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# THE FOURTEENTH AMENDMENT: ITS INTENDED EFFECT ON ANTI-MISCEGENATION LAWS

R. CARTER PITTMAN\*

From the earliest colonial times, laws, customs, and court proceedings proscribing miscegenation were a fundamental part of the mores of the American people. Many of the laws enacted or enforced in the colonies prior to 1776, for the stated purpose of preventing "abominable mixture and spurious issues," are listed in an appendix hereto. The moral and genetic views of the founders live on in the laws and constitutions of the states. Those laws and constitutions are now under attack as in violation of the fourteenth amendment.<sup>1</sup>

A cardinal rule involved in the interpretation or construction of the Constitution or one of its provisions is that "we are to place ourselves as nearly as possible in the condition of the men who framed that instrument."<sup>2</sup> Furthermore, in interpreting or construing, "nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process."<sup>3</sup>

The three constitutional amendments<sup>4</sup> that grew out of the War Between the States were designed to limit the powers of the States. The previous amendments limited the powers of the federal government.

The fourteenth amendment grew out of the Civil Rights Act of 1866<sup>5</sup> and its forerunner, the Freeman's Bureau Bill.<sup>6</sup> It therefore

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<sup>1</sup> *McLaughlin v. State*, 153 So. 2d 1 (Fla. 1963), *appeal docketed*, 32 U.S.L. WEEK 3168 (U.S. Oct. 28, 1963) (No. 585, 1963-64 Term; renumbered No. 11, 1964-65 Term), *prob. juris. noted*, 377 U.S. 914 (1964). The statute involved is FLA. STAT. ANN. § 798.05 (1944), which provides: "Any negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same room shall each be punished by imprisonment . . ."

<sup>2</sup> *Ex parte Bain*, 121 U.S. 1, 12 (1887), quoted with approval in *Adamson v. California*, 332 U.S. 46, 72 (1947).

<sup>3</sup> *Ullman v. United States*, 350 U.S. 422, 428 (1956).

<sup>4</sup> U.S. CONST. amends. XIII, XIV, XV.

<sup>5</sup> Ch. 31, 14 Stat. 27 (1866).

<sup>6</sup> Ch. 90, 13 Stat. 507 (1865), as amended, ch. 200, 14 Stat. 173 (1866).

becomes necessary that the debates in the first session of the Thirty-ninth Congress (1865-1866) be researched in order to determine the meaning of the pertinent language of the fourteenth amendment as understood by its authors and its proponents. This research shall seek an answer to the question:

What is the evidence as to the general purpose and meaning of the fourteenth amendment with respect to the anti-miscegenation laws of the states?

### I. THE FIRST SUPPLEMENTAL FREEDMEN'S BUREAU BILL<sup>7</sup>

This bill was the first reconstruction proposal and was a forerunner of the fourteenth amendment. It was introduced as a supplement to the original Freedmen's Bureau Bill,<sup>8</sup> enacted on March 3, 1865. The original protected only those Negroes who had been freed in territory under federal control. The supplemental bill, as reported by the Judiciary Committee of the Senate, contained a number of sections, the first six of which authorized the division of the seceding states into districts, the appointment of commissioners, the reservation of land, and the awarding of such lands to loyal refugees and freedmen.<sup>9</sup>

The seventh section contained language that, by way of the Civil Rights Act, subsequently became a part of the fourteenth amendment. It provided, in part, that if, because of any state or local law, custom or prejudice,

any of the civil rights or immunities belonging to white persons, including the right to make and enforce contracts . . . and to have full and equal benefit of all laws and proceedings for the security of person and estate, . . . are refused or denied to negroes . . . on account of race . . . it shall be the duty of the President of the United States, through the Commissioner, to extend military protection . . . over all cases affecting such persons so discriminated against.<sup>10</sup>

Section 8 made it a misdemeanor for any person to subject any other person on account of color "to the deprivation of any civil right secured to white persons, or to . . . any different punishment . . ."<sup>11</sup>

<sup>7</sup> S. 60, 39th Cong., 1st Sess. (1866).

<sup>8</sup> Ch. 90, 13 Stat. 507 (1865).

<sup>9</sup> CONG. GLOBE, 39th Cong., 1st Sess. 209-10 (1865-1866).

<sup>10</sup> S. EXEC. NO. 24, 39th Cong., 1st Sess. 9-10 (1866).

<sup>11</sup> *Id.* at 10.

These provisions of the bill were applicable only to those states or districts where the ordinary course of judicial proceedings had been interrupted by war. Tribunals consisting of officers and agents of the Bureau were to try all offenses.<sup>12</sup>

Senator Thomas A. Hendricks of Indiana, an opponent of the Bill, expressed the fear in the Senate debates that the "civil rights or immunities" clause in the seventh section would nullify many salutary laws of Indiana, including an Indiana constitutional provision which provided that no Negro man should be allowed to intermarry with a white woman. He then said:

Marriage is a civil contract, and to marry according to one's choice is a civil right. Suppose a State shall deny the right of amalgamation, the right of a negro man to intermarry with a white woman; then that negro may be taken under the military protection of the Government; and what does that mean? . . . Does it mean that this military power shall enforce his civil right, without respect to the prohibition of the local law? In other words, if the law of Indiana, as it does, prohibits under heavy penalty the marriage of a negro with a white woman, may it be said a civil right is denied him which is enjoyed by all white men, to marry according to their choice, and if it is denied, the military protection of the colored gentleman is assumed, and what is the result of it all? I suppose they are then to be married in the camp of the protecting officer without regard to the State laws.<sup>13</sup>

Senator Lyman Trumbull of Illinois, who had introduced the Bill and was its manager, made it clear that there was no intention to nullify the anti-miscegenation statutes or constitutional requirements of the various states or to restrict such future legislation as to miscegenation. On that point he said:

But, says the Senator from Indiana, we have laws in Indiana prohibiting black people from marrying whites, and you are going to disregard these laws? Are our laws enacted for the purpose preventing amalgamation to be disregarded, and is a man to be punished because he undertakes to enforce them? I beg the Senator from Indiana to read the bill. One of its objects is to secure the same civil rights and subject to the same punishments persons of all races and colors. How does this interfere with the law of Indiana preventing marriages between whites and blacks? Are not both races treated alike by the law of Indiana? Does not the law make it just as much a crime for a white man to

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<sup>12</sup> *Ibid.* See also CONG. GLOBE, *op. cit. supra* note 9, at 209-10.

<sup>13</sup> *Id.* at 318.

marry a black woman as for a black woman to marry a white man, and *vice versa*? I presume there is no discrimination in this respect, and therefore your law forbidding marriages between whites and blacks operates alike on both races. This bill does not interfere with it. If the negro is denied the right to marry a white person, the white person is equally denied the right to marry the negro. I see no discrimination against either in this respect that does not apply to both. Make the penalty the same on all classes of people for the same offense, and then no one can complain.<sup>14</sup>

A week later Senator Garrett Davis from Kentucky likewise expressed the fear that the language of section 7 was broad enough to strike down the anti-miscegenation laws of the State of Kentucky.<sup>15</sup>

Senator Trumbull replied:

The Senator says the laws of Kentucky forbid a white man or woman marrying a negro, and that these laws of Kentucky are to exist forever; that severe penalties are imposed in the State of Kentucky against amalgamation between the white and black race. . . . But, sir, it is a misrepresentation of this bill to say that it interferes with those laws. I answered that argument the other day when it was presented by the Senator from Indiana. The bill provides for dealing out the same punishment to people of every color and every race; and if the law of Kentucky forbids the white man to marry the black woman I presume it equally forbids the black woman to marry the white man, and the punishment is alike upon each. All this bill provides for is that there shall be no discriminations in punishments on account of color; and unless the Senator from Kentucky wants to punish the negro more severely for marrying a white person than a white for marrying a negro, the bill will not interfere with his law.<sup>16</sup>

The supplemental bill passed the Senate on January 25, 1866, by a vote of 37 to 10, three absent.<sup>17</sup>

On the same day the Bill was sent to the House of Representatives, but on the following day Senator Johnson from Maryland made a motion to reconsider, requesting that the Secretary of the Senate ask for the return of the Bill from the House of Representatives. Senator Johnson's motion was defeated 22 to 18.<sup>18</sup>

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<sup>14</sup> *Id.* at 322.

<sup>15</sup> *Id.* at 418.

<sup>16</sup> *Id.* at 420.

<sup>17</sup> *Id.* at 421.

<sup>18</sup> *Id.* at 437.

While the Bill was under consideration in the House of Representatives, on February 3, 1866, Representative Samuel W. Moulton from Illinois demonstrated the inapplicability of the language of the bill to state laws forbidding miscegenation or interracial marriages. In part he said:

My colleague says that . . . it is a civil right for a black man to marry a white woman. . . . I deny that it is a civil right for a white man to marry a black woman or for a black man to marry a white woman. . . . It is a matter of mutual taste, contract, and understanding between the parties. . . . The law, as I understand it, in all the States, applies equally to the white man and the black man, and there being no distinction, it will not operate injuriously against either the white or the black. . . .

I understand that the civil rights referred to in the bill are not of the fanciful character referred to by the gentleman, but the great fundamental rights that are secured by the Constitution of the United States, and that are defined in the Declaration of Independence, the right to personal liberty, the right to hold and enjoy property, to transmit property, and to make contracts. These are the great civil rights that belong to us all, and are sought to be protected by this bill.<sup>19</sup>

Thereupon, the following colloquy occurred:

Mr. THORNTON. On the point upon which my colleague is now speaking, civil rights, I would ask him if a marriage between a white man and a white woman is a civil right?

Mr. MOULTON. It is not a civil right.

Mr. THORNTON. It is not?

Mr. MOULTON. No, sir, not in my opinion.

Mr. THORNTON. Then what sort of a right is it?

Mr. MOULTON. Marriage is a contract between individuals competent to contract it.

Mr. THORNTON. Is it a political or civil right?

Mr. MOULTON. It is a social right. I understand that a civil right is a right that a party is entitled to and that he can enforce by operation of law.

Mr. THORNTON. I would ask my colleague if marriages are not contracted in all the States of this Union by virtue of provisions of law?

Mr. MOULTON. I think, perhaps, they are to a greater or less extent.

Mr. THORNTON. Then is not a contract provided for by law a civil right?

Mr. MOULTON. It is not especially provided for by the law

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<sup>19</sup> *Id.* at 632.

regulating it. The right to marry is a right which cannot be enforced. There are a great many things a man can do that are imperfect obligations which cannot be enforced by law, and hence are not civil rights contemplated by this bill. . . . The remarks that I made in connection with this matter were made for this purpose: I say that the right to marry is not strictly a right at all, because it rests in contract alone between the individuals, and no other person has a right to contract it. It is not a right in any legal or technical sense at all. No one man has any right to marry any woman he pleases. If there was a law making that a civil right, then it might be termed a civil right in the sense in which it is used here. But there being no law in any state to that effect, I insist that marriage is not a civil right, as contemplated by the provisions of this bill.<sup>20</sup>

On the same day, Hon. L. H. Rousseau of Kentucky expressed the fear that under the proposal a minister might be arrested for refusing to solemnize marriages between whites and Negroes.<sup>21</sup>

He was answered on the same day by Hon. C. E. Phelps of Maryland, even though he himself opposed the bill as written and desired amendments:

Efforts have been made, and very ingeniously, by gentlemen opposed to the bill, . . . by arguing from the language used in the seventh and eighth sections an inference of a design to control State laws in respect to the marriage relation. Such a construction is not warranted by the terms employed.<sup>22</sup>

After the final passage, the Freedmen's Bureau Bill was vetoed on February 19, 1866.<sup>23</sup> The veto was sustained February 20, 1866.<sup>24</sup> In a slightly modified form, the Bill was later re-enacted over the veto of the President.<sup>25</sup>

## II. THE CIVIL RIGHTS ACT OF 1866

The Senate proceeded to consider the proposed Civil Rights Act which was under the same management. The first section contained the following language:

The inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as

<sup>20</sup> *Id.* at 632-33.

<sup>21</sup> *Id.* App. at 69.

<sup>22</sup> *Id.* App. at 75.

<sup>23</sup> CONG. GLOBE, *op. cit. supra* note 9, at 915.

<sup>24</sup> *Id.* at 943.

<sup>25</sup> Act of July 16, 1866, ch. 90, 14 Stat. 173.

a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.<sup>26</sup>

It also 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.<sup>27</sup>

Again Senator Johnson expressed his misgivings about the possible effect of this act on the miscegenation statutes of the States. Among other things, he said:

There is not a State in which these Negroes are to be found where slavery existed until recently, and I am not sure that there is not the same legislation in some of the States where slavery has long since been abolished, which does not make it criminal for a black man to marry a white woman, or for a white man to marry a black woman; and they do it not for the purpose of denying any right to the black man or to the white man, but for the purpose of preserving the harmony and peace of society. The demonstrations going on now in your free States show that a relation of that description cannot be entered into without producing some disorder. Do you not repeal all that legislation by this bill? I do not know that you intend to repeal it; but is it not clear that all such legislation will be repealed, and that consequently there may be a contract of marriage entered into as between persons of these different races, a white man with a black woman, or a black man with a white woman?<sup>28</sup>

Thereupon, Senator William Pitt Fessenden, of Maine, asked: "Where is the discrimination against color in the law to which the Senator refers?"<sup>29</sup>

The following colloquy then took place:

Mr. JOHNSON. There is none, that is what I say; that is the very thing I am finding fault with.

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<sup>26</sup> CONG. GLOBE, *op. cit. supra* note 9, at 504.

<sup>27</sup> *Id.* at 505.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

Mr. TRUMBULL. This bill would not repeal the law to which the Senator refers, if there is no discrimination made by it.

Mr. JOHNSON. Would it not? We shall see directly. Standing upon this section, it will be admitted that the black man has the same right to enter into a contract of marriage with a white woman as a white man has, that is clear, because marriage is a contract. I was speaking of this without a reference to any State legislation.

Mr. FESSENDEN. He has the same right to make a contract of marriage with a white woman that a white man has with a black woman.

Mr. JOHNSON. . . . But whether I am wrong or not, upon a careful and correct interpretation of the provisions of these two sections, I suppose all the Senate will admit that the error is not so gross a one that the courts may not fall into it. Then what is the result? The whole of this legislation to be found in almost every State in the Union where slavery has existed, and to be found, I believe, in several of the other States, is done away with. You do not mean to do that. I am sure the Senate is not prepared to go to that extent; and I submit to the honorable chairman, without proclaiming myself to be right beyond all possible question of doubt, which would be in bad taste, and certainly very far from what I am disposed to do when I find that a different opinion is entertained by two gentlemen whose opinions I hold in so much respect—I submit to the honorable chairman of the Judiciary Committee whether he had not better make it so plain that the difficulty which I suggest in the execution of the law will be obviated.<sup>30</sup>

The Civil Rights Act of 1866 passed the Senate on February 2, 1866, by a vote of 33 to 12.<sup>31</sup> On March 13, with a few minor changes, it passed the House of Representatives by a vote of 111 to 38.<sup>32</sup> The House amendments were adopted in the Senate without debate.<sup>33</sup>

On March 27, 1866, President Johnson returned the Bill to the Senate without his approval.<sup>34</sup> His veto message contained objections to the Bill, section by section. With respect to the anti-miscegenation laws of the states, he said:

In the exercise of State policy over matters exclusively affecting the people of each State, it has frequently been thought expedi-

<sup>30</sup> *Id.* at 505-06.

<sup>31</sup> *Id.* at 606-07.

<sup>32</sup> *Id.* at 1367.

<sup>33</sup> *Id.* at 1413-16.

<sup>34</sup> *Id.* at 1679.

ent to discriminate between the two races. By the statutes of some of the States, northern as well as southern, it is enacted, for instance, that no white person shall intermarry with a negro or mulatto. Chancellor Kent says, speaking of the blacks, that "marriages between them and the whites are forbidden in some of the States where slavery does not exist, and they are prohibited in all the slaveholding states, and when not absolutely contrary to law, they are revolting, and regarded as an offense against public decorum."

I do not say this bill repeals State laws on the subject of marriage between the two races, for as the whites are forbidden to intermarry with the blacks, the blacks can only make such contracts as the whites themselves are allowed to make, and therefore cannot, under this bill, enter into the marriage contract with the whites. . . .

If it be granted that Congress can repeal all State laws discriminating between whites and blacks in the subjects covered by this bill, why, it may be asked, may not Congress repeal in the same way all State laws discriminating between the two races on the subject of suffrage and office? If Congress can declare by law who shall hold lands, who shall testify, who shall have capacity to make a contract in a State, then Congress can by law also declare who, without regard to color or race, shall have the right to sit as a juror or as a judge, to hold any office, and, finally, to vote in every State and Territory of the United States. As respects the Territories, they come within the power of Congress, for as to them, the law-making power is the Federal power: but as to the States no similar provisions exist, vesting in Congress the power to make rules and regulations for them.<sup>35</sup>

The veto was overridden in the Senate, 33 to 15, on April 6, 1866,<sup>36</sup> and was overridden in the House, 122 to 41, on April 9, 1866.<sup>37</sup>

So far as our research discloses, all of the proponents of the supplemental Freedmen's Bureau Bill and the Civil Rights Act of 1866 were of one accord in insisting that there was nothing in those acts that could possibly be construed as nullifying the anti-miscegenation laws of the various states. As we have seen, by March 27, 1866, the fears that the anti-miscegenation statutes of the states would be voided had so far vanished that President Johnson dismissed the objections as frivolous.

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<sup>35</sup> *Id.* at 1680.

<sup>36</sup> *Id.* at 1809.

<sup>37</sup> *Id.* at 1861.

## III. THE FOURTEENTH AMENDMENT

The supplemental Freedmen's Bureau Bill and the Civil Rights Act were taken up, debated and passed before the resolution proposing the fourteenth amendment came before the Congress for debate, but all had the same management and were a part of the same package. The proposal to amend the Constitution preceded the passage of the Bill and the Act, but the debates on the proposed amendment came after consideration of the two.

When the Thirty-ninth Congress convened in December, 1865, Thaddeus Stevens, a Pennsylvania representative, proposed the creation of a joint committee on reconstruction consisting of six senators and nine representatives.<sup>88</sup> This proposal was adopted and the committee of fifteen prepared the resolution that was finally proposed as the fourteenth amendment. The debates on the supplemental Freedmen's Bureau Bill and the Civil Rights Act therefore serve to refine and define the language that later went into the fourteenth amendment. As is well known, the purpose of the fourteenth amendment was to confer power upon the Congress to enact such laws as were embodied in the Bill and the Act. For example, on May 8, 1866, Thaddeus Stevens said that section 1 of the proposed amendment and its other provisions

all are asserted, in some form or other, in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. . . . Some answer, "Your civil rights bill secures the same thing." That is partly true, but a law is repealable by a majority. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed.<sup>89</sup>

Representative Thaddeus Stevens thus contended that the purpose of the first section of the amendment was to write the Civil Rights Act into the Constitution without in any wise adding to the

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<sup>88</sup> *Id.* at 6.

<sup>89</sup> *Id.* at 2459.

rights protected by the Act. Mr. Stevens discussed in specific terms: punishment for crime, means of redress, protective laws and testimony in court, all of which were listed in the Act; he never hinted at any idea of broader application.

Representative William E. Finck of Ohio then stated that if the first section of the proposed amendment was necessary, the Civil Rights Act was unconstitutional.<sup>40</sup> His colleague from Ohio, Representative James A. Garfield, disagreed, saying that the purpose of the first section of the amendment was to prevent the repeal of the Civil Rights Act:

The civil rights bill is now a part of the law of the land. But every gentleman knows it will cease to be a part of the law whenever the sad moment arrives when that gentleman's party comes into power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it. For this reason, and not because I believe the civil rights bill unconstitutional, I am glad to see that first section here.<sup>41</sup>

Representative M. Russell Thayer of Pennsylvania agreed with Mr. Garfield, saying:

As I understand it, it is but incorporating in the Constitution of the United States the principle of the civil rights bill which has lately become a law, and that, not as the gentleman from Ohio [Mr. Finck] suggested, because in the estimation of this House that law cannot be sustained as constitutional, but in order, as was justly said by the gentleman from Ohio who last addressed the House, [Mr. Garfield], that that provision so necessary for the equal administration of the law, so just in its operation, so necessary for the protection of the fundamental rights of citizenship, shall be forever incorporated in the Constitution of the United States.<sup>42</sup>

Mr. Benjamin M. Boyer, of Pennsylvania, opposed the proposed amendment, stating as one reason: "the first section embodies the principles of the civil rights bill . . ."<sup>43</sup>

Representative Henry J. Raymond of New York, publisher of the *New York Times*, had been opposed to the Civil Rights Act

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<sup>40</sup> *Id.* at 2460-61.

<sup>41</sup> *Id.* at 2462.

<sup>42</sup> *Id.* at 2465.

<sup>43</sup> *Id.* at 2467.

because of its doubtful constitutionality. As to the proposed constitutional amendment, he said: "And now, although that bill became a law and is now upon our statute-book, it is again proposed so to amend the Constitution as to confer upon Congress the power to pass it."<sup>44</sup>

The foregoing illustrates the view of the framers of the fourteenth amendment in the House that the purpose of the first section of the amendment was to place the provisions of the Civil Rights Act of 1866 beyond the reach of legislative repeal. That is the verdict of history, based on the facts material to the issue.<sup>45</sup>

The resolution proposing the fourteenth amendment was adopted by the House of Representatives on May 10, 1866, by a vote of 128 to 37.<sup>46</sup> The bill was called up for debate in the Senate, on May 23, 1866.<sup>47</sup> Senator Jacob M. Howard of Michigan took the lead in presenting the resolution since Senator Fessenden of Maine, the Chairman of the Committee on Reconstruction, had not been well. He spoke at length on "privileges and immunities," as this clause, he apparently thought, contained the gist of section 1. He considered this phrase incapable of accurate definition, but listed a great many things that he thought it included. These were the first eight amendments of the Constitution together with some even less well defined privileges and immunities included in article IV, section 2. Despite the long list that he gave, a right to marry across lines of race and color was never mentioned. He continued:

The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect those great fundamental guarantees. How will it be done under the present amendment? As I have remarked, they are not powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end. This is done by the fifth section of this amendment. . . . Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution.<sup>48</sup>

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<sup>44</sup> *Id.* at 2502.

<sup>45</sup> FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 81, 212 (1909); TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 183 (1951).

<sup>46</sup> CONG. GLOBE, *op. cit.* *supra* note 9, at 2545.

<sup>47</sup> *Id.* at 2763.

<sup>48</sup> *Id.* at 2766.

But again, these guarantees have no reference to anti-miscegenation laws.

Senator Howard made clear his views on the last portion of the first section. He said that this portion

does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man.<sup>49</sup>

That is the general field in which the due process and equal protection clauses operate. They were not designed to wipe out all distinctions or discriminations based on race or color. Senator Howard made this clear by his reference to the right to vote:

But, sir, the first section of the proposed amendment does not give to either of these classes the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a despotism.<sup>50</sup>

Is the right to enter into an interracial marriage one of those "fundamental rights"? Is it more "fundamental" than the right to vote? Howard could not have thought so. As to voting rights under section 2, he said:

It is very true, and I am sorry to be obliged to acknowledge it, that this section of the amendment does not recognize the authority of the United States over the question of suffrage in the several States at all; nor does it recognize, much less secure, the right of suffrage to the colored race. I wish to meet this question fairly and frankly; I have nothing to conceal upon it; and I am perfectly free to say that if I could have my own way, if my preferences could be carried out, I certainly should secure suffrage to the colored race to some extent at least. . . . The committee were of opinion that the States are not yet prepared to sanction so fundamental a change as would be the concession of the right of suffrage to the colored race. We may as well state it plainly and fairly, so that there shall be no misunderstanding on the subject. It was our opinion that three fourths of the

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<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

States of this Union could not be induced to vote to grant the right of suffrage, even in any degree or under any restriction, to the colored race.<sup>51</sup>

Howard spoke also of the last section of the proposed amendment. He added that section 5 gave Congress power to pass laws, "appropriate to the attainment of the great object of the amendment."<sup>52</sup>

Senator Benjamin L. Wade of Ohio on May 23 moved a substitute which contained the germ of the definition of citizenship.<sup>53</sup> Further consideration was then postponed.

The Senate Republicans went into caucus, where no doubt most of the basic differences were threshed out. Of the debates there we have no record. On May 29, the Senate returned to a consideration of the proposed amendment. Senator Howard at once offered a series of amendments, the product of the caucus.<sup>54</sup> The only amendment proposed for section 1 was the addition of the clause defining citizenship.<sup>55</sup>

When asked as to the purpose of the proposed amendment, on May 30, Howard said: "We desired to put this question of citizenship and the rights of citizens and freedmen under the civil rights bill beyond the legislative power . . ."<sup>56</sup>

Some debate followed on the citizenship provision. Then Senator James R. Doolittle of Wisconsin asserted that the amendment was designed to validate the Civil Rights Act.<sup>57</sup> Senator Fessenden denied that he had heard such a purpose mentioned in the Committee, but he had missed many sessions and Senator Howard interposed to remark that the purpose of the amendment was to prevent the repeal of the Civil Rights Act.<sup>58</sup>

Senator Luke P. Poland of Vermont made a speech in which he stated that the purpose of section 1 was to permit Congress to prohibit State interference with the privileges and immunities referred to in article IV, section 2.<sup>59</sup> He admitted that the proposed amendment would not confer suffrage on the Negro. Senator Wil-

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<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Id.* at 2768.

<sup>54</sup> *Id.* at 2869.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Id.* at 2896.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> *Id.* at 2961.

liam M. Stewart of Nevada renewed the general theme that the proposed amendment was designed to put the Civil Rights Act in the Constitution.<sup>60</sup>

Senator Garrett Davis of Kentucky, an opponent of the proposed amendment, spoke at length. He expressed the view that the amendment was designed to provide constitutional support for the Civil Rights Act.<sup>61</sup> He was followed by Senator John B. Henderson, a Republican from Missouri. He implied that the proposed amendment would accomplish only the same result as the Civil Rights Act.<sup>62</sup>

Thus, the verdict of the House and history was affirmed in the Senate debates. The vote was then taken on June 8, 1866, and the resolution was adopted by a vote of 33 to 11.<sup>63</sup>

The resolution went back to the House for concurrence in the Senate amendments. Debate was limited to one day. Mr. Rogers stated that the resolution "embodied the gist of the civil rights bill."<sup>64</sup> The House concurred with the Senate amendments on June 13 by a vote of 120 to 32.<sup>65</sup>

Thus, we have covered the ground and must conclude that the friends and foes of the fourteenth amendment who spoke on the subject were of the opinion that the purpose of the amendment was to validate the provisions of the Civil Rights Act and place them beyond the power of the Judiciary to nullify, and the power of the Congress to repeal.

It was the opinion of those who spoke in behalf of the Civil Rights Act that it had no application to marriage contracts, anti-miscegenation statutes, or the right of suffrage. The proponents of the Civil Rights Act seemed to convince all of the skeptical members of the Congress as well as President Johnson that nothing in that Act applied to the anti-miscegenation statutes of the states.

Since all the slave states and most of the non-slave states had anti-miscegenation statutes,<sup>66</sup> it would have been strange if a ma-

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<sup>60</sup> *Id.* at 2964.

<sup>61</sup> *Id.* App. at 240.

<sup>62</sup> *Id.* at 3010.

<sup>63</sup> *Id.* at 3042.

<sup>64</sup> *Id.* App. at 229.

<sup>65</sup> *Id.* at 3149.

<sup>66</sup> *Id.* at 1121. Rep. Andrew J. Rogers of New Jersey stated on March 1, 1866, that: "The laws of nearly all the States prohibit a colored man from marrying a white woman." *Ibid.* Sen. Trumbull of Illinois conceded that his state had anti-miscegenation statutes. *Id.* at 600.

jority of the members of the Congress from those latter states had intended to authorize the Congress or the courts to nullify that which their constituency favored.

However, a majority favored extending to Negroes not the right to vote but the right not to be discriminated against in voting. Nothing in the Civil Rights Act, legitimized by the amendment, nor in the amendment itself, accorded the right to vote or, as some thought, the right not to be discriminated against in the application of voting laws. It was necessary to frame and adopt the fifteenth amendment in order to accomplish the objective left untouched by the fourteenth. In a few words the right to racially integrate at the altar or in bed might have been constitutionalized in the fourteenth or the fifteenth amendment. Such was not done. Had it been done, surely the amendments would have lost.

If "we are to place ourselves as nearly as possible in the condition of the men who framed . . ." <sup>67</sup> the fourteenth amendment, we know that nothing in that amendment, so interpreted, authorizes federal interference with the anti-miscegenation laws of the states. If "nothing new can be put into the Constitution except through the amendatory process," <sup>68</sup> as was true in 1866, as was true in 1956, and as is true now, the current attacks <sup>69</sup> on the anti-miscegenation statutes of the states must surely fail.

Since "the object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it," <sup>70</sup> the intent of the legislative assemblies of the states adopting the fourteenth amendment is clearly relevant and persuasive. A comparison of the list of thirty states having anti-miscegenation laws in 1951 <sup>71</sup> with the list of states relied on for adoption of the fourteenth amendment in 1868 <sup>72</sup> discloses that a majority of the ratifying states retained such laws in 1951.

<sup>67</sup> *Adamson v. California*, 332 U.S. 46, 72 (1947); *Ex parte Bain*, 121 U.S. 1, 12 (1887).

<sup>68</sup> *Ex parte Bain*, 121 U.S. 1, 12 (1887), quoted with approval in *Adamson v. California*, 332 U.S. 46, 72 (1947).

<sup>69</sup> *McLaughlin v. State*, 153 So. 2d 1 (Fla. 1963), *appeal docketed*, 32 U.S.L. WEEK 3168 (U.S. Oct. 28, 1963) (No. 585, 1963-64 Term; renumbered No. 11, 1964-65 Term), *prob. juris. noted*, 377 U.S. 914 (1964).

<sup>70</sup> *Lake County v. Rollins*, 130 U.S. 662, 670 (1889).

<sup>71</sup> MURRAY, STATES' LAWS ON RACE AND COLOR 18 (1951). The most recent article on the subject lists 24 states prohibiting miscegenous marriages. Walton, *The Present Status of Miscegenation Statutes*, 4 WILLIAM & MARY L. REV. 28 (1963).

<sup>72</sup> On July 21, 1868, Congress adopted and transmitted to the Depart-

Within twenty years after the adoption of the fourteenth amendment, the Supreme Court of the United States upheld a statute of Alabama prohibiting interracial marriage or interracial cohabitation as against a fourteenth amendment attack.<sup>73</sup> Almost contemporaneously with the adoption of the amendment, federal<sup>74</sup> and state<sup>75</sup> courts upheld anti-miscegenation statutes against such attacks.

All court decisions on the question have upheld the constitutionality of anti-miscegenation statutes, with the exception of a split four to three decision of the Supreme Court of California.<sup>76</sup> In order to find the California statute to be in violation of the fourteenth amendment, the majority of that court relied principally on equalitarian propaganda,<sup>77</sup> masquerading as scientific authority,<sup>78</sup> and the Charter of the United Nations.<sup>79</sup>

If the anti-miscegenation laws of the states are now to fall under current attacks and be declared unconstitutional, that declaration must likewise be on some basis other than the law of the United States Constitution.

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ment of State a concurrent resolution to the effect that three-fourths of the states had ratified the amendment. Pursuant to this resolution Secretary of State Seward on July 28, 1868, certified that the proposed amendment had been ratified. 15 Stat. 708 (1868). The states relied on for ratification were: Alabama, Arkansas, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, West Virginia, Wisconsin, Vermont.

<sup>73</sup> *Pace v. Alabama*, 106 U.S. 583 (1882).

<sup>74</sup> *State v. Tutty*, 41 Fed. 753 (C.C.S.D. Ga. 1890); *Ex parte Kinney*, 14 Fed. Cases (No. 7825) (C.C.E.D. Va. 1879).

<sup>75</sup> *Scott v. State*, 38 Ga. 321 (1869); *State v. Gibson*, 36 Ind. 389 (1871).

<sup>76</sup> *Perez v. Sharp*, 32 Cal. 2d 711, 198 P.2d 17 (1948).

<sup>77</sup> *Id.*: at 720-28 & nn.3-8, 198 P.2d at 22-27 & nn.3-8.

<sup>78</sup> Compare *Evers v. Jackson School Dist.*, 232 F. Supp. 241 (S.D. Miss. 1964); *Stell v. Savannah-Chatham County Bd. of Educ.*, 220 F. Supp. (S.D. Ga. 1963). In both cases, inequality as between Negro and white school children was conceded by counsel for the NAACP; in *Stell*, such inequality was stipulated of record. Nevertheless, massive scientific proof was admitted exposing the nature and the falsity of equalitarian propaganda.

<sup>79</sup> *Perez v. Sharp*, 32 Cal. 2d 711, 732-33, 198 P.2d 17, 29-30 (1948) (concurring opinion).

## APPENDIX

REFERENCES TO REPRESENTATIVE ANTI-MISCEGENATION  
LAWS OF THE AMERICAN COLONIES

## MARYLAND:

- 1692—Acts of Md. 76 (Bisset 1759).  
1715—Laws of Md., ch. 44, § 25 (Bacon 1765).

## NORTH CAROLINA:

- 1715—See REUTER, *THE MULATTO IN THE UNITED STATES* 111 (1918), citing BASSETT, *SLAVERY AND SERVITUDE IN THE COLONY OF NORTH CAROLINA* 15 (1896).  
1741—1 Laws of N.C., ch. 35, § 15, at 157 (Potter, Taylor & Yancey 1821). 1 Public Acts 1715-90, at 45-46 (Martin's Revisal of Iredell 1804).

## PENNSYLVANIA:

- 1677—See REUTER, *THE MULATTO IN THE UNITED STATES* 110 (1918), citing TURNER, *THE NEGRO IN PENNSYLVANIA* 29 (1911).

## SOUTH CAROLINA:

- 1717—3 Statutes at Large of S.C., No. 383, at 20 (Cooper 1838).

## VIRGINIA:

- 1630—1 Laws of Va. 146 (Hening 1823).  
1640—1 Laws of Va. 552 (Hening 1823).  
1662—2 Laws of Va. 170 (Hening 1823).  
1691—3 Laws of Va. 86, 87 (Hening 1823).  
1696—3 Laws of Va. 140 (Hening 1823).  
1705—3 Laws of Va. 252, 453 (Hening 1823).  
1748—5 Laws of Va. 548 (Hening 1819).  
1753—6 Laws of Va. 111, 325, 361 (Hening 1819).  
1769—8 Laws of Va. 358 (Hening 1821).