ENFORCEMENT OF THE FOURTEENTH AMENDMENT

LAURENT FRANTZ

The most crucial turning points in American history seem to present one factor in common: they were moments at which the people found that, in order to defend old freedoms, they were compelled to win new ones. The seditionists of the 1770's originally meant to preserve for themselves the rights of Englishmen, but they wound up proclaiming the rights of man. In the next century, the struggle to halt the expansion of slavery led, by its own logic, to an assault on slavery in its heartland. In 1865-70, Unionists found they could retain the fruits of victory only by writing ambitious new liberties into the Constitution.

Our present situation needs to be examined in the light of these precedents. The amazing growth of the civil rights movement indicates that the possibility of a major advance in our democracy is greater than it has been since the defeat of Reconstruction. At the same time, the drive to restrict freedom of thought and expression gives warning that the possibility of a major set-back is equally real. Historical precedents suggest that to seize the opportunity may be the way to avert the danger.

A major obstacle to such a solution is the degree to which the highly nationalistic text of our Constitution has been obscured by the interpretations of those who have struggled to adapt it to "states rights" theories. Many civil rights supporters, who have long ago rejected the states rights theory itself, still accept these interpretations as authoritative and final.

The so-called "states rights" approach to the problem of civil rights has been given a thorough trial during the last three-quarters of a century. It has proved wholly inadequate. This is not to be wondered at, since the approach is one which rejects in advance any solution on a scale comparable to that of the problem. Nevertheless, a large part of our constitutional thinking still proceeds from the uncriticized premise that a civil rights policy or measure, however inherently democratic and just it may be, becomes wicked and dangerous the instant it is projected on a national scale. Until quite recent years this theory was especially prominent in the decisions of the Supreme Court—that body of commentaries on the Constitution which, under our unique judicial system, is considered more authoritative than the text itself.

Fifteen years ago the same situation existed with regard to economic questions which were pressing the nation for solution. Those who today fight for civil rights must face the same dual problem which then confronted the New Deal. They must develop national solutions and rally support for them. At the same time they must find constitutional roads by which these solutions may be approached.

In one essential respect the constitutional problem which confronts the present-day civil rights movement differs from that with which the New Deal had to contend. The New Deal problem was very largely without precedent. The civil rights problem is not.

Our forefathers were confronted with a previous national crisis in which the fate of the nation was bound up with the civil rights issue. They chose to meet it by removing that issue from the control of the states and transferring it to that of the nation. For this purpose they adopted the Fourteenth Amendment.

The Fourteenth Amendment has never been enforced according to its plain terms and its known intentions. It exists in the Constitution as an unfulfilled promise. Because it is in the Constitution, it is a weapon for civil rights of enormous potential. Public consciousness of the Fourteenth Amendment's historic meaning and public demand that its promise be fulfilled are all that are needed to restore its full potency.

The New Deal was forced to push into unexplored constitutional territory. The problem of the civil rights movement is simpler. It has only to reclaim a constitutional heritage.

I. THE MEANING OF THE AMENDMENT

The Fourteenth Amendment was passed at a moment when slavery had just been abolished and a new social and economic pattern to take its place was still in process of formation. It was evident from the race riots in the South, the passage of the Black Codes, and many similar indications that, if control of civil rights were left in the hands of the states, slavery would soon be reestablished in all but name. When the 39th Congress met in December, 1865, it was confronted with this alternative: either bring the civil rights of individuals under national protection or risk losing in the political arena all that had been won on the battlefield.

Both from its own members and from outside, Congress was deluged with proposals to amend the Con-

stitution to meet this situation.[1] Congress turned over all of these proposals to its Joint Committee on Reconstruction. The Joint Committee put elements from many of them together and thus drafted the Fourteenth Amendment.[2]

While it was drafting the Amendment, the Joint Committee was also taking testimony on conditions in the South. This testimony[3] is of the first importance in interpreting the Amendment, because it discloses the practical problems for which the drafters were seeking a constitutional solution. It is noteworthy that this testimony dealt largely with abuses to the Negro by his white neighbors rather than abuses by the states themselves. It should also be noted that, while the plight of the Negro was central, it was not the Committee's sole concern; unofficial private terrorism was also being used against whites who had sided with the Union or who dared to advocate civil rights for the Negro.[4] It is evident that the Committee could not possibly have supposed that an amendment which merely restrained the states would serve the purposes they had in view. The Committee's report shows that much more than mere restraints upon the states was intended:

> . . . The conclusion of your committee therefore is that the so-called Confederate states are not, at present, entitled to representation in the Congress of the United States; that before allowing such representation, adequate security for future peace and safety should be required; that this can be found only in such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic. . . . To this end they offer a joint resolution for amending the Constitution of the United States. . . .[5]

The Congressional debates in the Congress which proposed the Amendment[6] and the popular debates during the Congressional election of 1866 in which the Fourteenth Amendment was the main issue[7] show that the Amendment was looked upon by its drafters and their contemporaries as insuring to Congress power to pass any legislation it deemed necessary to protect the civil rights of all Americans. Some thought that the Amendment conferred such a power,[8] others that the power existed already, but an amendment was needed to confirm and protect it.[9] None seems to have doubted that such a power would exist, once the Fourteenth Amendment had been ratified.[10]

By its first sentence,[11] the Amendment reverses the relationship which had previously existed between state and national citizenship.[12] It makes citizenship in the United States primary and independent and state citizenship a secondary and derivative matter.[13] That this supreme and all-embracing United States citizenship necessarily contemplated national protection to the citizen in his *fundamental* rights must have seemed to the framers too obvious to require statement;[14] in any case, this concept had already been spelled out in the Civil Rights Act of 1866,[15] from which the citizenship clause is drawn.[16] It is also the

1. JAMES, FRAMING OF THE FOURTEENTH AMENDMENT (1939) Ch. 3.
2. The process by which the Amendment took shape may be followed in the Committee's journal of its proceedings, published in KENDRICK, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION (1914) 41-117.
3. Printed in REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION (Government Printing Office, Washington, D. C., 1866).
4. See, for example, memorial of Jan. 9, 1866, from executive committee of Union Party of Tennessee, warning that native white Union veterans, as well as Negroes, will be persecuted if federal troops are withdrawn. *Report of the Joint Committee on Reconstruction, supra,* note 2, 91-95.
5. *Id.* at xxi.
6. FLACK, ADOPTION OF THE FOURTEENTH AMENDMENT (1908) Ch. 2.
7. *Id.* at Ch. 3. See also James, *supra* note 1, at Ch. 12.
8. Senator Howard, acting as spokesman for the Joint Committee, said of Section 5 of the Amendment: "Here is a direct, affirmative delegation of power to Congress to carry out all the principles of these guaranties, a power not found in the Constitution." CONGRESSIONAL GLOBE, 39th Cong., 1st Sess., at 2766.
9. This must have been the majority view, as the Civil Rights Act was adopted prior to the Amendment. Flack, *supra,* note 6, at Ch. 1. However it is significant that Bingham, author of Section 1 of the 14th Amendment, believed the Civil Rights Act unconstitutional, though in sympathy with its purposes, and considered an amendment necessary to give Congress the necessary power. *Ibid.* at 30-32.
10. Flack points out that the issue between the majority and the minority was whether the power was one that Congress ought to have. On the interpretation of the text of the Amendment there was remarkably little disagreement. Those who favored it and those who opposed it were of one mind about its meaning. Flack, *supra,* note 6 at 87 and 139.
11. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."
12. BLAINE, TWENTY YEARS OF CONGRESS (1886) 189. See also Flack, *supra* note 6 at 89.
13. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY (8th ed. 1946) 180.
14. *Cf.* the later argument by Bingham that citizenship is necessarily a two-sided relationship, contemplating an obligation of support by the citizen and a reciprocal duty of protection by the government. CONGRESSIONAL GLOBE, 42nd Cong., 1st Sess., Appendix, at 81-86.
15. 14 STAT. 27. First passed March 14, 1866. Reenacted over presidential veto, April 9, 1866.
16. As the Amendment came from the hands of the Joint Committee, the text of Section 1 was exactly as it now stands, except that it contained no definition of citizenship. The Committee was evidently relying on the idea that Congress already had the power to define U. S. citizenship and had already exercised it in the Civil Rights Act. Senator Wade, however, feared that there might be some later effort to withdraw the protection of the Amendment from the Negro, by declaring him not a citizen. He suggested changing the clause to read: "No state shall make or enforce any law which shall abridge the privileges or immunities of persons born in the United States or naturalized by the laws thereof." CONGRESSIONAL GLOBE, 39th Cong., 1st Sess., p. 2768. The citizenship definition later inserted by the caucus of Senate Republicans (Kendrick, *supra* note 2, at 316), was apparently intended to meet Mr. Wade's objection and the two clauses together were apparently intended to have the same effect as Mr. Wade's elision. Flack, *supra* note 6 at 88-90.

necessary premise without which the next clause,[17] which provides that state law may not subtract from these rights, does not and cannot make sense. It is interesting to note that the Supreme Court has never, to this day, succeeded in making any sense whatever of the privileges and immunities clause, precisely because it persists in denying the premise from which the thought of the clause must flow.[18]

It is natural to ask at this point why the framers of the Fourteenth Amendment did not guard against misinterpretation by spelling out the "privileges and immunities" they had in mind. The answer must be to some degree speculative. It is clear, however, that to have done so would have required reenacting all applicable provisions of the U. S. Constitution and of federal statutes with regard to civil rights.[19] What is probably more important is that to enumerate the rights protected might well have been to codify them, resulting in a closed list. The framers seem to have intended a system of civil rights which was not merely advanced, but also open to still further advance from time to time by action of Congress.[20]

The due process and equal protection clauses,[21] which the Supreme Court has treated as though they were the whole Amendment, were regarded by the framers as of distinctly secondary importance. They simply guarded against any efforts the states might make to evade or undermine the nationally protected civil rights of persons within their borders. The privileges and immunities clause, which the Supreme Court has treated as wholly nugatory,[22] was regarded by the framers as the heart of the civil rights section.[23]

How did the rights of the Negro fit into this picture? Congress has already conferred United States citizenship upon the Negro in the Civil Rights Act of 1866.[24] The Amendment guaranteed that that grant of citizenship should not be revoked by the courts, by the states, or even by future Congresses. And it attempted to provide that national citizenship should be a sure guarantee of both the civil rights of the individual and the civil equality of the Negro throughout the land.[25].

II. The Perversion of the Amendment

The Fourteenth Amendment has not had anything resembling the effect which its framers intended. The reason is that it was given a strained and unnatural interpretation, hostile to the purposes of the Amendment, in the early decisions of the Supreme Court and that other branches of the government have allowed these interpretations to stand unquestioned.

The first and primary case in which the Supreme Court accomplished the amendment, if not the judicial repeal,[26] of the Fourteenth Amendment, was the *Slaughterhouse* cases of 1873.[27] In that case, the meaning of the citizenship clause was completely turned upside down. The Court said that the Amendment recognized two classes of citizenship, state and national, and that only the national kind received any protection from the privileges and immunities clause. All the fundamental rights of citizens are attached to their state citizenship and hence the Amendment leaves all such rights to the mercy of the states. The "privileges or immunities of citizens of the United States"

17. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ."

18. In his dissenting opinion in *Colgate* v. *Harvey,* 296 U. S. 404, 445, note 2 (1935) and his concurring opinion in *Hague* v. *C.I.O.,* 307 U. S. 496, 520, note 1 (1939), Justice Stone cites more than 50 cases in which appeals were brought to the Supreme Court under the privileges and immunities clause. In only one (*Colgate* v. *Harvey, supra*) did the majority find the clause to be applicable and that one case was speedily overruled (*Madden* v. *Kentucky,* 309 U. S. 83, 1940).

19. The phrase, "privileges and immunities of citizens" used in Art. IV, Sec. 2 of the original Constitution had been judically interpreted to include all fundamental rights. *Corfield* v. *Coryell,* 4 Wash. Circ. Crt. Rep. 371, 380 (1823). Explaining the meaning of the phrase as used in the 14th Amendment, Senator Howard, acting as spokesman for the Joint Committee, read from this opinion and added that rights protected by the first eight amendments would also be covered. Congressional Globe, 39th Cong., 1st Sess., p. 2765. Flack points out that Howard's interpretation of the clause was not challenged either by the Amendment's supporters or by its opponents. *Supra* note 6 at 87.

20. "It may be said, in conclusion, that the House believed and intended that the purpose and effect of the first section of the Fourteenth Amendment would be to give Congress the power to enact affirmative legislation, especially where state laws were unequal, and that it would also make the first eight Amendments binding upon the States as well as upon the Federal Government, Congress being empowered to see that they were enforced in the States. It also seems proper to say that Congress would be authorized to pass any law which it might declare 'appropriate and necessary' to secure to citizens their privileges and immunities, together with the power to declare what were those privileges and immunities." Flack, *supra* note 6, at 81-82.

21. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

22. *See supra,* note 18.

23. See the sponsoring speech of Senator Howard, in which he expounded the privileges and immunities clause at some length, but dismissed due process and equal protection with the brief comment that these provisions were necessary to prevent caste and class legislation. Congressional Globe, 39th Cong., 1st Sess., pp. 2764-6.

24. *Supra,* note 15.

25. "The Amendment was an attempt to give voice to the strong national yearning for that time and that condition of things, in which American citizenship should be a sure guaranty of safety, and in which every citizen of the United States might stand erect in every portion of its soil, in the full enjoyment of every right and privilege belonging to a freeman, without fear of violence or molestation." Justice Bradley, dissenting, in the *Slaughterhouse Cases,* 16 Wall. 36, 123 (U. S. 1873).

26. One writer said of the *Slaughterhouse Cases*: "Thus the Supreme Court of the United States began its series of adjudications under the Fourteenth Amendment by substantially repudiating it." Abbot, Justice and the Modern Law (1913) 75.

27. 16 Wall. (83 U. S.) 36. For a thorough critical analysis of this case, see Louis B. Boudin, Government by Judiciary (1932) Ch. 23.

means auxiliary rights beyond the power of a state to confer, such as the right to travel to the national capitol, the right to sue in federal courts, the right to protection abroad and on the high seas.[28]

To arguments that the Amendment had been intended to bring the fundamental rights of citizens under national protection, the Court replied that such a construction would be "so great a departure from the structure and spirit of our institution" and would so "fetter and degrade the state governments" that it would not be adopted "in the absence of language which expresses such a purpose too clearly to admit of doubt."[29]

Thus the Court rendered state citizenship once more primary and national citizenship once more incidental and so reversed the intent of the Amendment.

Thus it confined the meaning of a clause, which had notoriously been adopted for the protection of the Negro, to the protection of a class of rights which had no practical value for the Negro in the then-existing circumstances.

Thus it reduced the operation of the privileges and immunities clause, regarded by the framers as the heart of the Amendment, to the protection of only such rights as were already, without the Amendment, constitutionally safe from state infringement.[30] Thus it made of the clause, as Justice Field declared, "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." [31]

To appreciate the full absurdity of the Slaughterhouse doctrine, it is merely necessary to point out that, since 1868, state citizenship is itself conferred by the U. S. Constitution and not by the state.[32] The Fourteenth Amendment does not leave to a state even the privilege of determining who its citizens shall be. Yet the Court still insists that we derive our civil rights from the states and that American citizenship has nothing at all to do with the matter!

It was in the *Cruikshank* case[33] that the Court first applied this doctrine to Negro rights and thus made it impossible for the national government to protect the Negro against the lawless violence by which the Ku Klux Klan was depressing him from his new citizenship status into something more closely resembling his old slave status. This the Court accomplished by saying that the first section of the Fourteenth Amendment consists exclusively of restrictions upon the states[34] and therefore that the national government has no authority to protect civil rights against violations by private individuals.[35]

The effectiveness of the Amendment was still further reduced in the *Civil Rights Cases,*[36] in which the 5th Section of the Amendment,[37] that clause which commits its enforcement to Congress, was virtually repealed. In that case, the Court had before it the Civil Rights Act of 1875,[38] which provided that persons of all races should have equal right to the use of railroads, theatres and similar public accommodations without being subjected to any racial discrimination. The Supreme Court held this Act unconstitutional. Since the Fourteenth Amendment restrained only the states, Congressional legislation to enforce it could only be corrective and remedial legislation directed to alleviate injustices by the states. Congress could not pass any affirmative or general legislation in the civil rights field.[39]

28. A conservative Southern lawyer wrote of this argument in 1879: "It must be admitted that the construction put upon the language of the first section of this amendment by the majority of the court is not its primary and most obvious signification. Ninety-nine out of every hundred educated men, upon reading this section over, would at first say that it forbade a state to make or enforce a law which abridged any privilege or immunity whatever of one who was a citizen of the United States; and it is only by an effort of ingenuity that any other sense can be discovered that it can be forced to bear." Royall in 4 SOUTH. L. REV. 563, (quoted in Boudin, *supra* note 27, at 120).

29. 16 Wall. (U. S.) 36, 78 (1873).

30. The construction "renders the clause tautological". Corwin, *supra* note 13, at 180. Rights peculiar to national citizenship would be sufficiently protected by the supremacy clause of the original constitution. (ART. VI, CLAUSE 2).

31. 16 Wall. 36, 96 (U. S. 1873).

32. *Supra,* note 11.

33. *U. S.* v. *Cruikshank,* 2 Otto [U. S.] 542 (1876). *See also U. S.* v. *Harris,* 16 Otto [U. S.] 629 (1883).

34. This statement is often made but it is not true. The first sentence is an affirmative grant of citizenship and therefore also of whatever rights, if any, are recognized as incidental to citizenship.

35. When the three "no state" clauses are torn out of their context, this argument has a deceptive surface plausibility. However, a phrase in the original Constitution which merely recognized the right of a master to reclaim a fugitive slave (ART. IV, SEC. 2, CLAUSE 3) had been held to authorize Congress to make it a federal crime for any individual to hinder or obstruct the slavecatcher or to harbor or conceal the fugitive. *See Prigg* v. *Pennsylvania,* 16 Peters [U. S.] 539 (1842); *Ableman* v. *Booth,* 21 How. [U. S.] 506 (1858). This was on the Marshall theory that ". . . where the end is required the means are given . . . If . . . the Constitution guarantees the right . . . the natural inference certainly is that the national government is clothed with the appropriate authority and functions to enforce it." *Id.* at 615. The framers of the 14th Amendment therefore wrote in the light of settled constitutional construction that, where a right is recognized in the Constitution, Congress may adopt restraints upon individuals as a means of making the right effective. The Supreme Court's sudden abandonment of this rule, for the purpose of narrowing the powers conferred on Congress by the 14th Amendment, caused Justice Harlan to protest: ". . . I insist that the National Legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this court, for the protection of slavery . . ." 109 U. S. 3, 53 (1883).

36. 109 U. S. 3 (1883). For analysis of *Civil Rights Cases, see* KONVITZ, THE CONSTITUTION AND CIVIL RIGHTS (1947) 8-28.

37. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

38. 18 STAT. 335, enacted March 1, 1875.

39. *See* Howard statement quoted *supra,* note 8. For a summary of the evidence on the intent of the framers in regard to Section 5, see Flack, *supra* note 6 at 136-9.

It is plain that both the doctrine that the national government cannot protect the rights of U. S. citizens from attack by private individuals and the dogma that Congress cannot pass general legislation in the civil rights field necessarily follow, once the theory of the *Slaughterhouse* case[40] is accepted as the premise. It is also clear that neither of these results could have been reached until the heart of the Amendment was first excised by the operation done on the citizenship clause and the privileges and immunities clause.[41]

The effect of all these holdings was to transfer the initiative in the development of a new pattern of racial relations from Congress to the Southern states,[42] in which the white supremacy faction had regained control. The inevitable result of such judicial statesmanship[43] was the creation of the compulsory, selfperpetuating segregation system which is our problem today. Not only did the Court open the way for such a system; it also placed its stamp of approval on what had been done, in such cases as *Pace* v. *Alabama,*[44] upholding the miscegenation statutes, and *Plessy* v. *Ferguson,*[45] sustaining the segregation laws.

The significance of the *Pace* case was not appreciated at the time. In the light of modern criticism, we can understand that the miscegenation question, though of minor importance in itself, is of tremendous importance to the white supremacist, as a rationalizing mechanism for the defense of every other kind of inequality.[46] In the *Pace* case, the Court opened the door for the introduction of these rationalizations into constitutional law, by permitting the superstitious[47] racist theory on which they are founded to be written into the law.

If racial purity may be adopted as a constitutional goal, the next step must be that the state, under the pretext of pursuing this goal, is allowed to erect legal barriers against social intermingling of the races. This step was taken in *Plessy* v. *Ferguson,*[48] in which the whole Jim Crow system was ruled constitutional on the amazing theory that compulsory segregation does not necessarily imply that the persons segregated are regarded as inferior.[49]

One might summarize the effect of all these cases by saying that the Amendment's effectiveness in achieving the principal purpose for which it had been passed—the protection of the Negro—was almost totally destroyed.[50] This was done by reading into the Amendment the very States Rights doctrine it had been adopted to overcome.[51] This was done by taking all the arguments of those who had opposed passage of the Fourteenth Amendment and converting them into canons for its "interpretation."[52]

The consequences of this destruction of the Fourteenth Amendment as a charter of Negro rights were not limited to the field of Negro rights. Obviously, the Court could not adopt one standard of Fourteenth Amendment interpretation for cases involving the

40. *Supra,* note 27.

41. When "the function in which the party is engaged or the right which he is about to exercise is dependent on the laws of the United States . . . it is the duty of that government to see that he may exercise this right freely and to protect him from violence while so doing or on account of so doing." *Ex parte Yarbrough,* 110 U. S. 651, 662 (1884).

42. In a purely technical sense, the Court passed the initiative to all the states. But since the great bulk of Negro population was in the South, the practical result was that the Southern states were enabled to impose their views on this question on the rest of the nation.

43. Though the point is not susceptible of definite proof, nullification of Negro rights by the Supreme Court in the first 30 years following adoption of the three Civil War amendments was so consistent and the reasoning frequently so strained [*see,* for example, *Blyew and Kennard* v. *U. S.,* 13 Wall. [U. S.] 581 (1872); *U. S.* v. *Reese,* 2 Otto (U. S.) 214 (1876)] that it is only reasonable to suppose that the decisions were steps in the execution of a conscious, long-range policy. Shellabarger, in a memorial speech on the death of Chief Justice Waite, argued, in effect, that the Court's wisdom and ingenuity in evading the 14th Amendment had saved the people from the consequences of their own folly in adopting it. 126 U. S. 600-601 (Appendix). Boudin argues that the Court considered it necessary to sacrifice Negro rights in order to heal the breach between North and South left by the Civil War. Boudin, *Truth and Fiction About the Fourteenth Amendment,* 16 N.Y.U. L. Q. 19, 75 (1938).

44. 16 Otto [U. S.] 583 (1883).

45. 163 U. S. 537 (1896).

46. MYRDAL, AN AMERICAN DILEMMA (1944), 590-592.

47. For a recent review of the scientific evidence, concluding that race mixture presents no biological perils, *see, Perez* v. *Lippold,* 198 P 2d 17 (Calif., 1948) and Note, 58 YALE L. J. 472 (1949).

48. *Supra,* note 45.

49. "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Plessy* v. *Ferguson,* 163 U. S. 537, 551 (1896).

50. Collins stated in 1912 that the Supreme Court had decided 604 cases under the Fourteenth Amendment. Only 28 involved Negro rights and, of these, 22 were decided adversely to the Negro. The remaining 6 all involved some aspect of the exclusion of Negroes from jury service. Collins demonstrates that these 6 failed to add up to any practical protection to the Negro even on this narrow sector. COLLINS, THE FOURTEENTH AMENDMENT AND THE STATES, (1912) Chs. 5 & 6.

51. Commenting on the Supreme Court's ruling that the Amendment offers protection against states, but none against individuals, one constitutional historian wrote: "I contend that this is no satisfactory solution of the problem because . . . sound political science requires that the entire individual immunity shall be defined, in principle, in the national constitution, and shall have the fundamental means and guarantees of its defense provided in that constitution. . . . It was a resurrection of the doctrine of States' rights in the extreme, when the Supreme Court of the United States put the interpretation which it did upon the new amendments—a doctrine which should have been considered as entirely cast out of this system by the results of the Civil War." Burgess, *Present Problems of Constitutional Law,* 19 POL. SCI. Q. 573-4 (1904).

52. "Several years after the adoption of the Amendment, when the various clauses thereof came up to the Supreme Court of the United States for interpretation, the majority of the Court followed, in effect, the reasoning of the Democratic opposition, and refused to give effect to the ideals of the Radical Republicans." Collins, *supra* note 50, at 15.

rights of Negroes and another for those in which other human rights were involved. The necessary effect of this restrictive and hostile reading was to make the Amendment a useless shield for the protection of general human rights as well.

The first fruit of the *Slaughterhouse* doctrine, even before its application to Negro rights, was the holding in *Bradwell* v. *Illinois*[53] *and Minor* v. *Happersett*,[54] that the Fourteenth Amendment had given no protection to the rights of women. This was followed by a series of cases, beginning with *Walker* v. *Sauvinet*[55] and *Hurtado* v. *California*,[56] in which it was held that there is no federally protected right to indictment or jury trial in the state courts. This trend was climaxed in *Maxwell* v. *Dow*,[57] in which the Court finally expressed the view already implicit in its decisions that the Fourteenth Amendment had not, as its framers intended, made the Bill of Rights enforceable against the states.[58]

Since indictment and jury trial were the very essence of "due process", as that phrase was understood when the Amendment was written,[59] and since the Amendment had virtually been built upon the root idea that the Bill of Rights ought to be made binding on the states,[60] this was nullification, naked and unabashed.

The consequences of the betrayal of Negro rights, however, went far beyond mere nullification. The ultimate result was the transformation of the Amendment into a powerful weapon for the protection of interests which were the very opposite of those to protect which it had been intended.

The period of the 1870's and 1880's was one of the very rapid rise of large-scale industry, led by the railroads, and of efforts by the state legislators to curb the excesses of business and to bring the corporations under regulation. It was a period in which business and its attorneys were demanding an amendment which would write into the Constitution the laissez-faire philosophy and so give them protection from the alleged "populistic" tendencies of the state legislatures.[61] It is curious that business got just exactly such a laissez-faire amendment, without the bother of having it passed by two-thirds of each house of Congress and ratified by three-fourths of the states. The Supreme Court constructed it from the ruins of the Fourteenth. This was done by transforming the meaning of some of the key words. The word "person" was expanded to include a corporation,[62] although the context clearly shows that natural persons were intended.[63] The word "liberty" which it absorbs virtually all the mores of laissez-faire capitalism.[65] The word "property" was expanded from its ordinary and popular meaning to a vague concept of beneficial interest, which includes the prospect of future profits.[66]

The phrase "due process" underwent the most amazing transformation of all, with the result that statutes regularly passed by the legislature and regularly enforced by the executive branch were held not "due process of law" if the Court regarded their provisions as unreasonable and arbitrary.[67]

53. 16 Wall. [U. S.] 130 (1873).
54. 21 Wall. [U. S.] 162 (1875).
55. 2 Otto [U. S.] 90 (1876).
56. 110 U. S. 516 (1884).
57. 176 U. S. 581 (1900).
58. A bare majority of the present Court still holds to this position, though Justices Black and Douglas are prepared to abandon it, as were the late Justices Murphy and Rutledge. *See, Adamson* v. *California*, 332 U. S. 46 (1947); *The Adamson Case: a Study in Constitutional Technique*, 58 YALE L. J. 268 (1949).
59. COUDERT, CERTAINTY AND JUSTICE, (1914) 59-100. *See also* Justice Harlan's dissents in *Hurtado* v. *California*, 110 U. S. 516, 538 and *Maxwell* v. *Dow*, 176 U. S. 581, 605.
60. Flack, *supra*, note 6 at Ch. 2; Boudin, *Truth & Fiction*, *supra*, note 43 at 31-46.
61. 2 Boudin, *supra*, note 26, Chs. 35 and 36.
62. *Santa Clara County* v. *Southern Pacific R.R. Co.*, 118 U. S. 394, 396 (1886); *Pembrina Mining Co.* v. *Pa.*, 125 U. S. 181 (1888). The story of Roscoe Conkling's famous argument, which produced this holding is told in Kendrick, *Journal of the Joint Committee of Fifteen on Reconstruction*, pp. 21-36.
63. The previous sentence speaks of "All persons *born* or *naturalized* . . ." The word person occurs five times in the Amendment. In three out of the five, it could not possibly include a corporation. *See* Justice Black's famous dissent on this point, *Conn. General Life Ins. Co.* v. *Johnson*, 303 U. S. 77, 83 (1938). It is the opinion of this writer that the legal significance of this holding has been greatly exaggerated by popular historians. Had the word "person" been interpreted to mean natural persons only, it is still conceivable that corporations might have made very extensive use of the Amendment through the device of stockholders' suits. *Cf. Smyth* v. *Ames*, 169 U. S. 466 (1898). The basic question is not, who can be a party to the record, but what kind of rights does the Amendment protect. It is clear, however, that the inclusion of corporations among the named beneficiaries eased the way for more crucial transformations in the words "liberty," "property," and "due process". It also seems clear that one reason we have today a greatly overexpanded due process clause and a greatly underdeveloped privileges and immunities clause is that the Supreme Court decided in 1869 in *Paul* v. *Virginia*, 8 Wall. 168, that a corporation is not a "citizen" within the meaning of the privileges and immunities clause of the original Constitution (ART. IV, SEC. 2). After this decision, corporation lawyers, who are the original inventors of most of our constitutional law, lost interest in privileges and immunities and concentrated their talents on the embellishment of "due process." See 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1935) 567.
64. *Allgeyer* v. *Louisiana*, 165 U. S. 578 (1897); *Lochner* v. *New York*, 198 U. S. 45 (1905).
65. CORWIN, THE TWILIGHT OF THE SUPREME COURT; A HISTORY OF OUR CONSTITUTIONAL THEORY (1934), 78 *et seq.*
66. "If the company is deprived of the power of charging reasonable rates . . . it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself." *Chicago, Milwaukee & St. Paul Ry.* v. *Minnesota*, 134 U. S. 418, 458 (1890).
67. This particular transformation has produced a wealth of controversial literature. An excellent summary is Corwin, *supra*, note 65, Ch. 2. It has also produced a persistent folk-tale that the drafting of the Fourteenth Amendment was a plot by corporation lawyers, who put over on the country laissez-faire amendment disguised as a civil rights amendment. This view is accepted by 2 CHARLES A. AND MARY R. BEARD, RISE OF AMERICAN CIVILIZATION (1927), 111-114. It has been convincingly refuted. See Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L. J. 371; 48 YALE L. J. 171 (1938) and Boudin, *supra*, note 43, *passim*.

By this cumulative process of redefiniton, the Due Process clause of the Fourteenth Amendment was converted to read something like this:

> No state shall deprive any corporation of its freedom to do business as it sees fit or its prospects of future profits by any action which may seem to the United States Supreme Court to be unreasonable and arbitrary.

Thus the Court reached the extremely remarkable result that "due process of law" includes the right of a corporation to a reasonable profit,[68] but not the right of an individual accused of crime to indictment and trial by jury.[69]

In the transformation of the Fourteenth Amendment into a business charter, the leading role was that played by the railroads. The cases in which the development took place were almost invariably cases won by railroads. The justices who decided them were quite frequently persons who had risen to eminence in the legal profession as railroad attorneys. This was true, for example, of five of the nine justices who were on the Court in 1895.[70]

It must be noted that the reading of corporation rights into the Amendment was not an independent development, but was made possible precisely by the fact that Negro rights—and consequently human rights—had been read out of it.[71]

Though the initiative in rewriting the Fourteenth Amendment was that of the Court, it is important to realize that such a process of judicial amendment could hardly have been successful without at least the passive support of the other two coordinate branches of the national government. The acquiescence of Congress was signalized by its failure to make any further attempt at legislative enforcement.[72] The acquiescence of the executive has taken the form of a policy determination by the Department of Justice to refrain from vigorous enforcement of that modicum of civil rights legislation which still remains on the books.[73]

Toward Enforcement

The last two decades have seen a dramatic and historic turn in the judicial approach to the 14th Amendment.

The most important and precedent-shattering phase of this turn has been a long line of cases[74] holding that the four freedoms of the First Amendment—freedom of religion,[75] speech,[76] press,[77] and assembly[78]—are now, at last, enforceable against states and municipalities under the authority of the Fourteenth.[79] A humble beginning has been made in bringing the rights of labor under constitutional protection through the elaboration of these same principles.[80]

68. *Supra,* note 66.
69. *Supra,* notes 55, 56, 57.
70. Myers, History of the Supreme Court of the United States (1912), 528-577, 625.
71. It is often assumed that construction of the Fourteenth Amendment must be either "broad," with the result that it prohibits social legislation, or "narrow," with the result that it fails to protect civil rights. *See,* for example, Fraenkel, Our Civil Liberties (1944), 4-5, 150-1. A recent note 58 Yale L. J. 268 (1949) suggests that both Justice Black's famous dissent on the reading of the word "person" to include a corporation, 303 U. S. 77, 83 (1938) and his more recent theory that the Fourteenth Amendment protects *only* rights mentioned in the Bill of Rights, 332 U. S. 46, 89-92 (1947) represent efforts to get the Court off the horns of this dilemma, *i.e.,* efforts to find a formula whereby the Fourteenth Amendment can be made "broad" in its protection for human rights without interfering with social legislation by the states. However, the history of Fourteenth Amendment construction in the Supreme Court suggests that the "two Fourteenth Amendments", the laissez-faire amendment and the civil rights amendment, have always tended to be mutually exclusive. Periods in which the Amendment was construed "broadly" to strike down state interference in economic matters have also been periods in which it was construed "narrowly" in human rights cases. *Compare Smyth* v. *Ames,* 169 U. S. 466 (1898) *with Cumming* v. *Board of Education,* 175 U. S. 528 (1899). On the other hand the present tendency to give the Amendment a much broader human rights construction than it ever had before began in 1931 with *Near* v. *Minnesota,* 283 U. S. 697, and has been closely correlated with a tendency, dating approximately from *Nebbia* v. *New York,* 291 U. S. 502 (1934), to give state legislatures greatly increased freedom for economic experiment. The issue is not broad versus narrow construction, but what kinds of rights the Amendment is deemed to protect. It seems clear that, had the Amendment been given a broad construction from the first in line with the framers' intentions, any attempt to read laissez-faire economics into it would have seemed as silly and inappropriate as the effort of the independent butchers in the *Slaughterhouse* case, *supra,* note 27, to contend that they were being subjected to "involuntary servitude."
72. So far as the present writer has been able to ascertain, Congress has passed no new legislation for the enforcement of the Amendment since 1875. In 1894, it repealed most of the enforcement legislation passed during Reconstruction. Davis, *The Federal Enforcement Acts,* in Studies in Southern History and Politics (1914).
73. "The Department of Justice has established a policy of strict self-limitation with regard to prosecutions under the civil rights acts. When violations of such statutes are reported, the Department requires that efforts be made to encourage state officials to take appropriate action under state law. To insure consistent observance of this policy in the enforcement of the civil rights statutes, all United States attorneys have been instructed to submit cases to the Department for approval before prosecutions or investigations are instituted. The number of prosecutions which have been brought under the civil rights statutes is small." Statement of U. S. Attorney General, quoted in Justice Roberts' dissent in *Screws* v. *U. S.,* 325 U. S. 91, 159 (1945). The statement quotes figures on complaints received by the Civil Rights Unit of the Department of Justice which indicate that less than one per cent of these complaints are ever even fully investigated and a still smaller fraction ever reach the prosecution stage.
74. Beginning with *Near* v. *Minnesota,* 283 U. S. 697 (1931).
75. *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940).
76. *Herndon* v. *Lowry,* 301 U. S. 242 (1937).
77. *Near* v. *Minnesota,* 283 U. S. 697 (1931).
78. *DeJonge* v. *Oregon,* 299 U. S. 353 (1937).
79. It is ironic that when Bingham's idea of making the Bill of Rights enforceable against the states finally came, after 65 years, to partial fruition, the Court used, not the privileges and immunities clause, which had been inserted for that purpose (*see supra,* note 19), but the due process clause.
80. *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *Thomas* v. *Collins,* 323 U. S. 516 (1945). For a discussion of the exceptions and qualifications that have grown up around the doctrine of the *Thornhill* case, see Armstrong, *Where Are We Going With Picketing,* 36 Calif. L. Rev. 1 (1948).

Some sixty years late, the abused Due Process clause has been allowed to acquire some effectiveness for the protection of the kinds of rights for which it must have been intended: Those coming under the heading of the right to a fair trial.[81] Convictions secured through forced confessions have been brought within the condemnation of the clause.[82] Under some circumstances, at least, the right to counsel is protected.[83]

Equal protection, an empty formality until the '20's so far as Negro rights were concerned, has taken on real substance in several connections. Systematic exclusion of Negroes from jury service has been rendered provable without the services of a mind-reader.[84] The white primary has been condemned.[85] A new field of constitutional right—equality of educational opportunity—has been opened up.[86] The assistance of courts to enforce racial zoning by private covenant has been refused.[87]

Two significant portents of the future have recently come out of California in a state court ruling that miscegenation laws are unconstitutional,[88] and a lower federal court opinion that segregation is invalid in the public schools, irrespective of "equality" of facilities.[89]

All of these are new developments of the last twenty years. All of them represent a judicial approach to the interpretation of the Fourteenth Amendment which is not merely different but fundamentally opposed to the extreme "states-rights" philosophy which molded the Amendment in its early formative period. But the basic rules laid down in the period of restrictive interpretation have not yet been abandoned and enforcement can never be fully effective until they are.

There is no reason to suppose that the limits of judicial enforcement have been reached. However, a point has been reached where it must be said that the primary need is no longer new court victories, but action from the President and Congress.[90]

Judicial enforcement, however enlightened it may become, must always remain a severely limited instrument for carrying out the intentions of the framers. It is limited by its essentially negative character. It can frustrate an injustice in a particular case, but it cannot lay down general affirmative requirements for future conduct. It is limited by the planless and piecemeal development inherent in the case by case approach. It is limited by the months or years of delay which intervene before a case reaches decision in the Supreme Court and by the myriad technicalities, a fumble on any one of which may cause the federal question to be lost in transit. Above all, it is limited by the enormous expense of taking a case to the high tribunal, a burden which those who have the greatest need of civil rights protection are very seldom able to bear.

The historically unique situation which has prevailed in the last dozen years, in which the Supreme Court has tended to be the most enlightened branch of the government in civil rights matters, has cast the whole civil rights movement into an unfortunate mold, in which overly great reliance has been placed upon test cases and relatively too little attention has been given the need for positive executive action and for new legislation.[91] One of the first prerequisites for the development of effective Fourteenth Amendment enforcement is the correction of this misplaced emphasis.

The responsibilities which the civil rights movement should press upon the Executive are simple, but crucial.

The Department of Justice must give vigorous enforcement to existing civil rights legislation.

The government must set its own house in order, by eliminating discrimination and segregation in both its military and its civil branches.[92]

81. Prior to 1932, the fairness or unfairness of a trial in state court was deemed to present no federal question. *Frank* v. *Mangum,* 237 U. S. 309 (1915). But the due process clause was held to require that the trial should be a genuine judicial proceeding, not a mere sham. *Moore* v. *Dempsey,* 261 U. S. 86 (1923).

82. *Chambers* v. *Florida,* 309 U. S. 227 (1940).

83. *Powell* v. *Alabama,* 287 U. S. 45 (1932). *But cf. Betts* v. *Brady,* 316 U. S. 455 (1942).

84. *Norris* v. *Alabama,* 294 U. S. 587 (1935); *Patton* v. *Mississippi,* 332 U. S. 463 (1947).

85. The first two cases invalidating the white primary, *Nixon* v. *Herndon,* 273 U. S. 536 (1927) and *Nixon* v. *Condon,* 286 U. S. 73 (1932), were decided under the equal protection clause of the Fourteenth Amendment. *Smith* v. *Allwright,* 321 U. S. 649 (1944) put the question back under the Fifteenth Amendment where it more appropriately belongs.

86. *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337 (1938); *Sipuel* v. *Board of Regents,* 332 U. S. 631 (1948).

87. *Shelley* v. *Kraemer,* 334 U. S. 1 (1948).

88. *Perez* v. *Lippold,* 198 P. 2d 17 (Calif. 1948). *See* Note, 58 YALE L. J. 472 (1949).

89. *Mendez* v. *Westminster School District,* 64 F. Supp. 544 (1946), *aff'd.* 161 F. 2d 774 (1947).

90. The decision in *Morgan* v. *Virginia,* 328 U. S. 373 (1946), that Jim Crow laws may not be applied to interstate passengers is freely ignored in the South today, since neither Congress, the Department of Justice, nor the Interstate Commerce Commission has seen fit to take any steps to compel compliance with it. Under such circumstances, the justices must be impelled to wonder whether a paper victory for civil rights is worth a loss in judicial prestige. If the present Court could be persuaded that segregation is discriminatory *per se,* they might still consider that it was the better part of valor to defer any holding to that effect until such time as they could feel some assurance that other branches of the government would cooperate to give effect to the ruling.

91. A reading of BOUDIN, GOVERNMENT BY JUDICIARY, or MYERS, HISTORY OF THE SUPREME COURT, will make it clear that the present judicial leadership in the civil rights field is an abnormal phenomenon and one we cannot assume will last long or be often repeated.

92. The power to do this does not, of course, arise from the Fourteenth Amendment. But such an example, set by the government, would create more favorable conditions for Fourteenth Amendment enforcement.

The Executive must explore the possibilities of international treaties and covenants which would provide for the protection of minorities in each signatory county.[93]

But the most fundamental change in orientation is to abjure the concept that the Amendment is necessarily a rule of decision to be applied by courts. The proponents of civil rights must insist upon a return to the intent of the framers, clearly and expressly set down in the text of the Amendment itself,[94] that the Amendment is primarily a grant of broad new legislative powers to Congress.

The possibilities of legislative enforcement are vast and untapped. No effort will be made here to do more than suggest a few points at which a beginning might be made.

Congress must take the initiative on the whole civil rights question by undertaking to define "the privileges or immunities of citizens of the United States."[95] The definition should include all the rights covered by the first eight amendments, plus the right of racial, national, religious and political minorities to non-discriminatory treatment. Teeth must be put in the definition by making an attempt to deprive any citizen of these rights a crime against the United States.[96]

Congress must take the initiative in enforcing the Due Process clause. For example, fear of an ultimate reversal in the Supreme Court is hardly an efficient deterrent to police brutality, in view of the fact that the victims are customarily persons who have little hope of ever claiming such expensive redress. A comprehensive federal law against such practices, vigorously enforced, would be substantially more effective.[97]

Congress must take the initiative in enforcing the equal protection clause. The spending of tax money in a discriminatory manner is a denial of equal protection.[98] This opens the way for a federal statute requiring that all facilities which are aided by tax funds, or by tax exemptions, should be operated without discrimination or segregation, and enforcing such requirement by appropriate civil and criminal remedies against the individuals in charge of the facilities.[99]

Congress must explore the use of other constitutional powers to fill gaps in its authority created by restrictive interpretation of the Fourteenth Amendment. The commerce clause, for example, has served to open up the whole field of national labor legislation. It can serve as well to bring a very large sector of the civil rights field into the domain of Congress. The constitutional reasoning which made the National Labor Relations Act and the Fair Labor Standards Act valid would be equally applicable to sustain a federal fair employment statute.[100]

Congress must outlaw discrimination and segregation in the District of Columbia.[101]

Finally, Congress has a responsibility to organize itself constitutionally, in compliance with the Fourteenth Amendment. This brings up the question of the neglected and often forgotten, but vitally important Section Two.[102]

---

93. The national government has exclusive power to enforce treaties, even where they deal with matters previously considered part of the reserved powers of the states. See *Some Possibilities in the Way of Treaty-Making* in CORWIN, DOCTRINE OF JUDICIAL REVIEW, (1914) 161 *et seq.*

94. *Supra,* note 37.

95. The Supreme Court has never squarely answered the question whether Congress has power to do this. The result in the *Civil Rights Cases, supra,* note 36, is inconsistent with the idea that Congress has such a power. But the result was reached without answering the question. The result was reached by reading the Tenth Amendment as a limitation on the Fourteenth, thereby violating two elementary rules of construction: that the later provision should control the former, and that the specific should be read as an exception to the general. The opinion also violates the rule of *McCulloch* v. *Maryland,* 4 Wheat. [U. S.] 316 (1819), that the choice of means in carrying out a power conferred on the nation by the Constitution is a question for Congress. The present Court takes a diametrically opposite approach to civil rights questions. It has overruled many long-standing precedents. It cannot be assumed that the present Court would feel bound by the 1883 decision to hold that defining the privileges and immunities of American citizenship is beyond Congressional power.

96. Once it be recognized that an individual has a positive right which is derived from the Constitution or laws of the United States, it follows that Congress has power to protect that right from interference by private individuals. *Ex parte Yarbrough,* 110 U. S. 651 (1884); *U. S.* v. *Waddell,* 112 U. S. 76 (1884); *Logan* v. *U. S.,* 144 U. S. 263 (1892).

97. The Supreme Court has already held that such a statute is constitutional, provided it is specific enough to furnish a reasonably ascertainable standard of guilt. *Screws* v. *U. S.,* 325 U. S. 91 (1945). For an analysis of *Screws* case, Konvitz, *supra,* note 36, at 48-73.

98. This is clearly the principle underlying the *Gaines* and *Sipuel* cases, *supra,* note 86.

99. Even under the narrow view of Congressional power taken in the *Civil Rights Cases, supra,* note 36, this would clearly be constitutional, as it would be remedial legislation, directed toward correcting state action violating the equal protection clause. It is recognized that federal enforcement can be directed against individuals who are acting for the state and clothed with its authority. *Ex parte Virginia,* 100 U. S. 339 (1880). This is true even though the individual is acting beyond the authority conferred, or even in violation of state law, *Screws* v. *U. S., supra,* note 97.

100. *See, N.L.R.B.* v. *Jones & Laughlin,* 301 U. S. 1 (1937), upholding the Wagner Act and *U. S.* v. *Darby Lumber Co.,* 312 U. S. 100 (1941), sustaining the Wage-Hour Act. On constitutionality of federal fair employment legislation, see Konvitz, *supra,* note 36, at 93-96.

101. As in the case of eliminating discrimination in the federal service, the power required is not derived from nor dependent upon the Fourteenth Amendment. But Congress is in a poor position to enforce the Fourteenth Amendment in the states unless it maintains equally high standards in territory as to which it has exclusive legislative power.

102. "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a state, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being 21 years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein 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."

The story of Section Two of the Fourteenth Amendment is less dramatic and colorful, but in some ways even stranger, than that of Section One. It is probably the only section in the entire Constitution which has been violated on every occasion when the possibility of violating it existed and always—so far—with complete impunity.[103]

When a formula for representation in the House was under consideration by the Constitutional Convention in 1787, the Southern states demanded that slaves should be counted. Since slaves were not only voteless and without rights, but regarded as mere chattels, the Northern delegates experienced some difficulty in appreciating either the justice or the logic of this demand. A compromise, devoid of principle but serving to break the deadlock, was adopted, in which each slave was counted as three-fifths of a person.[104]

When the slaves were freed in 1865, the North was confronted with the dilemma that, unless Negro suffrage were adopted or the basis of representation changed, emancipation would not only leave the ex-rebels with their previously inflated representation, but would actually strengthen them by adding the missing two-fifths of the Negro population to the South's count. This meant that the nation would have defeated the Confederates in battle only to strengthen their political grip on the nation, an entirely insupportable result. To avoid it, the radicals—being unable, as yet, to achieve Negro suffrage—wrote Section Two of the Fourteenth Amendment.[105] This section provided that any state which disfranchised any part of its adult male population should have its representation in the House proportionately reduced.

Later commentators have sometimes sneered at Section Two as a mere "political" device to keep the Republican Party in power. This attitude ignores the fact that the issues dividing the parties were deep and fundamental in 1866-68. In such a situation, the effort to keep the Republican Party in power was itself a fight for principles, not a mere factional struggle for the spoils of office.

An even more popular method of disposing of Section Two has been to maintain that it was never intended to apply to any situation except the disfranchisement of the Negro and to conclude that the adoption of the Fifteenth Amendment in 1870 therefore made Section Two of the Fourteenth "obsolete". The conclusion, however, does not follow from the premise. Section Two does not enfranchise the Negro, but provides that his ex-masters shall not, after disfranchising the Negro, presume to cast his vote in the halls of Congress. Despite the Fifteenth Amendment, the Negro is still disfranchised in large parts of the South. It is highly appropriate constitutionally, as well as politically, that the penalty provided by Section Two for just such a situation should be invoked.

However, the premise itself is incorrect. Disfranchisement of the Negro was certainly the occasion for Section Two, but the language of the Section forbids the interpretation that it was limited to this subject only. The Section applies "when the right to vote . . . is denied . . . or *in any way abridged* except for participation in rebellion, or other crime . . ." [emphasis added].[106]

At least since the Southern states broke the back of populism by adopting their disfranchising constitutions in the 1890's and 1900's, no Congress of the United States has been constitutionally organized. When the statesmen from the South raise their customary cry of "unconstitutional" against civil rights and other progressive legislation, it is instructive to remember that they hold their seats in open defiance—one might well say contempt—of the Constitution itself.

Our representatives in Congress are required to take an oath to support the Constitution.[107] We certainly have a right not merely to petition or recommend but to demand that they obey the Constitution's mandate[108] with respect to the organization of Congress itself. Such a reorganization of the House would be the most effective possible pressure for the abandonment of minority suffrage, for the restoration of popular government in the South. This is exactly what the framers hoped to accomplish through Section Two.[109]

103. For a history of efforts to enforce Section 2, see NELSON, THE FOURTEENTH AMENDMENT AND THE NEGRO SINCE 1920, (1946) 49-55.

104. WARREN, MAKING OF THE CONSTITUTION, (1937) 286-292

105. See CONGRESSIONAL GLOBE, 39th Congress, 1st Sess., pp. 2766-7.

106. In the Congressional debates, sponsors of the Amendment emphasized that Section 2 was broad enough to reach any type of disfranchisement. The following exchange is typical:

> "MR. CLARK: If the Senator will pardon me for a moment, I wish to inquire whether the committee's attention was called to the fact that if any State excluded any person, say as Massachusetts does, for want of intelligence, this provision cuts down the representation of that State.
>
> MR. HOWARD: Certainly it does, no matter what may be the occasion of the restriction."

CONGRESSIONAL GLOBE, 39th Cong., 1st Sess., p. 2767.

107. Constitution of the U. S., ART. VI, CLAUSE 3.

108. The language of Section 2— ". . . the basis of representation therein *shall* be reduced . . ."— is clearly mandatory.

109. "As the best if not the only method of surmounting the difficulty, and as eminently just and proper in itself, your committee came to the conclusion that political power should be possessed in all the states exactly in proportion as the right of suffrage should be granted, without distinction of color or race. This it was thought would leave the whole question with the people of each State, holding out to all the advantage of increased political power as an inducement to allow all to participate in its exercise. Such a provision would be in its nature gentle and persuasive, and would lead, it was hoped, at no distant day, to an equal participation of all, without distinction, in all the rights and privileges of citizenship, thus affording a full and adequate protection to all classes of citizens, since all would have, through the ballot box, the power of self-protection." REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, p. xiii.

The cost of Southern oligarchy to American democracy is already incalculable. The stranglehold over national legislation long exercised by the Southern bloc in Congress is merely one of the more obvious items in this long debit.

The future danger may be still greater. In view of the strong probability that any American fascist movement will utilize "white supremacy" in the same way the Nazis utilized "Aryan supremacy", the winning of new liberties through enforcement of the Fourteenth Amendment may well, as in previous historical crises, prove to be a necessary measure for the defense of those liberties we have traditionally enjoyed.