. Hotchkiss); *id.* at 1082 (remarks of Sen. Stewart); *id.* at 1083, 1087 (remarks of Rep. Davis); *id.* at 1095 (by implication) (remarks of Rep. Conkling); Springfield Republican, Mar. 2, 1866, at 2; Chicago Tribune, Mar. 1, 1866, at 1, col. 3; Maltz, *supra* note 41, at 267-75.

91. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1366-67 (1866) (remarks of Rep. Wilson); Maltz, *supra* note 41, at 253-58.

92. E. FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 255 (1988); *see also*, W. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 136-39 (1988).

women could only divert attention from the mere pressing problems of freedmen's rights and dilute support for already-controversial measures designed to protect those rights.

The radical *National Anti-Slavery Standard* aptly described the prevailing political situation. While noting that women's rights was a "good cause," an editorial in the *Standard* also asserted that:

> [W]e cannot agree that the enfranchisement of women and enfranchisement of blacks stand on the same ground at this moment. Thirty years of agitation and four years of war have created this costly opportunity [for blacks]. If we let it pass, it passes forever, or at any rate for a generation. . . . Causes have their crises. That of the negro has come; that of the women's rights movement has not come.[93]

Despite this dynamic, Congressional debates on Reconstruction measures did include significant (albeit sporadic) discussions of the rights of women. The discussions focused on three important issues—the economic rights of married women, women's suffrage, and the right of women to serve on juries.

During the antebellum era, married women had made significant progress toward gaining control of their economic affairs. At common law, the rule had been that "the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during marriage, or at least is incorporated into that of the husband."[94] Under this principle, the woman could not contract except for "necessaries" and as her husband's agent; could not sue or be sued in her own name; and could neither make a will nor alienate realty except with her husband's consent.[95] During the nineteenth century the rigors of this regime began to be eased through a variety of devices. The movement toward greater economic independence was, however, far from complete by the end of the Civil War.[96] Moreover, considerations of federalism limited agitation on the subject to the state level.

Not surprisingly, claims that civil rights initiatives would abrogate state authority over women's property rights were used to attack early Reconstruction initiatives. For example, Senator Edgar Cowan of Pennsylvania—a nominal Republican who consistently

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93. National Anti-Slavery Standard, December 30, 1865, at 2, col. 3.

94. W. BLACKSTONE, BLACKSTONE'S COMMENTARIES ON THE LAW *442 (1941); *see also* J. KENT, COMMENTARIES ON AMERICAN LAW *129 (1896).

95. N. BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE AND PROPERTY IN NINETEENTH-CENTURY NEW YORK 54 (1982). The economic relationship between husband and wife at common law is discussed extensively in J. KENT, *supra* note 94, at *129-89.

96. For discussions of the evolution of Married Women's Property Acts in the nineteenth century, see N. BASCH, *supra* note 95; Chused, *Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures*, 29 AM. J. OF LEG. HIST. 3 (1985); Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1983).

opposed his party's program on civil rights—brought up the point in his critique of the Civil Rights Bill of 1866. Claiming that the language of the Bill guaranteed all native-born citizens "the same right [to contract] in every State and Territory of the United States," Cowan continued:

> Now, a married woman in no State that I know of has a right to make contracts generally. In some of the States she cannot contract at all; in others she contracts *sub modo*; and in all there is a limit put upon her power to contract. Is it intended by this bill that it shall be put in the hands of any judge to decide that this bill confers upon married women the unlimited right to contract?. . . Now I ask Senators having the care of States here, whether they are willing to put it in the power of the district court of the United States, or the circuit court of the United States, or any other court *de hors* the State to interfere with regard to the contracts of married women?[97]

Senator Lyman Trumbull of Illinois—the author of the Civil Rights Bill—emphatically denied any such intention.[98] Further the supporters of the Bill consistently maintained that it was aimed only at racial discrimination. This claim derives strong support from the language of the Bill itself, which guaranteed to all citizens only "the same right to make and enforce contracts . . . as is enjoyed by *white citizens*."[99] Since the rights of female white citizens were restricted by state law, Trumbull's bill would not have any effect on women's rights generally.

Representative John A. Bingham of Ohio—the author of section one of the fourteenth amendment—also encountered problems with the issue of sex discrimination. Initially, Bingham introduced a proposal for a constitutional amendment that would simply have armed Congress with the power to secure to citizens all "privileges and immunities of citizens in the several States" and to persons "equal protection in the rights of life, liberty and property." Conservative Republican Robert S. Hale of New York used the example of married women's property rights to launch a federalism-based attack on the proposal:

> Take the case of married women; did any one ever assume that Congress was to be invested with the power to legislate on that subject, and to say that married women, in regard to their rights of property, should stand on the same footing with men and unmarried women? There is not a State in the Union where disability of married women in relation to the rights of property does not exist to a greater or lesser extent.[100]

As has often been noted, Thaddeus Stevens of Pennsylvania

97. CONG. GLOBE, 39th Cong., 1st Sess. 1781-82 (1866).

98. *Id.* at 1782.

99. This language was deliberately added by the Judiciary Committee of the House of Representatives. *See id.* at 1115.

100. *Id.* at 1064.

responded that"[w]hen a distinction is made between two married people or two *femmes soles*, that is unequal legislation; but where all of the same class are dealt with in the same way there is no pretense of inequality."[101] Hale, however, refused to accept this explanation:

> [I]f [the language of the proposal] means you shall extend to one married woman the same protection you extend to another, and not the same you extend to unmarried women and men, then by parity of reasoning it will be sufficient if you extend to one negro the same rights you do to another, but not those you extend to a white man.[102]

Bingham's response to Hale on this issue—delivered the next day—is less often considered:[103]

> [Representative Hale says] if you adopt this amendment you give to Congress the power to enforce all the rights of married women in the several States. . . . He need not be alarmed at the condition of married women. Those rights which are universal and independent of all local State legislation belong, by the gift of God, to every woman, whether married or single. The rights of life and liberty are theirs whatever States may enact. But the gentleman's concern is as to the right of property in married women.
>
> Although this word property has been in your Bill of Rights from the year 1789 until this hour, who ever heard it intimated that anybody could have property protected in any state until he owned or acquired property there according to its local law or according to the law of some other State which he may have carried thither? I undertake to say no one.
>
> As to real estate, everyone knows that its acquisition and transmission under every interpretation ever given to the word property as used in the Constitution of the country are dependent exclusively upon the local law of the State, save under a direct grant of the United States. But suppose any person has acquired property not contrary to the laws of the State but in accordance with its law, are they not to be equally protected in the enjoyment of it, or are they to be denied all protection? That is the question, and the whole question, so far as that part of the case is concerned.[104]

Bingham's analysis links two different concepts that figured prominently in the debates of the Reconstruction era. The first is the distinction between natural rights and rights derived from citizenship. Rights to life and liberty—freedom from physical restraint[105]—were clearly in the former category. The absolute right to real property, by contrast, derived from citizenship; thus, the rights of aliens in this regard were often restricted by the states.[106]

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101. *Id.*

102. *Id.*

103. For examples of scholarship considering only Stevens's response on this point, see J. BAER, *supra* note 32, at 90; Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 38 (1955) (considering Bingham's response on other points); Note, *Sex Discrimination and the 14th Amendment*, 97 YALE L.J. 1153 (1988).

104. *Id.* at 1089.

105. *See* J. KENT, *supra* note 94, at *26.

106. *See* CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866); CONG. GLOBE, 41st Cong., 2d Sess. 1536 (1870); J. KENT, *supra* note 94, at *53-64.

Bingham connects this distinction with an appeal to principles of federalism. He seems to suggest that since the rights to life and liberty are natural rights, states may not distinguish between sexes with respect to those rights. By contrast, since the right to own and convey real property is derived from citizenship, Bingham indicates that even under his proposal Congress would have no authority to overturn state judgments in these areas.

Taken alone, Bingham's argument is not a complete response to Hale's contentions. First, even on its own terms Bingham's analysis does not support state autonomy with respect to the right to contract—one area in which many states had limited the power of married women.[107] That right seems to have been considered a natural right rather than one derived from citizenship.[108] Thus, if one focused only on the natural right/citizenship right dichotomy, under Bingham's proposal the federal government would have gained authority to override state law on this issue.

Moreover, even with respect to real property, the appeal to principles of federalism was not an entirely satisfactory response to Hale. After all, the same argument might be made in connection with state laws that prohibited ownership of property by blacks—laws that Bingham plainly wished to arm Congress with authority to abrogate. Thus Bingham's position is only plausible if he viewed his proposal as incorporating the antebellum position on sex discrimination—that although women were citizens, they nonetheless could appropriately be subjected to disabilities that would have been unacceptable if imposed on men.

Similarly, under the post-War Republican ideology, women could be placed under restrictions that could not be applied to blacks generally. Representative William Lawrence of Ohio summarized this position in his defense of the Civil Rights Bill: "distinctions created by nature of sex . . . are recognized as modifying [privileges and immunities of citizenship], but mere race or color, as among citizens, never can."[109] Representative Samuel Shellabarger—also from Ohio—took a similar position. In his defense of the constitutionality of the Bill, Shellabarger distinguished sharply between federal power over the rights of women and federal power to outlaw state-imposed racial discrimination:

> If [the Bill] undertook, for example, to say that a married woman [was entitled to particular rights], that would invade the rights reserved to the States. But, sir, it

107. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1781-82 (1866) (remarks of Sen. Cowan).

108. *See* CONG. GLOBE, 41st Cong., 2d Sess. 1536 (1870) (text of Civil Rights Act of 1870) (by implication) (protecting right of aliens to contract).

109. CONG. GLOBE, 39th Cong., 1st Sess. 1835 (1866).

> does nothing like that. It permits the States to say that the wife may not testify, sue, or contract. It makes no law as to this. Its whole effect is to require that whatever rights as to each of these enumerated civil . . . matters the States may confer upon one race or color of the citizens shall be held by all races equally. Your State may deprive women of the right to sue or contract or testify. . . . But if you do so, or not do so as to one race, you shall treat the other likewise.[110]

In any event, one point emerges clearly from the discussions. Neither supporters nor opponents of civil rights proposals wished to arm the federal government with power to change the economic rights of women. However, the relatively sparse debates did not provide a complete picture of the justification for the Republican position. Discussions of the suffrage issue, by contrast, produced a much fuller view of the competing arguments.

The suffrage issue was a central focus of the nineteenth century feminist movement. Feminists made concerted but ultimately fruitless attempts to obtain the vote for women in states such as New York, Wisconsin and Kansas; their earliest successes came in the Wyoming territory in 1869 and the Utah territory in 1870. They also continually pressed for a federal enactment that would guarantee women the right to vote nationwide.[111] In the Reconstruction era, Congress was presented with a variety of petitions to take the necessary action.[112] The Republican party split over the appropriate response to these petitions.

The pronouncements of important Republican journals provided evidence of this split. The *National Anti-Slavery Standard* consistently supported the basic feminist position on voting rights;[113] *The Nation* also endorsed the principle of women's suffrage.[114] By contrast, the conservative New York *Times* evinced much less enthusiasm for granting women the right to vote.[115]

Republican legislators were similarly divided on the issue. In the 40th Congress, Senator Samuel C. Pomeroy of Kansas and Representative George V. Julian of Indiana each introduced legislation that would have forbidden discrimination on the basis of sex in

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110. *Id.* at 1293.

111. A concise overview of the development of the women's suffrage movement can be found in M. BUHLE & P. BUHLE, *supra* note 82, at 1-49.

112. *E.g., Resolutions of Equal Rights Meeting*, Boston, Mass., May 31, 1866 *quoted in*, National Anti-Slavery Standard, June 23, 1866, at 3, col. 1; CONG. GLOBE, 39th Cong., 1st Sess. 951-52 (1866); *Address to Congress*, adopted by the Eleventh National Women's Rights Convention, May 10, 1866, *in* M. BUHLE & P. BUHLE, *supra* note 82, at 226-29; *Memorial and Petition of Victoria Woodhull to the Judiciary Committee of the House of Representatives*, in *id.* at 283-87.

113. *See, e.g.*, National Anti-Slavery Standard, April 4, 1866, at 2, col. 3; February 16, 1867, at 2, col. 2; March 23, 1867, at 2, col. 3; July 6, 1867, at 2, col. 2-3.

114. The Nation, vol. 3, at 498-99 (1866).

115. N.Y. Times, December 13, 1866, at 4, col. 4.

voter qualifications.[116] Senators such as Henry B. Anthony of Rhode Island,[117] Benjamin Wade of Ohio,[118] and Edmund G. Ross of Kansas[119] and Representatives such as Benjamin F. Butler of Massachusetts[120] also supported the right of women to vote. On the other hand, Senators such as Lot Morrill of Maine[121] and George H. Williams of Oregon[122] expressed opposition.

The issue posed particularly acute difficulties for those Republicans who took the view that suffrage was either a natural right or a necessary concomitant of citizenship. Obviously, women were citizens; how, then, could they be denied the right to vote? Representative John Broomall of Pennsylvania attempted to solve the problem through the theory of "virtual representation." He argued that women, like children, are "under the legal control of others," and that their interests were represented indirectly by their adult male husbands and fathers.[123] This theory had obvious flaws,[124] and those who argued that suffrage was simply a conventional right continued to use the example of the status of women as evidence in support of their position.[125]

But even among supporters of the feminist position, simple belief in women's suffrage was insufficient to guarantee support for congressional action. Considerations of federalism were particularly important in the voting rights context. At the beginning of the Reconstruction era, most Republicans believed that states should retain full control over voting qualifications. Ultimately, as the fifteenth amendment demonstrates, they reluctantly modified this position to forbid racial discrimination. The political exigencies that generated this narrowly-focused change in position were particularly strong; no such exigencies existed in the context of the struggle of women for the right to vote. The result was that the Reconstruction Congresses took no action on this issue.

Congressional Republicans were rarely put to the test on the female suffrage question. Racial discrimination was the central civil rights issue of the era, and Republicans were understandably preoc-

116. *See* M. BUHLE & P. BUHLE, *supra* note 82, at 281.

117. CONG. GLOBE, 39th Cong., 2d Sess. 55 (1866).

118. *Id.* at 63.

119. *Letter to the Voters of Kansas*, National Anti-Slavery Standard, July 12, 1867, at 1 col. 3.

120. *See* H.R. Rep. No. 22, 41st Cong., 1st Sess. pt. 2 (1871).

121. CONG. GLOBE, 39th Cong., 2d Sess. 40 (1866).

122. CONG. GLOBE, 40th Cong., 3d Sess. 901 (1869).

123. CONG. GLOBE, 40th Cong., 2d Sess. 1956 (1868). *See also* CONG. GLOBE, 39th Cong., 1st Sess. 2962 (1866) (remarks of Sen. Poland) (same argument).

124. *See* J. BAER, *supra* note 32, at 91-92.

125. *See, e.g.*, sources cited at nn.136-37, *infra*.

cupied with the question of black suffrage. However, on one critical suffrage-related issue—changing the basis of representation for the House of Representatives—Congress took action that infuriated supporters of women's rights. Section 2 of the fourteenth amendment provides that "when the right to vote . . . is denied to any of the *male* inhabitants of [a] state [meeting certain qualifications], the basis of representation [in the House of Representatives] shall be reduced in the proportion which the number of such *male* citizens shall bear to the whole number of *male* citizens twenty-one years of age in such State." Women's rights advocates charged that this provision implicitly recognized the justice of denying women the right to vote.[126]

The Congressional debates concerning section 2 seemed to confirm this view. Acting as official spokesman for the Joint Committee on Reconstruction, Senator Jacob Howard of Michigan argued that the denial of the right to vote to blacks as a class was inconsistent with Madison's concept of a republican form of government.[127] Democratic Senator Reverdy Johnson of Maryland asked whether the same principle might apply to the issue of women's suffrage.[128] Howard responded:

> I believe that Mr. Madison was old enough and wise enough to take it for granted there was such a thing as the law of nature which has a certain influence in political affairs, and that by that law women . . . were not regarded as the equals of men. Mr. Madison would not have quibbled about the question of women's voting. . . .[129]

Advocates of women's suffrage were understandably chagrined by the expression of sentiments such as these. Commenting on earlier proposals that were similar to section 2, the radical *New York Independent* summarized the feminist complaint:

> The spider-crab walks backward. Borrowing this creature's mossy legs, [some Republicans] are working to fix these upon the Federal Constitution, to make that instrument walk backward in like style. For instance, the Constitution has never laid any legal disabilities upon women.
>
> . . . .
>
> [Proposals such as section 2] array the fundamental law of the land against the multitude of American women by ordaining a denial of the political rights of a whole sex. To this injustice we object totally! Such an amendment is a snap judgment before discussion; it is an obstacle to future progress; it is a gratuitous bruise inflicted upon the most tender and humane sentiment that has entered into American politics. If the present Congress is not called to legislate *for* the rights of wo-

126. M. BUHLE & P. BUHLE, *supra* note 82, at 226-29.
127. CONG. GLOBE, 39th Cong., 1st Sess. 2767 (1866).
128. *Id.*
129. *Id.*

men, let it not legislate against them.[130]

The choice of language for section 2 was not in fact intended to be a direct attack on the concept of women's suffrage. The adjustment to the basis of representation was an essential part of the compromise Reconstruction plan embodied in the fourteenth amendment as a whole. The problem was one that concerned all Republicans. Prior to the adoption of the thirteenth amendment, each slave was counted as only three-fifths of a person for purposes of determining a state's representation in the House of Representatives. When the thirteenth amendment abolished slavery, each of the freed slaves perforce counted as a full person. In the absence of some further Constitutional alteration, this change threatened to greatly increase the political power of the overwhelmingly Democratic white voters of the erstwhile slave states.

One possible solution to this problem might have been to enfranchise the freed slaves, who would presumably support the Republican party. In 1866, however, more conservative mainstream Republicans were unwilling to take such a step. Alternatively, Congress might have reduced the basis of representation only of those states that imposed racial qualifications on suffrage. Such a proposal actually passed the House of Representatives in 1866; it was defeated in the Senate, however, having been opposed by some radical Republicans who viewed it as implicitly sanctioning state refusals to enfranchise blacks.[131]

Other race-blind, sex-blind language had been proposed to deal with the problem. The difficulty was that any language that reduced the basis of representation for states that did not allow women to vote would reallocate representatives between loyal states—from states that had a high percentage of women in the population (generally located in the Northeast) to those states whose population was dominated by men (generally located in the West). Obviously, the Republican representatives from those states which would lose in such a process were not happy with this prospect.[132] Only by choosing language such as that ultimately adopted could this difficulty be avoided.[133]

In short, section 2 was more a product of indifference to the women's rights movement than of active hostility. The vote on the

130. M. BUHLE & P. BUHLE, *supra* note 82, at 226-29.

131. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1227 (remarks of Sen. Sumner).

132. *See* CONG. GLOBE, 39th Cong., 1st Sess. 357 (1866) (remarks of Rep. Conkling).

133. For detailed accounts of the debate over the earlier representation proposal, see M. BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863-1869 152-61 (1974); J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 68-74 (1956).

proposal should not be taken as a referendum on women's suffrage. The most important direct discussion of the issue came in the debate over the District of Columbia suffrage bill, the first major black suffrage bill of the Reconstruction era. It is thus not surprising that Republicans chose the District for their initial assault on the black suffrage problem. All agreed that Congress had plenary authority over the affairs of the nation's capitol. Therefore, unlike attempts to impose black suffrage on the states, analogous Congressional efforts to change voting requirements in the District did not raise federalism-related concerns.

The House of Representatives considered a bill providing for race-blind suffrage in the District in January, 1866. The most radical supporters of the bill claimed that the right to vote was a natural right,[134] and that universal manhood suffrage was a prerequisite to a republican form of government.[135] Attacking the entire concept of black suffrage, Democrat Benjamin M. Boyer declared:

> If the negro has a natural right to vote because he is a human inhabitant of a community professing to be republican, then women should vote, for the same reason; and the New England States themselves are only *pretended* republics, because their women, who are in a considerable majority, are denied the right to suffrage.[136]

Seeking to limit the scope of black suffrage, conservative Republican John A. Kasson of Iowa took a similar tack:

> [I]n the history of this country we have excluded certain classes generally from taking part in the election . . . we have excluded women of all ages irrespective of intelligence or tax paying.[137]

Despite the comments of Boyer and Kasson, the question of women's suffrage did not play a major role in the House debates on the District of Columbia bill. When the Senate took up the bill in December, however, the issue of sex qualifications was much more fully discussed. In an attempt to embarrass the supporters of the bill, Edgar Cowan proposed an amendment that would have extended the suffrage to women.[138] The proposal elicited an extended debate.

Republicans Henry B. Anthony of Rhode Island,[139] B. Gratz Brown of Missouri,[140] and Benjamin Wade of Ohio[141] expressed

134. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 205 (1866) (remarks of Rep. Farnsworth).
135. *See, e.g., id.* at 182-83 (remarks of Rep. Kelley).
136. *Id.* at 177.
137. *Id.* at 237.
138. CONG. GLOBE, 39th Cong., 2d Sess. 46-47 (1866).
139. *Id.* at 55-56.
140. *Id.* at 76-78.
141. *Id.* at 62-63, 65.

support for the Cowan amendment. They spoke, however, for only a small minority even within their own party. Other Republicans gave a variety of reasons for opposing the women's suffrage proposal.

Some spoke frankly in terms of expediency. They worried that attaching the Cowan amendment to the suffrage bill would result in its defeat and the loss of black suffrage in the District as well. The statement of Henry Wilson of Massachusetts is typical in this regard:

> I am for enfranchising the black man, and if [the woman's suffrage] question shall come up in due time and I have a vote I shall give my vote for it. But to vote for it now is to couple it with the great measure now pressing upon us, to weaken that measure and to endanger its immediate triumph, and therefore I shall vote against the [Cowan amendment].[142]

These concerns were coupled with the view that women had much less need of suffrage than blacks. Adopting the virtual representation analysis, Frederick T. Freylinghuysen of New Jersey argued

> [T]he women of America vote by faithful and true representatives, their husbands, their brothers, their sons; and no true man will go to the polls and deposit his ballot without remembering the true and loving constituency that he has at home
>
> . . . .
>
> In [this regard] there is a vast difference between the situation of the colored citizen and the women of America.

Freylinghuysen continued with a more basic attack on the theory of women's suffrage

> [T]he women of America are not called upon to serve the government as the men of America are. They do not bear the bayonet, and have not that reason why they should be entitled to the ballot; and it seems to me as if the God of our race has stamped upon them a milder, gentler nature, which not only makes them shrink from, but disqualifies them for the turmoil and battle of public life.[143]

This argument captured the essence of the ideological justification for limitation of voting rights to men. Women may have been considered citizens, but they were members of a different class of citizen than men—a class with both fewer rights and fewer obligations to society. As such, they were not entitled to exercise the franchise.

Ultimately, the women's suffrage amendment was soundly defeated. It garnered only nine votes, with four of those coming from Cowan and his allies in an effort to undermine the entire suffrage

142. *Id.* at 63-64 (remarks of Sen. Yates), 84 (remarks of Sen. Pomeroy).

143. *Id.* at 65-66. *See also id.* at 40 (remarks of Sen. Morrill); *id.* at 56-57 (remarks of Sen. Williams).

bill.[144] Thus the Republican party overwhelmingly refused to commit itself to the principle of sex-blind suffrage.

Despite the result of the District of Columbia suffrage vote, the issue of women's suffrage did not completely disappear from the deliberations of the Reconstruction Congresses. The possibility of extending suffrage to women was mentioned a number of times during the debates over the fifteenth amendment;[145] no vote was taken on any proposal aimed at enfranchising women, however.[146] In addition, suffrage advocates repeatedly petitioned Congress to enfranchise women by federal action. Some argued for a constitutional amendment; others contended that the newly-ratified fourteenth amendment gave Congress the necessary authority. The latter position was the focus of an 1871 "memorial" to the House of Representatives from Victoria C. Woodhull and a similar 1872 memorial to the Senate from a group of prominent feminists including Elizabeth Cady Stanton and Susan B. Anthony.

These memorials were rejected by the respective Judiciary Committees of both Houses. The House Judiciary report was prepared by John A. Bingham of Ohio—the author of section 1 of the fourteenth amendment;[147] the Senate report was the work of Matthew W. Carpenter.[148] Both the Bingham and Carpenter reports focused on issues of federalism. They first noted that the original Constitution had left the matter of qualifications for voting entirely with the states.[149] Turning to the impact of the fourteenth amendment, both Bingham and Carpenter argued that section 2 of the amendment implicitly recognized the continued authority of the

144. *Id.* at 84.

145. *See, e.g.*, CONG. GLOBE, 40th Cong., 3d Sess. 644 (remarks of Rep. Eldridge); *id.* at 691 (remarks of Rep. Beck); *id.* at 862 (remarks of Sen. Warner); *id.* at 901 (remarks of Sen. Williams); *id.* at 904 (remarks of Sen. Vickers); *id.* at 984 (remarks of Sen. Ross); *id.* at 1303 (remarks of Sen. Fowler); *id.* at 1317 (remarks of Sens. Hendrick, Morrill and Conkling).

146. Senator Samuel C. Pomeroy of Kansas did offer a proposal with women's suffrage in mind, *see id.* at 708-10, but no vote was ever taken on the proposal. In addition, some members objected to Senator Jacob Howard of Michigan's proposed wording on the ground that it would enfranchise black women, *id.* at 1317, but this objection does not seem to have been critical to its defeat. Finally, Senator Joseph S. Fowler argued that the constitutional amendment should read: "The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State." *Id.* at 1306. This wording rather plainly would have enfranchised women—a result that Fowler himself favored. *Id.* at 1303. The primary reason for the overwhelming defeat of Fowler's language, *see id.* at 1306, was not the women's suffrage issue, but rather the fear that it would enfranchise unreconstructed rebels. *See id.* (Remarks of Sen. Edmunds).

147. H.R. REP No. 22, 41st Cong., 3d Sess. (1871) [hereinafter, the Bingham Report].

148. S. Rep. No. 21, 42d Cong., 2d Sess. (1872) [hereinafter the Carpenter Report]. Ironically, the following year Carpenter was counsel for Myra Bradwell in Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873), discussed at nn.153, *infra*.

149. Bingham Report, *supra* note 147, at 2; Carpenter Report *supra* note 148, at 1.

states over voter qualifications.[150] They agreed that the right to vote was not one of the "privileges and immunities of citizenship" guaranteed by section 1 of the amendment[151]—a view that Bingham had also expressed during the debates over the adoption of the fourteenth amendment in 1866.[152] Thus, both reports concluded that Congress had no authority to legislate on the subject beyond that provided by section 2 of the fifteenth amendment, which dealt with racial discrimination only. Thus they avoided addressing directly the merits of the women's suffrage issue—an issue on which the Republican party remained divided.[153]

To summarize, on the suffrage issue Congressional Republicans consistently demonstrated an unwillingness to tamper with the traditional exclusion of women from the right to vote. On a number of occasions they were presented with opportunities to embrace the cause of women's suffrage; in each case, they declined the invitation.

The Congressional discussions of the exclusion of women from juries followed the pattern of earlier discussions of women's property rights rather than that of the suffrage debates. Republicans were never asked to vote directly on the question of whether women should be allowed to serve. Instead, the possibility that expansive constitutional theories might authorize Congress to place women on state juries was used as an argument against those theories.

One of the sharpest exchanges took place in 1872 between Senator Lot Morrill of Maine and Senator John Sherman of Ohio. Both Morrill and Sherman had voted for the fourteenth amendment in 1866; they differed, however, on the question of whether the enforcement clause of that amendment empowered Congress to require states to allow blacks to serve on juries. Sherman based his argument on the right of an accused to have members of his own class judge his guilt or innocence. Morrill challenged this proposition by suggesting that the same logic would justify a federal requirement that women be allowed to serve as jurors. The following colloquy ensued:

> Mr. SHERMAN. In regard to the right of trial by jury as to women, it is a matter of municipal regulation.

150. Bingham Report, *supra* note 147, at 3; Carpenter Report, *supra* note 148, at 3.

151. Bingham Report, *supra* note 147, at 1-2; Carpenter Report, *supra* note 148, at 3-4.

152. All members of the two judiciary committees that considered the suffrage petitions who had also been present during the drafting of the fourteenth amendment agreed with this conclusion. Only Benjamin F. Butler of Massachusetts and William Loughridge of Iowa—neither of whom served in the 39th Congress—dissented from the Bingham report. *See* H.R. REP. No. 22, *supra* note 147, pt. 2. No Senator filed a dissent from the Carpenter report.

153. The Supreme Court took a similar approach in Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874).

> Mr. MORRILL. It is a matter of municipal regulation; but that raises the precise question . . . can the Congress of the United States invade it?
>
> Mr. SHERMAN. So far as the mere equity of the question raised by [Morrill] is concerned, I have no point to make. I never could give any reason that was satisfactory to my own conscience why an intelligent, educated woman should be excluded from the jury box.
>
> Mr. MORRILL. But the question comes back whether the Congress of the United States may interfere . . . undoubtedly my State could . . . put [women] in the jury box; but it does not; and can [Congress] do it?
>
> Mr. SHERMAN. I am certain I would not.
>
> . . . .
>
> I do not wish to prolong my remarks by entering into a discussion of women's rights. I can only say that I never could give any good reason, satisfactory to my own conscience, why a woman should not be allowed to vote or why she should not be allowed to hold office, or have the right to sit upon a jury, except that I would not vote to give them these rights, because I do not think it is best for human society, organized as it is on the basis of the family, to introduce such disturbing elements into the family circle, which is even of higher obligation than the obligation of Government.[154]

Sherman's response to Morrill is in many ways typical of the Republican approach to the problem of sex discrimination. In the Reconstruction era, most Republicans viewed the status of women as an almost irrelevant side issue and consistently denied any intention to diminish traditional state prerogatives over the subject. At the same time, a significant number recognized that their position on women's rights created some tension with the basic political philosophy which justified federal intervention on behalf of the freed slaves. The solution to the dilemma was often to emphasize another widely-shared aspect of contemporary ideology—the belief that women were inherently different from men, and thus should be assigned a different role in economic and political affairs.

More generally, the framers' treatment of the issue of sex discrimination clearly demonstrates that equality was not the only value that influenced the drafting of the fourteenth amendment. The concept of limited absolute equality was clearly an important consideration; it was modified, however, to accommodate other important values. Any theory of constitutional interpretation that seeks to rely on the framers' general political/moral theory must take this point into account.

In short, any attempt to construct a classification-based theory of equal protection jurisprudence based on the framers' theory of equality must inevitably fail. The framers' treatment of aliens during the Reconstruction era demonstrates that their basic view of equality was not classification-based at all; moreover, their ap-

154. CONG. GLOBE, 42d Cong., 2d Sess. 845 (1872). *See also id.* at 820-21, 827 (Remarks of Sen. Carpenter) (supporting Morrill position).

proach to issues of sex discrimination shows that this basic view was modified by other considerations such as a commitment to federalism and a keen awareness of political reality. In short, the fourteenth amendment does not encompass *any* pure theory of equality, let alone one which focuses on classification problems.

Of course, this analysis does not demonstrate that contemporary judicial activism against discrimination based on alienage or sex is objectively "wrong," or that the Court should not be even more aggressive in these areas, as many critics have suggested. It does, however, demonstrate that constitutional attacks on sex discrimination are not defensible in terms of any conception of the intent of the framers, be it broad or narrow. Instead, the Court's approach (and that of those commentators who urge the Court to go further) can only be justified by a purely nonoriginalist theory of constitutional interpretation.[155]

155. M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982), develops one prominent example of such a theory. My own views on originalism are found in Maltz, *The Failure of Attacks on Originalist Theory*, 4 CONST. COMM. 43 (1987); Maltz, *Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773; and Maltz, *Some New Thoughts on an Old Problem: The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U. L. REV. 811 (1983).