Racial Segregation in Public Accomodations: Some Reflected Light on the Fourteenth Amendment from the Civil Rights Act of 1875

Alfred Avins
Racial Segregation in Public Accommodations: Some Reflected Light on the Fourteenth Amendment From the Civil Rights Act of 1875

Alfred Avins

In light of recent congressional and judicial reliance upon the fourteenth amendment as a constitutional justification for civil rights legislation, Dr. Avins discusses the consensus of opinion which prevailed among the amendment's framers at the time of its enactment. By recounting the matters discussed in the Thirty-Ninth through Forty-Third Congresses regarding the public accommodations legislation introduced by Senator Charles Sumner of Massachusetts and ultimately adopted as the Civil Rights Act of 1875, the author attempts to shed further light upon the scanty legislative history of the fourteenth amendment in order to ascertain its limitations. He concludes that since those who drafted, debated, and voted upon the amendment did not envision its provisions as conferring social equality upon Negro citizens, legislation prohibiting their segregation in public accommodations is an unconstitutional infringement upon individual rights.

The extent to which the fourteenth amendment forbids racial segregation is a matter of current importance in the field of public accommodations. Section 201(d) of the Civil Rights Act of 1964 specifically relies on the fourteenth amendment as one of the constitutional bases for forbidding segregation in public facilities. Moreover, where the Supreme Court has found "state action" to exist, it has specifically relied on this amendment to forbid such segregation, even without a federal statute, and in so doing has overruled what was long the landmark case in the field of race relations, Plessy v. Ferguson.

While direct light on the intent of the framers of the fourteenth amendment as a constitutional justification for civil rights legislation, Dr. Avins discusses the consensus of opinion which prevailed among the amendment's framers at the time of its enactment. By recounting the matters discussed in the Thirty-Ninth through Forty-Third Congresses regarding the public accommodations legislation introduced by Senator Charles Sumner of Massachusetts and ultimately adopted as the Civil Rights Act of 1875, the author attempts to shed further light upon the scanty legislative history of the fourteenth amendment in order to ascertain its limitations. He concludes that since those who drafted, debated, and voted upon the amendment did not envision its provisions as conferring social equality upon Negro citizens, legislation prohibiting their segregation in public accommodations is an unconstitutional infringement upon individual rights.

The extent to which the fourteenth amendment forbids racial segregation is a matter of current importance in the field of public accommodations. Section 201(d) of the Civil Rights Act of 1964 specifically relies on the fourteenth amendment as one of the constitutional bases for forbidding segregation in public facilities. Moreover, where the Supreme Court has found "state action" to exist, it has specifically relied on this amendment to forbid such segregation, even without a federal statute, and in so doing has overruled what was long the landmark case in the field of race relations, Plessy v. Ferguson.

While direct light on the intent of the framers of the fourteenth amendment as a constitutional justification for civil rights legislation, Dr. Avins discusses the consensus of opinion which prevailed among the amendment's framers at the time of its enactment. By recounting the matters discussed in the Thirty-Ninth through Forty-Third Congresses regarding the public accommodations legislation introduced by Senator Charles Sumner of Massachusetts and ultimately adopted as the Civil Rights Act of 1875, the author attempts to shed further light upon the scanty legislative history of the fourteenth amendment in order to ascertain its limitations. He concludes that since those who drafted, debated, and voted upon the amendment did not envision its provisions as conferring social equality upon Negro citizens, legislation prohibiting their segregation in public accommodations is an unconstitutional infringement upon individual rights.

The extent to which the fourteenth amendment forbids racial segregation is a matter of current importance in the field of public accommodations. Section 201(d) of the Civil Rights Act of 1964 specifically relies on the fourteenth amendment as one of the constitutional bases for forbidding segregation in public facilities. Moreover, where the Supreme Court has found "state action" to exist, it has specifically relied on this amendment to forbid such segregation, even without a federal statute, and in so doing has overruled what was long the landmark case in the field of race relations, Plessy v. Ferguson.

While direct light on the intent of the framers of the fourteenth amendment as a constitutional justification for civil rights legislation, Dr. Avins discusses the consensus of opinion which prevailed among the amendment's framers at the time of its enactment. By recounting the matters discussed in the Thirty-Ninth through Forty-Third Congresses regarding the public accommodations legislation introduced by Senator Charles Sumner of Massachusetts and ultimately adopted as the Civil Rights Act of 1875, the author attempts to shed further light upon the scanty legislative history of the fourteenth amendment in order to ascertain its limitations. He concludes that since those who drafted, debated, and voted upon the amendment did not envision its provisions as conferring social equality upon Negro citizens, legislation prohibiting their segregation in public accommodations is an unconstitutional infringement upon individual rights.

The extent to which the fourteenth amendment forbids racial segregation is a matter of current importance in the field of public accommodations. Section 201(d) of the Civil Rights Act of 1964 specifically relies on the fourteenth amendment as one of the constitutional bases for forbidding segregation in public facilities. Moreover, where the Supreme Court has found "state action" to exist, it has specifically relied on this amendment to forbid such segregation, even without a federal statute, and in so doing has overruled what was long the landmark case in the field of race relations, Plessy v. Ferguson.

While direct light on the intent of the framers of the fourteenth amendment as a constitutional justification for civil rights legislation, Dr. Avins discusses the consensus of opinion which prevailed among the amendment's framers at the time of its enactment. By recounting the matters discussed in the Thirty-Ninth through Forty-Third Congresses regarding the public accommodations legislation introduced by Senator Charles Sumner of Massachusetts and ultimately adopted as the Civil Rights Act of 1875, the author attempts to shed further light upon the scanty legislative history of the fourteenth amendment in order to ascertain its limitations. He concludes that since those who drafted, debated, and voted upon the amendment did not envision its provisions as conferring social equality upon Negro citizens, legislation prohibiting their segregation in public accommodations is an unconstitutional infringement upon individual rights.

The extent to which the fourteenth amendment forbids racial segregation is a matter of current importance in the field of public accommodations. Section 201(d) of the Civil Rights Act of 1964 specifically relies on the fourteenth amendment as one of the constitutional bases for forbidding segregation in public facilities. Moreover, where the Supreme Court has found "state action" to exist, it has specifically relied on this amendment to forbid such segregation, even without a federal statute, and in so doing has overruled what was long the landmark case in the field of race relations, Plessy v. Ferguson.
amendment respecting segregation is scanty,\(^4\) there is abundant reflected light with respect to segregation and public accommodations from the debates on the Civil Rights Act of 1875.\(^5\) The first section of that statute forbade discrimination in inns, public carriers, theaters, and places of amusement.

Apparently, examination of the legislative history of that act has been discouraged by the fact that it was held unconstitutional in the Civil Rights Cases\(^6\) on the ground that it went beyond the "state action" limitation of the fourteenth amendment. Nevertheless, the debates in connection with that act are illuminating. This article will attempt to weave the reflected light into a pattern which will show the intent of the framers of the fourteenth amendment regarding segregation in public accommodations.

I. SUMNER AND THE AMNESTY BILL

On May 13, 1870, Senator Charles Sumner of Massachusetts, the ultra-equalitarian Radical Republican, introduced in the Senate a bill to supplement the Civil Rights Act of 1866.\(^7\) The first section of Sumner's bill read:

That all citizens of the United States, without distinction of race, color, or previous condition of servitude, are entitled to the equal and impartial enjoyment of any accommodation, advantage, facility, or privilege furnished by common carriers, whether on land or water; by inn-keepers; by licensed owners, managers, or lessees of theaters or other places of public amusement; by trustees, commissioners, teachers, or other officers of common schools and other public institutions of learning, the same being supported or authorized by law; by trustees or officers of church organizations, cemetery associations, and benevolent institutions incorporated by national or State authority; and this right shall not be denied or abridged on any pretense of race, color, or previous condition of servitude.\(^8\)

The bill died after being sent to the Judiciary Committee and re-

---


\(^5\) 18 STAT. 335.

\(^6\) 109 U.S. 3 (1883).

\(^7\) 14 STAR. 27.

\(^8\) CONG. GLOBE, 41st Cong., 2d Sess. 3434 (1870). See also CONG. GLOBE, 42d Cong., 1st Sess. 21 (1871); CONG. GLOBE, 42d Cong., 2d Sess. 244, 821 (1872). The bill had probably been inspired by some complaints Sumner had received from colored legislators. See CONG. GLOBE, 41st Cong., 3d Sess. 2740 (1870). There were a number of complaints by Negroes concerning railroad discrimination during this period. See, e.g., CONG. GLOBE, 41st Cong., 3d Sess. 1060 (1871) (remarks of Senator Revels); id. at 1637 (remarks of Senator Vickers, quoting a resolution of a colored convention).
ported adversely by its chairman, Senator Lyman Trumbull of Illinois. In the next session, Sumner again introduced the bill, but once more it died in the Judiciary Committee.

When the First Session of the Forty-Second Congress opened, Sumner introduced the bill for the third time. Having twice been rebuffed by the Judiciary Committee, he asked that the bill not be returned to that Committee again and urged its support:

[Y]ou cannot expect repose in this country ... until all citizens are really equal before the law. Why, sir, you know well that the Senator from Mississippi, who sat at our right only the other day, (Mr. Revels), cannot travel to his home as you can without being insulted on account of his color. And ... has he not the same rights before the law that you have? Should you enjoy in any car a privilege which the late Senator from Mississippi should not enjoy? And yet you know his rights in the cars are not secured to him; you know that he is exposed to insult. So long as this endures, how can you expect the colored population of this country to place trust in our Government? Government insults them so long as it refrains from giving them protection in these rights of equality.

However, no other Senator showed much interest, and the bill once again died of its own accord.

In the face of these repulses, Sumner moved, on December 20, 1871, to attach his proposal as a rider to the Amnesty Bill, a proposal authorized by the third section of the fourteenth amendment to lift the remaining political disabilities which that section imposed on many important Confederates. This bill was supported by the President, ardently desired by southern Republicans and all Democrats, and acquiesced in, at least half-heartedly, by most northern Republicans. Its passage by the necessary two-thirds majority seemed all but assured.

When Sumner contended that his bill was designed to secure "equal rights," Senator Joshua Hill, a Georgia Republican, immediately arose to contest this. He declared that separate dining rooms in hotels and separate railway cars did not deny civil rights if the accommodations were equal. He pointed to the fact that slaves who had worshipped at the same churches as their masters before

---

9 CONG. GLOBE, 41st Cong., 2d Sess. 5314 (1870). See also CONG. GLOBE, 42d Cong., 2d Sess. 821 (1872).
10 CONG. GLOBE, 41st Cong., 3d Sess. 616 (1871).
11 Id. at 1263. See also CONG. GLOBE, 42d Cong., 2d Sess. 822 (1872).
12 CONG. GLOBE, 42d Cong., 1st Sess. 21 (1871).
the Civil War requested assistance in building separate churches after emancipation. The following colloquy then occurred:

MR. SUMNER. Mr. President, we have a vindication on this floor of inequality as a principle, as a political rule.

MR. HILL. On which race, I would inquire, does the inequality to which the Senator refers operate?

MR. SUMNER. On both. Why, the Senator would not allow a white man to go into the same car with a colored man.

MR. HILL. Not unless he was invited, perhaps. (Laughter).

MR. SUMNER. Very well, the Senator mistakes substitutes for equality. Equality is where all are alike. A substitute can never take the place of equality.

The colloquy continued, with Sumner asserting that in railroads and hotels, as well as schools, Negroes should have the same rights as whites. He contended that segregation in these places was an indignity, an insult, and a wrong. Hill, however, pointed out that he himself was "subject in hotels and upon railroads to the regulations provided by the hotel proprietors for their guests, and by railroad companies for their passengers." He pointed out that while both he and Negroes were entitled to "all the security and comfort that either presents to the most favored guest or passenger," physical proximity did not add to it and hence was not a denial of any right to either white or Negro. He drew on the example of segregated ladies' cars on railroads and concluded that separation was a matter of taste.

Discussion continued in the same vein. Sumner justified first, second, and third class railroad cars based on price but proclaimed that segregation was synonymous with inequality and violated the Declaration of Independence. He alluded to the large Negro voting population of Georgia and how badly Hill was representing them. Hill replied that while Sumner's views were consistent with his whole life's outlook, "he has not yet succeeded in convincing the great mass of minds, even in the far North and East," of the practicality or necessity of those views. Hill denied that race mixing in railroads added to comfort, while Sumner asserted that to select a white person as a railroad companion on a long trip was an indignity to the colored man. When Sumner decried the segregation of Frederick Douglass in a steamboat dining room because

---

14 Id. at 241.
15 Id. at 242.
16 Ibid.
17 Ibid.
18 Id. at 243.
of his race as a violation of equal rights, Hill defended the right of companies to make regulations that constitute "no infringement of the Constitution of the country or of any existing law." Sumner concluded the colloquy by asserting that Congress must annul all such regulations because they were in defiance of equality and that unless Negroes were equal before the law the promises of the Dec-

---

10 Ibid. As to common law, at least, Hill was unquestionably correct. See Chicago & Nw. Ry. v. Williams, 55 Ill. 183 (1870); Day v. Owen, 5 Mich. 520 (1858); West Chester & Phil. R.R. v. Miles, 55 Pa. 209 (1867); Goines v. M'Candless, 4 Phil. 255 (Pa. Dist. Ct. 1861). Day v. Owen and Goines v. M'Candless suggest that the separate accommodations may be inferior; the other two cases noted above, decided after the Civil War, require equal accommodations, as does Coger v. North W. Union Packet Co., 37 Iowa 145 (1873), which did not decide the question of segregation. All of the cases, however, required carriers to take Negroes in some way. Cully v. Baltimore & O.R.R., 6 Fed. Cas. 946 (No. 3466) (D. Md. 1876), citing Field v. Baltimore City Passenger R.R., 20 Beav. No. 4763 (unreported); Pleasant v. North Beach & Mission R.R., 34 Cal. 586 (1868); Turner v. North Beach & Mission R.R., 34 Cal. 594 (1868); State v. Kimber, 3 Ohio Dec. Reprint 197 (C.P. 1859); Derry v. Lowry, 6 Phil. 30 (C.P. 1865). There are a considerable number of later federal cases holding that a carrier may offer Negroes separate accommodations only if they are equal to those accorded whites. McGuinn v. Forbes, 37 Fed. 639 (D. Md. 1889); Murphy v. Western & Atl. R.R., 23 Fed. 637 (C.C.B.D. Tenn. 1885); Logwood v. Memphis & C.R.R., 23 Fed. 318 (C.C.W.D. Tenn. 1885); The Sue, 22 Fed. 843 (D. Md. 1885); Gray v. Cincinnati So. R.R., 11 Fed. 683 (C.C.S.D. Ohio 1882); Green v. City of Bridgeton, 10 Fed. Cas. 1090 (No. 5754) (S.D. Ga. 1879); Charge to Grand Jury, 30 Fed. Cas. 1005 (No. 18260) (C.C.W.D. Tenn. 1875); Charge to Grand Jury, 30 Fed. Cas. 999 (No. 18238) (C.C.N.C. 1875). It might also be noted that at common law an innkeeper could assign whatever rooms he wanted to give to his guests. See Fell v. Knight, 8 M. & W. 269, 151 Eng. Rep. 1039 (Ex. 1841); Doyle v. Walker, 26 U.C. Rep. 302 (Q.B. 1867); Rogers, THE LAW OF HOTEL LIFE 7 (1879); Wandell, THE LAW OF INNS, HOTELS AND BOARDING HOUSES 75 (1888). To the same effect see The Civil Rights Bill, 10 WEEKLY L. BULL. 241 (1883).

It is quite likely that Sumner was aware of the common law rule permitting segregation of passengers and hotel guests. In his opening speech on the bill, he had quoted from STORY, BAILMENTS § 591 (5th ed. 1851). Id. at 383. The next section, § 591a, which was in every edition from the third edition published in 1832, stated that "the passengers are bound to submit to such reasonable regulations as the proprietors may adopt for the convenience and comfort of the other passengers, as well as for their own proper interests." See, in particular, id. § 591a. Sumner had edited the fifth edition of Story on Bailments and was thus unquestionably familiar with this statement of the law. See Advertisement to the Fifth Edition printed following Story's dedication page. However, it is probable that Sumner was reading from a later edition than that which he had edited, since the quotation from Wintermute v. Clarke, 7 N.Y. Super. 242 (1831), which he quoted, does not appear in Story's treatise until the sixth edition, published in 1856. Commencing with the seventh edition, published in 1863, Day v. Owen, supra, is cited. See STORY, BAILMENTS § 591a n.6 (7th ed. 1863). And Fell v. Knight, supra, is noted in 2 Kent, Commentaries 596 (11th ed. 1866), from which he also read. Id. at 383. The point that carriers could not exclude, but could segregate, Negroes, is made quite clear in the speeches of Senator Willard Saulsbury (D. Del.), John S. Carlisle (Va.) and James R. Doolittle (R. Wis.), in CONG. GLOBE., 36th Cong., 1st Sess. 1157-59 (1864), notwithstanding Mr. Justice Black's doubt on this point expressed in Bell v. Maryland, 378 U.S. 226, 336 (1964) (dissenting opinion). And the Field decision, cited by Mr. Justice Goldberg as a desegregation case (id. at 308 n.26), is more properly interpreted as a nondiscrimination case. See the Cully case, supra. Cf. Brief for the United States as Amicus Curiae, p. 51 n.91, Griffin v. Maryland, 373 U.S. 920 (1963).
laration of Independence would not be fulfilled. As the self-pro-
claimed defender of the Negro race, he pledged to see that they
were not treated with indignity.20 Sumner then began to read let-
ters from Negroes complaining that hotels would not serve them.
However, debate on this was concluded when Sumner’s amendment
was ruled out of order.21

The next day, Sumner moved that his amendment be adopted
in the Committee of the Whole.22 Debate centered around argu-
ments that Sumner’s amendment would kill the amnesty bill.23
Finally, a vote was taken and the amendment lost by a vote of 30
to 29.24 But Sumner renewed his amendment on the floor of the
Senate,25 and spoke at length in its favor on January 15, 1872. He
decried the cases where Frederick Douglass was not permitted to
dine with fellow commissioners and where a colored Lieutenant
Governor of Louisiana “was denied the ordinary accommodations
for comfort and repose” on a railway trip to Washington.26 Sum-
ner protested that all classes and sexes of Negroes were “shut out
from the ordinary privileges of the steamboat or railcar, and driven
into a vulgar sty with smokers and rude persons, where the conver-
sation is as offensive as the scene, and then again at the road-side
inn are denied that shelter and nourishment without which travel
is impossible.”27 Even Massachusetts was not free from discrimina-
tion.28

Sumner denied that separate facilities were equal. They were
equivalent, but equality demanded the same thing. He contended
that “in the process of substitution, the vital elixir [of equality] ex-
holes and escapes,”29 even if accommodations are the same. It was
an indignity to Negroes and “instinct with the spirit of slavery.”30
He concluded that the law would change adverse public opinion

20 CONG. GLOBE, 42d Cong., 2d Sess. 243 (1872).
21 Id. at 244-45.
22 Id. at 263, 272.
23 Id. at 272.
24 Id. at 274.
25 Id. at 278.
26 Id. at 381.
27 Id. at 382.
28 Ibid. But Massachusetts had an antidiscrimination law. Act of May 16, 1865,
MASS. STAT. 1865, ch. 277. See also Commonwealth v. Sylvester, 95 Mass. 247 (1866).
29 CONG. GLOBE, 42d Cong., 2d Sess. 383 (1872).
30 Ibid.
and that patronage of mixed facilities would not cease because of the requirements of his bill.\textsuperscript{31}

Two days later Sumner was back on his feet to rebut assertions that the bill was unnecessary. He read to the Senate long excerpts from letters and resolutions by Negroes complaining of denials of equal treatment by railroads and hotels. A colored teacher traveling to Alabama from Boston could get nothing to eat for several days.\textsuperscript{32} A hotel in Boston would not give a Negro a room during one of the worst storms of the year.\textsuperscript{33} The colored Secretary of State of South Carolina wrote in a letter to Sumner that a federal law was needed because state courts would not enforce a similar state statute.\textsuperscript{34} A Negro legislator from North Carolina complained that he had passed a charter through the state house of representatives for a steamboat company. On returning home, his only route was on the company's line; he was denied first-class accommodations and was placed in a colored section with very inferior facilities.\textsuperscript{35} First-class accommodations were closed to Negroes, as were hotels, places to eat, sleeping cars, churches, and cemeteries.\textsuperscript{36}

Senator Frederick T. Frelinghuysen, a New Jersey Republican, then rose to offer some technical amendments as to wording and to urge an amendment providing that churches, schools, cemeteries, and institutions of learning established exclusively for either colored or white people should remain segregated. To do otherwise, he contended, would allow whites to join Negro churches and wrest their valuable property from them. Since Negroes could not be given greater privileges than whites, the law would have to be modified.\textsuperscript{37} Sumner ultimately accepted this amendment.\textsuperscript{38}

Next, Senator Frederick A. Sawyer, a South Carolina Republican, objected that the Sumner amendment would endanger the amnesty bill. He stated that the South Carolina civil rights law\textsuperscript{39} was enforced generally, although he conceded some lapses by courts. He favored Sumner's bill as an independent measure and spent

\begin{itemize}
\item \textsuperscript{31} Id. at 429-35.
\item \textsuperscript{32} Id. at 429-30.
\item \textsuperscript{33} Id. at 430.
\item \textsuperscript{34} Ibid.
\item \textsuperscript{35} Id. at 431.
\item \textsuperscript{36} Id. at 429-35.
\item \textsuperscript{37} Id. at 435.
\item \textsuperscript{38} Id. at 487.
\item \textsuperscript{39} South Carolina Act of Feb. 13, 1869, No. 98. Senator Sawyer had previously pointed out that under South Carolina law desegregation was enforced. CONG. GLOBE, 41st Cong., 2d Sess. 3519 (1870); CONG. GLOBE, 41st Cong., 3d Sess. 1058 (1871).
\end{itemize}
much time defending himself from Sumner's stinging attacks.\textsuperscript{40} Hill also asserted that Negroes had ample accommodations and did not favor race-mixing.\textsuperscript{41} Senator James W. Nye, a Radical Republican lawyer from Nevada, supported Sumner's bill. He asserted that equality before the law does not "mean that I am to be kicked from the cars because I am not blessed with a white skin."\textsuperscript{42}

Senator Eli Saulsbury, a Delaware Democrat, made a characteristic attack on Sumner's bill as one "of social equality enforced by pains and penalties" and further declared:

If a man chooses to ride in the same car with negroes, if he voluntarily attends the same church and sits in the same pew . . . then he chooses social equality with negroes . . . But, if . . . he is compelled to ride in the same car . . . then it is enforced social equality, and that is what the Senator's amendment proposes.\textsuperscript{43}

Saulsbury condemned the bill for requiring mixed railroads, theaters, hotels, churches, and cemeteries. He predicted that whites would cease to patronize places affected by the law and that they would have to close for want of business. He even asserted that churches would be closed.\textsuperscript{44} But Nye said that since southerners were willing to ride with Negroes when they were slaves, they should not object now that they are free. He added that if they did not wish to eat with Negroes, they could leave the table.\textsuperscript{45}

The next day, Sumner read more letters from Negroes. One complained that he could get no seat in a theater or a street car.\textsuperscript{46} Another said that the Arkansas civil rights law\textsuperscript{47} was a "dead letter," while a third stated that a Negro committee was refused service at a restaurant, that another colored family could not get a stateroom, and that a colored minister was refused admission to hotels, theaters, and churches.\textsuperscript{48}

Senator Allen G. Thurman, an Ohio Democrat and a former chief justice of the state supreme court, attacked Sumner's amendment as infringing individual liberty and freedom of association, by forcing whites to associate with Negroes in places of amusement,

\textsuperscript{40} CONG. GLOBE, 42d Cong., 2d Sess. 489-90 (1872).
\textsuperscript{41} Id. at 491-92.
\textsuperscript{42} Id. at 495.
\textsuperscript{43} Id. app. 9.
\textsuperscript{44} Id. app. 10-11.
\textsuperscript{45} Id. at 706.
\textsuperscript{46} Id. at 726.
\textsuperscript{47} Arkansas Act of Feb. 25, 1873, No. XII, amending the act of 1868.
\textsuperscript{48} CONG. GLOBE, 42d Cong., 2d Sess. 726-30 (1872).
clubs, and churches. He said that the bill denied "them the liberty to choose their own associates in places of public amusement, in the church, or in the school."\[^{40}\] He discussed at length the right of people to form clubs, societies, and churches limited to one group.\[^{50}\] After some legal arguments, Thurman returned to attack the bill for enforcing "social equality." He asked rhetorically: "Where have the people of the United States given up their liberty to form associations the members of which shall be exclusively black or exclusively white?"\[^{51}\] He applied this concept to churches, lodges, cemeteries, and "a theater for whites alone or blacks alone."\[^{52}\] Thurman concluded:

I do not know any country in the world in which the subject or the citizen is interfered with as this bill proposes to interfere with him; to take from men the right to associate according to their own tastes when by so doing they interfere with the right of no one, and do not injure or in any way prejudice the State. I know of no country in which the liberty of free association, according to the tastes or the wishes or the interests of the persons associating, is denied to either subject or citizen. And yet, the Senator, in the name of liberty, in the name of freedom, in the name of humanity, seeks to manacle the American people and take from them liberties that they and their ancestors have enjoyed from time immemorial, and which the people in every civilized country enjoy at this day.

I repeat again, this bill is a bill of despotism and not of liberty.\[^{53}\]

Two days later, Senator Lyman Trumbull, the veteran Illinois lawyer and legislator who, as Republican Chairman of the Senate Judiciary Committee had shepherded to passage the Civil Rights Act of 1866 — the forerunner of the equal protection clause of the fourteenth amendment — and had frequently acted as spokesman and leader of the Senate Republicans in the Thirty-Ninth Congress, opposed Sumner's amendment. He confined civil rights to those enumerated in the 1866 law and said that it "did not extend... to social rights."\[^{54}\] He added:

The railroad corporations make regulations in regard to the manner in which their trains are to be conducted; they set aside one car for ladies, another for gentlemen; they have first and second-

\[^{40}\] Id. app. 27.  
\[^{50}\] Ibid.  
\[^{51}\] Id. app. 29.  
\[^{52}\] Ibid.  
\[^{53}\] Ibid. See also Thurman's attack on Sumner's bill the year before. CONG. GLOBE, 42d Cong., 1st Sess. app. 216-17, 219 (1871).  
\[^{54}\] CONG. GLOBE, 42d Cong., 2d Sess. 901 (1872).
class passenger cars, freight cars, and saloon cars, and I suppose they have a right to make all these regulations; but whatever right the white man has the black man has also.\textsuperscript{55}

Senator John W. Stevenson, a Kentucky Democratic lawyer, also complained that the bill was intended to "coerce social equality between the races . . . in hotels, in theaters, in railways, and other modes of public conveyance."\textsuperscript{56}

At length, a vote was taken on Sumner's amendment to the amnesty bill. A 28 to 28 tie resulted, and the Vice-President voted in the affirmative to break it.\textsuperscript{57} However, because a number of the amnesty bill's supporters considered Sumner's measure unconstitutional and voted against it,\textsuperscript{58} it received less than the requisite two-thirds vote.\textsuperscript{59}

On February 19, 1872, a bill similar to Sumner's was introduced into the House of Representatives.\textsuperscript{60} Congressman James G. Blair, a Missouri Republican lawyer, advocated the right of business owners to provide segregated facilities. He declared that "unless the law imposes upon public carriers and hotel-keepers the duty of providing "[sic] white associates for their colored passengers and guests, there can be no question but that these officers and persons may discharge every duty enjoined upon them by law by providing separate accommodations for the colored people."\textsuperscript{61} He said that the bill imposed unwanted social equality on whites and that hotels would be closed if it were passed.\textsuperscript{62} He further asserted:

Let the steam and sail vessels have their separate rooms and tables for the colored people, the railway companies separate cars, and the hotel-keepers separate rooms and tables; managers of theaters separate galleries, and public schools separate houses, rooms, and teachers, and the question of races will adjust itself quicker than by using arbitrary means . . . .

Let our Republican friends come up to the work manfully, for if they have the power under the Constitution to do what they are seeking to do by this bill, they have the power to blot out all distinction on account of color. Let me insist that my Republican friends stop not here. . . . Should any white man or white child refuse to speak to a negro on the public highway, in the streets

\textsuperscript{55} Ibid.
\textsuperscript{56} Id. at 913.
\textsuperscript{57} Id. at 919.
\textsuperscript{58} Id. at 926-28.
\textsuperscript{59} Id. at 928-29.
\textsuperscript{60} Id. at 1116.
\textsuperscript{61} Id. app. 143.
\textsuperscript{62} Ibid.
or elsewhere, because of color, fine them and send them to the penitentiary.\textsuperscript{63}

Congressman Henry D. McHenry, a Kentucky Democratic lawyer, also decried the bill for enforcing social equality in public accommodations.\textsuperscript{64} He, too, concluded: "The right of a citizen to associate exclusively with those who are congenial to him, and whom he recognizes as his peers, is an individual liberty, and no Government can prostrate it to his inferiors under the specious pretext of 'equality before the law.'"\textsuperscript{65} Congressman John M. Rice, another Kentucky Democratic lawyer, also raised the social equality argument and predicted that white patronage would be withdrawn from carriers, hotels, and theaters and that these businesses would be ruined.\textsuperscript{66}

On May 8, the Senate again considered an amnesty bill which had been passed in the House.\textsuperscript{67} Sumner at once attached his civil rights bill to this measure.\textsuperscript{68} During the ensuing debate and parliamentary maneuvering, Trumbull got into a debate with Sherman of Ohio and Edmunds of Vermont. Trumbull attacked his fellow Republicans with some warmth for loading Sumner's measure on to the amnesty bill. He added:

That is his proposition; and to pass what? A civil rights bill! Mr. President, it is a misnomer; and I now ask the Senator from Ohio, and I would be glad to give way for an answer, if he will tell me one single civil right that he has or I have that the colored people of this country have not. What is it? What civil right do I have or has he that is denied a colored man? I want to know what it is....

I know of no civil right that I have that a colored man has not, and I say it is a misnomer to talk about this being a civil rights bill. If the Senator from Ohio means social rights, if he means by legislation to force the colored people and white people to go to church together, or to be buried in the same grave-yard, that is not a civil right. I know of no right to ride in a car, no right to stop at a hotel, no right to travel possessed by the white man that the colored man has not.\textsuperscript{69}

Edmunds then asserted that it was no more equality before the

\textsuperscript{63} Id. app. 144.
\textsuperscript{64} Id. app. 217.
\textsuperscript{65} Id. app. 219. See also id. app. 371 (remarks of Congressman James C. Harper, D.N.C.).
\textsuperscript{66} Id. app. 597. See also id. app. 383.
\textsuperscript{67} Id. at 3179.
\textsuperscript{68} Id. at 3181.
\textsuperscript{69} Id. at 3189. Trumbull called Sumner's amendment a "social equality bill" the next day. Id. at 3254. This is precisely what the southern Democrats were calling it.
law to require "that the black man shall go to one hotel to stay and the white man shall go to another" than it would be to require "that the colored man shall go into Pennsylvania Avenue or Maryland Avenue when he wants to go to the west end of the town, and the white man shall take Massachusetts or some other avenue where it is proper for white people to go." When Senator Orris S. Ferry, a Connecticut Republican lawyer, asked him whether segregation by sex was any denial of equality, Edmunds replied: "Would it not be a denial of right to declare that white men, or men with red hair, or native citizens only should be entitled to travel in a particular horse-car, and that every other class of people should only be allowed to travel in another?"

Trumbull then derided Edmunds' argument by saying that no one was being kept out of the cars on account of his hair color. He added that Negroes had the same legal right to be transported on a railroad or put up in a hotel as white people, and that the bill was not a civil rights bill at all. Senator John Sherman, the Ohio Republican lawyer who had voted with Trumbull for the fourteenth amendment then reminded the latter that the Republicans had voted under his leadership for the Civil Rights Act of 1866 and that this bill was intended to carry out the purposes of that act by protecting "the colored people in their right to travel in the cars, [which] . . . right is denied practically in many of the States." When Trumbull urged that they had this right at common law, Sherman said that a better remedy was needed.

Senator Francis P. Blair, a Missouri Democratic lawyer who had switched from the Republican Party to become the losing Democratic Vice-Presidential candidate in 1868 also said that the bill was designed to give Negroes "social rights, to impose upon the whites of the community the necessity of a close association in all matters with the negroes." He said that this would irritate the

---

70 Id. at 3190.
71 Ibid. Edmunds also said:
I defy him to point out any distinction between the right of Congress under the Constitution in this District, for illustration, to declare that a white child shall not go to a particular public school and that he shall go to another if he goes at all, and the power to declare that a white man shall not ride in a particular horse-car that has a blue stripe across it, and that if he rides at all he shall ride on a different one. Ibid.
72 Ibid.
73 Ibid.
74 Id. at 3192.
75 Ibid.
76 Id. at 3251.
whites, and he therefore advocated separate railway cars, hotels, and other facilities for Negroes. Senator Orris S. Ferry, a Connecticut Republican lawyer, also denied the necessity for the bill on the ground that Negroes had all the common law remedies they needed to obtain service on carriers and in hotels.

Trumbull, Senator Eugene Casserly, a California Democratic lawyer, and Senator James L. Alcorn, a Mississippi Republican lawyer, all declared that Negroes had the same rights under common law to travel on railways as did whites, while Edmunds and Sumner declared once again that the bill was necessary. When a vote was taken on adding Sumner's civil rights bill to the amnesty bill, it resulted in a 29 to 29 tie. The Vice-President then broke the tie in Sumner's favor.

Next, amendments were introduced which were obviously intended merely to make a point. Senator Henry Cooper, a Tennessee Democratic lawyer, moved to amend Sumner's bill to provide that there should be no discrimination based on pecuniary condition, so that a poor person who could not pay would have to be given accommodation. This was laughingly voted down by a vote of 35 to 7. Hill moved to require that customers be properly clothed. No roll call was even demanded on this.

Ultimately, a second vote was taken on annexing Sumner's bill to the amnesty bill, and a 28 to 28 tie again resulted which the Vice-President again broke in Sumner's favor. However, the 32 to 22 vote on the combined measure was less than the requisite two thirds needed for passage.

Several days later, Trumbull, who was much in favor of amnesty but who had voted consistently against the amnesty bill with Sumner's amendment, moved to annex the bill as a rider to another piece of legislation. When several Senators warned that Sumner would simply annex his bill to the amnesty rider, the following colloquy ensued:

---

77 Ibid.
78 Id. at 3257.
79 Id. at 3264. Speaking of Trumbull, Edmunds declared: "He does not believe that it is a right belonging to a citizen of the United States to travel in a car if he is a citizen and conforms to all other conditions if his color happens to be one way rather than another." Id. at 3268.
80 Id. at 3264-65.
81 Id. at 3265.
82 Id. at 3268.
83 Id. at 3270.
84 Id. at 3360.
Mr. TRUMBULL. . . . I want amnesty so much that I will vote for almost anything that is not unconstitutional to get it.

Mr. SCOTT. . . . Suppose . . . the civil rights bill gets on by the same process?

Mr. TRUMBULL. . . . I know of no civil rights bill.

Mr. SUMNER. . . . I know of one. (Laughter).

Mr. TRUMBULL. . . . There is a bill that has been misnamed a civil rights bill, proposing to establish social rights which is unconstitutional in its provisions, and which I shall not vote for. But the Senator from Pennsylvania and myself agreeing, and the Senator from West Virginia, I believe, agreeing, let us unite together and vote down this misnamed civil rights bill, this monstrosity that has got a name that does not belong to it, that seeks under false pretenses to impose upon the country and upon the colored people of the country by giving it a name. You cannot make a mule a horse by calling it a horse. Let us vote it down . . .

Bills misnamed civil rights — called bills to establish equal rights when they establish no equality.85

Sumner answered Trumbull's vehement attack with a letter from Frederick Douglass denying any desire for "social equality," and Trumbull replied by reading a newspaper clipping that Negroes wanted social equality, the accuracy of which Sumner disputed.86 No southern Democrat arose; Trumbull was no doubt doing their work very satisfactorily.

Meanwhile, in the House a move was made to suspend the rules and pass a resolution requiring the House Judiciary Committee to report a supplemental civil rights bill, the terms of which were not set forth. Presumably they were to be at least generally similar to the Sumner Senate bill. The vote was 112 yea to 76 nay, and it lost for want of a two-thirds vote. Eleven Republicans who had voted for the fourteenth amendment voted yea; four Democrats who had voted against the amendment voted nay. Representative John A. Bingham of Ohio, who had framed the first section of the fourteenth amendment, voted in the affirmative.87

After sundry parliamentary maneuvers in which Trumbull and Sumner proposed to tack the amnesty bill and the civil rights bill on to various items of legislation, and which other Senators opposed because it would defeat every bill to which they were attached,88

---

85 Id. at 3361. Trumbull also called it a "social equality bill" the next day. Id. at 3418, 3421.
86 Id. at 3361-62.
87 Id. at 3383. The Republicans voting yea were: Ames, Banks, Bingham, Dawes, Garfield, Hooper, Kelley, Ketcham, Myers, Sawyer, and Scofield. Democrats in the negative were Eldridge, Kerr, Niblack, and Randall. See also CONG. GLOBE, 42d Cong., 3d Sess. 85 (1872).
88 CONG. GLOBE, 42d Cong., 2d Sess. 3418-27 (1872).
Senator Matthew H. Carpenter, a Wisconsin Republican, decided to break the deadlock. On May 21, at about 5 p.m., with both Sumner and Trumbull absent, and with the Senate barely having a quorum, Carpenter first called up the civil rights bill with the intention of amending it to cover only public inns, licensed places of amusement, and common carriers. By passing a civil rights bill first, he could then get the amnesty bill through, he reasoned. The Senate rebuffed Democratic members' attempts to adjourn and prepared to work through the night.

Democrats opposed the civil rights bill. The Carpenter substitute, principally designed to eliminate the school and jury clauses, was then adopted by a vote of 22 to 20, with thirty-two senators absent, and the bill then passed by a party-line vote of 28 to 14.

The next morning, Sumner bitterly denounced the Carpenter substitute as "an emasculated civil rights bill!" and moved to add his own proposal to the pending amnesty bill. This time, his entreaty that the Senate make "the Declaration of Independence in its principles and promises a living letter" fell on deaf ears, and his proposal was decisively rejected, 13 to 29. The Senate then passed the amnesty bill, 38 to 2, with Sumner and one other western Radical voting in the negative. That was the end of the bill for that session and that Congress.

II. SUMNER'S LEGACY

At the opening of the First Session of the Forty-Third Congress, Sumner once again introduced his civil rights bill. However, debate commenced in the House, where a copy of the bill had previously been introduced. Congressman Charles A. Eldridge, a Wisconsin Democratic lawyer, immediately proposed an amendment permitting businesses to provide separate accommodations for white persons. Congressman Benjamin F. Butler, Republican Chair-

---

80 Id. at 3730.
81 Id. at 3727-29.
82 Id. at 3733-34. Casserly called it unconstitutional.
83 Id. at 3736.
84 Id. at 3735.
85 Id. at 3736.
86 Id. at 3737.
87 Id. at 3238. See also id. at 3739.
88 2 CONG. REC. 10-11 (1873).
89 Id. at 337-38.
90 Id. at 339.
91 Id. at 339.
man of the Judiciary Committee which had reported the bill, advocated its passage because Negroes who paid first-class fare were thrown into dirty cars or expelled from railroads entirely. Congressman William Lawrence, an Ohio Republican, gave an instance of this. Butler, however, added that Negroes who discriminated against whites would also be liable.\textsuperscript{101} And Congressman Joseph H. Rainey, a South Carolina Negro Republican, complained that Negroes could not enter hotels, public conveyances, amusements, churches, and cemeteries.\textsuperscript{102}

Congressman John T. Harris, a thoroughly unreconstructed Virginia Democrat lawyer, justified segregation on railroads by noting that white persons were also on occasion prevented from entering particular cars.\textsuperscript{103} Another voice from the past came from Congressman Alexander H. Stephens, a Georgia Democrat and Vice-President of the Confederacy. Stephens said:

\begin{quote}
Under our law as it stands whoever pays for a first-class car railroad ticket is entitled to a first-class car seat, whatever may be his or her condition in life, and whether white or colored. If he be a colored man who pays for such a ticket, he is entitled to a seat of equal comfort with the white man who may purchase a like ticket; but this does not entitle him of right to a seat in the same car with the white man. Railroad companies, and all public carriers, have the right by common law to assign their passengers to such seats in such coaches as they may please, provided they are of the comforts and class paid for.\textsuperscript{104}
\end{quote}

He was answered by Congressman Alonzo J. Ransier, a South Carolina Negro Republican, who denied that Negroes wanted social equality and asserted that they asked only for equal accommodations.\textsuperscript{105} Representative Roger Q. Mills, a Texas Democrat, added a speech devoted to freedom of association and taste, which he asserted Congress could not control.\textsuperscript{106}

The next day, Congressman James B. Beck, a Kentucky Democratic lawyer, offered an amendment allowing business owners to segregate their patrons.\textsuperscript{107} Another South Carolina Negro Republican, Congressman Robert B. Elliott, also justified the bill because of "our exclusion from the public inn, from the saloon and table of

\textsuperscript{101} Id. at 341-42.
\textsuperscript{102} Id. at 344.
\textsuperscript{103} Id. at 377.
\textsuperscript{104} Id. at 379.
\textsuperscript{105} Id. at 382-83. See also id. at 1311-12.
\textsuperscript{106} Id. at 385.
\textsuperscript{107} Id. at 403.
the steamboat, from the sleeping-coach on the railway . . . "108

But Congressman James H. Blount, a Georgia Democratic lawyer, replied that Negroes had their own separate facilities and were well provided for. He predicted bad feeling if the bill should pass.109

Next, Lawrence made the point that the bill would not change the common law but would merely give an additional means to enforce it by preventing the states from depriving Negroes of equal common law benefits, a point previously made by Butler in his opening speech.110 Lawrence justified the bill as one to enforce the equal protection clause of the fourteenth amendment.111 Congressman John M. Bright, a Tennessee Democratic lawyer, opposed the bill because most Negroes were laborers and could not afford first-class accommodations, and because they had their own facilities.112 Congressman William S. Herndon, a Texas Democratic lawyer, predicted withdrawal of white patronage and closing of public places as well as danger to "our social system."113

The next rhetoric came from Representative William J. Purman, a Florida Republican lawyer. In the process of denying that states had "the right to enforce any condition of inequality,"114 he gave examples of such laws.115

A Missouri Democrat followed, whose southern sympathies per-

---

108 Id. at 408.
109 Id. at 411.
110 Id. at 340.
111 Id. at 412.
112 Id. at 416.
113 Id. at 421.
114 Id. at 423.
115 Id. at 423-24.

An act to prohibit all white persons, not citizens of and not residing within the State, from being admitted and accommodated in any public inn.
An act to exclude all persons not possessed of real and personal property to the value of ten thousand dollars from all places of public amusement or entertainment for which a license from any legal authority is required.
An act to exclude all persons of the religious denomination known as Methodists from riding on any line of stagecoaches, railroads, or other means of public carriage of passengers or freight.
An act to prohibit all foreign-born citizens and their descendants from being buried in any public cemetery.
An act to exclude all persons known as the "colored race" from public inns, cemeteries, and common schools supported by public taxation, and from equal accommodations with other persons, on all public stagecoaches, steamboats, and railroads.

He lapsed into a harangue of the House, but did declare in passing that "the sixth act, which is not supposed now for illustration, but is virtually in existence in most of the States of the Union, especially in the Southern States . . . is the hostile pretended legislation that the passage of the bill under consideration will wipe out."
vaded his speech. He denied that Negroes were refused access to public facilities and declared that the objection was based on segregation, which he extolled. His position was that the equal protection clause did not abolish the right to segregate and that any such abolition would interfere with private property rights.116

Debate was closed the next day. An Ohio Democratic lawyer pronounced the bill to be one for social equality and hence unconstitutional.117 Two other Democrats lauded segregation,118 and one of them accused the Republicans of hypocrisy in attempting to abolish it.119 The final Democratic argument, made by Congressman John D. C. Atkins of Tennessee, again accused the Republicans of hypocrisy, denounced the bill for imposing social equality, and concluded with a plea for segregation.120 Butler then made the last speech. In sarcastic measure he rejected the social equality argument on the grounds that southerners were quite willing to associate freely with Negro slaves before the war and hence should have no objection now. He related how he had used his military authority to order a boat clerk to let a Negro sit in a dining room and occupy a stateroom against boat regulations during the war. He concluded with a general oration, and the bill was returned to the Judiciary Committee.121

Several days later, there was an encore to the debate. Congressman Robert B. Vance, a prominent Democrat and ex-Confederate from North Carolina, declared that the bill was a social rights bill. He said that Negroes now had the right to enter conveyances and hotels, but that they were segregated. This he supported with considerable warmth.122 Congressman Richard H. Cain, a South Carolina Negro Republican, rose to answer Vance. Cain com-

116 Id. at 427-30 (remarks of Congressman Aylett H. Buckner).
117 Id. app. 1-3 (remarks of Congressman Milton I. Southard).
118 Id. app. 3-4 (remarks of Congressman Hiram P. Bell of Georgia and John M. Glover of Missouri).
119 Id. app. 5, where Glover said: When has President Grant . . . seen fit to leave his box at the theatre and go to the pit or the gallery to get in contact with those who cannot come to him? . . . Why have we never witnessed the "civil rights" advocates setting one solitary example of the propriety, the advantage, and the excellence of a law which they propose to enforce against their remonstrating countrymen with fire and sword? Why don't we see them leaving Williard's and going to some colored hotel? Why do we not see them, by a delicious choice, going to worship in a colored church?
120 Id. at 453-55.
121 Id. at 457-58.
122 Id. at 554-56.
plained that he and colleagues of his were not served in hotels, railroad cars, and restaurants. He saw no objection to the use of first-class accommodations by Negroes who could pay for them. He concluded that Negroes were entitled to their rights. Congressman David B. Mellish, a Republican, added that in New York City, where some street car lines would not take Negro passengers and others made them wait for long periods to take exclusively colored cars, discrimination was ended when the president of the police board ordered policemen to arrest any conductor who ejected a Negro passenger from a car.

On January 17, 1874, the House was treated to more oratory on the civil rights bill. Congressman Henry R. Harris, a Georgia Democrat, spent his time on a general declamation about social equality and freedom of association. And Congressman Robert Hamilton, a New Jersey Democratic lawyer, urged freedom of association for white people.

In the Senate, Sumner's bill was referred to the Judiciary Committee, and, while the bill was under consideration there, on March 11, 1874, Sumner died. His last wish was that his civil rights bill be passed. Senator Frelinghuysen reported the bill for the Judiciary Committee. He declared that it would protect white people as well as Negroes and that it was not designed to enforce social equality. He narrowed its constitutional basis to the equal protection clause of the fourteenth amendment. He then said:

As the capital invested in inns, places of amusements, and public conveyances is that of the proprietors, and as they alone can know what minute arrangements their business requires, the discretion as to the particular accommodation to be given to the guest, the traveler, and the visitor is quite wide. But as the employment these proprietors have selected touches the public, the law demands that the accommodation shall be good and suitable, and this bill adds to that requirement the condition that no person shall, in the regulation of these employments, be discriminated against merely

123 Id. at 565-67. A few days later, Congressman Samuel S. Cox, a New York Democrat, said that Negroes did not care much for the use of expensive hotels and theaters. Id. at 618.

124 Id. at 567.

125 Id. at 726.

126 Id. at 741.

127 Id. at 949-51.

128 Id. at 4786. See also 3 CONG. REC. 952 (1875) (remarks of Congressman Thomas Whitehead).

129 2 CONG. REC. 3451 (1873).
because he is an American or an Irishman, a German or a colored man.\textsuperscript{130}

Some days later Senator Thomas M. Norwood, a Georgia Democrat, made a speech in which he accused the Republicans of passing a social equality bill which would affect only the poor whites, since the rich could afford to hire private conveyances. He sarcastically asked why the Republican congressmen chose to ride to the Capitol in their own carriages instead of public street cars filled with Negroes.\textsuperscript{131} He caustically made suggestions as to how Congress might supervise the equality of foods served to both races at hotels.\textsuperscript{132}

On May 20, when the Senate resumed consideration of civil rights, Senator Daniel D. Pratt, an Indiana Republican lawyer, spoke at length in support of the bill. He stated that at common law all colored people were entitled to the privileges mentioned in the bill and could maintain a suit against the proprietor who denied them. He said:

Suppose a colored man presents himself at a public inn ... and is either refused admittance or treated as an inferior guest — placed at the second table and consigned to the garret, or compelled to make his couch upon the floor — does any one doubt that upon an appeal to the courts, the law if justly administered would pronounce the innkeeper responsible to him in damages for the unjust discrimination? I suppose not. ... The same is true of public carriers. ... [A]nd all persons who behave themselves and are not afflicted with any contagious disease are entitled to equal accommodations where they pay equal fares.

But it is asked, if the law be as you lay it down, where the necessity for this legislation, since the courts are open to all? My answer is, that the remedy is inadequate and too expensive, and involves too much loss of time and patience to pursue it. When a man is traveling, and far from home, it does not pay to sue every inn-keeper who, or railroad company which, insults him by unjust discrimination. Practically the remedy is worthless.

Now sir, if I am right in stating the law, this bill is justified in providing a more efficient remedy, one that is so stringent in its penalties that it is likely to be obeyed, and render litigation unnecessary. Many a wrong is practiced even upon the white traveler, upon the supposition that his business will not allow him to remain and bring the wrong-doer to account, which is generally true.

And let me say right here, that this measure is not confined to colored citizens; it embraces all, of whatever color.\textsuperscript{133}

\textsuperscript{130} Id. at 3452.
\textsuperscript{131} Id. app. 236.
\textsuperscript{132} Id. app. 238.
\textsuperscript{133} Id. at 4081-82.
Pratt denied that the bill would promote social equality and declared that in public facilities travelers had to tolerate all types of people. He concluded with a long declamation on equality and prejudice.\(^{134}\) Thurman arose to answer Pratt. He proceeded to reason that the bill must have intended mixed public facilities, but it was not until he got to the school clause that his opponents paid any attention to what he was saying, and it is probable that his observation was incorrect.\(^{135}\)

The last day of Senate debate was May 22. Senator Timothy O. Howe, a Wisconsin Radical Republican, supported the bill because Negroes were being turned away from hotels and other accommodations.\(^{136}\) Senator James L. Alcorn, a Mississippi Republican lawyer, then orated, adding little but generalized declamation on the "right guaranteed to [Negroes] of free transit throughout the country"\(^{137}\) and Congress' right to assure colored people of equal treatment by carriers.\(^{138}\) He noted the complaints of Negroes that they were not admitted to theaters in Washington and in the North, and likewise advocated the bill so they would be admitted to hotels.\(^{139}\) Then, as an ex-slave holder and former Confederate elected

\(^{134}\) Id. at 4082.

\(^{135}\) Id. at 4088. He said:
That means mixed audiences, does it not? That means mixed guests at a hotel, does it not? That means mixed travelers on a railway or in a stagecoach, does it not? If not, it does not mean anything. It certainly was not intended by the committee that Mr. Saville should build another theater for the entertainment of the colored people of Washington City, or that the Baltimore and Ohio Railway or the Baltimore and Potomac Railway is to run separate cars to carry colored persons. These are the very things that are complained of. Therefore, mixture is meant in inns, in public conveyances on land or water, in theaters, in other places of public amusement . . . .

It may be noted that the premise for the remark, that segregation was what was being complained of, is inaccurate. It was the denial of facilities, or unequal facilities, and not mere segregation, which drew Republican fire. Hence it is probable that this remark was just made to bolster his school clause argument, in opposition to Pratt, that school segregation was not permissible under the bill. Since Thurman, an opponent of the bill, was using this to rebut an argument by Pratt, a proponent, that the bill permitted segregation though not inequality, his argument can hardly be considered an accurate reflection of the intention of Congress.

\(^{136}\) Id. at 4148.

\(^{137}\) Id. app. 304.

\(^{138}\) Ibid.

\(^{139}\) Id. app. 305. He said:
Objection is made that the bill provides that the colored man shall have accommodations at public hotels. If he is denied accommodations at the public hotels, where will he get accommodations if he sees proper to travel? When upon a journey, he has no right to go to a private house. If the public houses refuse him, then an American citizen becomes a pauper in the land which guarantees to him the right of travel. The hotels are licensed institutions. When the grant of a license is made, the municipality demands of the
to the Senate by the Negro majority of Mississippi, he launched into rhetoric well calculated to endear him to his new friends.\textsuperscript{140} Senator Henry R. Pearce, Alcorn's Republican colleague from Mississippi, urged enactment of the bill to spare Negroes from "indignities."\textsuperscript{141}

Discussion continued into the night, as Senator Saulsbury, a Delaware Democrat, arose to protest that the bill would enforce association among the races. After observing that his colleagues were too exhausted to listen to debate, he argued that the bill was intended to enforce race-mixing in inns and theaters, a proposition he deduced from the absence of a clause specifically permitting segregation. He charged that compulsory integration was to be applied to schools, hospitals, almshouses, orphan asylums, and benevolent associations, and that whites would resent this.\textsuperscript{142} He told the Republicans: "Do not say that you can make any separate arrangement under the provisions of this bill,"\textsuperscript{143} thereby showing that the charge of compulsory association was made for partisan advantage and not as a true reflection of the majority's intent. His rambling discourse carried him through generalized constitutional discussion, the Negro vote, a prediction that hotels and theaters would lose their patronage, prejudice, social equality, and, finally, schools.\textsuperscript{144} At his conclusion, the Senate had been sitting for over ten hours and it was 9:30 p.m. The Democrats wanted an adjournment, but the Republicans voted it down, and the Senate went into an all-night session.\textsuperscript{145}

The contribution to the Democratic filibuster by Senator Merrimon of North Carolina was a self-confessed "desultory" history

\textsuperscript{140} Id. app. 307. One can well believe that this speech represented the views of Alcorn's Negro constituents and not his own views in light of the fact that only two years before he consistently spoke and voted against Sumner's bill. CONG. GLOBE, 42d Cong., 2d Sess. 274, 3264, 3268, 3270 (1872).
\textsuperscript{141} 2 CONG. REC. 4154 (1873).
\textsuperscript{142} Id. at 4157-58.
\textsuperscript{143} Id. at 4159.
\textsuperscript{144} Id. at 4159-62.
\textsuperscript{145} Id. at 4162.
of the United States from the Declaration of Independence onward, replete with cases.\textsuperscript{146} When he finally arrived at the equal protection clause of the fourteenth amendment, he said that while it forbade giving rights to some people but not to others, it permitted racial segregation. After supporting segregation by law in schools, he indorsed the same for theaters.\textsuperscript{147} He meandered back to a defense of segregation by law in theaters, inns, cemeteries, and schools,\textsuperscript{148} and ultimately concluded with a protracted harangue on race-mixing, hybrids, and school destruction.\textsuperscript{149}

At 1:30 a.m., with the Republicans still refusing to adjourn,\textsuperscript{150} Senator William T. Hamilton, a Maryland Democratic lawyer, launched into a lengthy oration. He advocated separate churches, cemeteries, hotels, places of amusement, and other facilities, and predicted that the bill would destroy the white patronage of hotels.\textsuperscript{161}

The early hours of the morning were taken up principally with the school clause.\textsuperscript{162} In the course of discussing segregated schools, Senator Edmunds of Vermont, a staunch Radical Republican supporter of Sumner, contended that the fourteenth amendment forbade state segregation in carriers,\textsuperscript{163} while Senator Aaron A. Sargent, a California Republican lawyer, denied that this was the effect

\textsuperscript{146} Id. app. 307-12.
\textsuperscript{147} Id. app. 313. He said:

Can't be denied that the States have power to regulate theaters — the manner of conducting them? Have they not always exercised power to do so? They are supreme in that respect. If they judge that it is necessary that one class of people shall go into one apartment and another class into another, with a view to good order and decency, why is it not competent to do that?

\ldots By our system of government, the States are left to regulate society within their respective jurisdictions.

\textsuperscript{148} Id. app. 315.
\textsuperscript{149} Id. app. 316-18 (1873).
\textsuperscript{150} Id. at 4166.
\textsuperscript{151} Id. app. 367-70.
\textsuperscript{152} Id. at 4167-75.
\textsuperscript{153} Id. at 4172-73. Replying to Senator Sargent, he declared:

But the Senator's argument results in exactly this: that the fourteenth amendment does not, as it respects common schools, level a distinction which a state may have a right to make on account of race and color. If it does not level that distinction, then it does not level a distinction that a State has a right to make on the same account in respect to a railway, or a highway, or a steamboat, or any other thing; for the fourteenth amendment is general and sweeping \ldots If the State has that right, we cannot interfere with it. If the State has not that right, we cannot confer it by an act of Congress, because such an act of Congress would be in violation of the fourteenth amendment itself. \textit{Ibid.}
of the amendment. Then, after the school issue was disposed of, the Senate passed the bill by a vote of 29 to 16 and adjourned after a twenty-hour session. Voting or paired against the bill were all the Democrats and four Republicans from Nebraska, Virginia, West Virginia, and Wisconsin, with the affirmative votes all cast by Republicans.

The House took no action on the bill during this session. In occasional debate, Democrats attacked it in broadside harangues for

---

154 Id. at 4174. He said:

*Now, sir, one single remark in reply to that only which can be considered as argument in reply to my positions, and that is, that the amendment which I propose, by providing that there may be separate schools, is a violation of the fourteenth amendment, upon the same principle that a denial of the right of a colored man to ride in the same car, or to have identical accommodations in the same hotel would be a violation of the fourteenth amendment. I do not believe either of these cases cited as illustrations would be a denial of any right guaranteed by the fourteenth amendment. The fourteenth amendment was not intended merely to say that black men should have rights, but that black and white men and women should have rights. It was a guarantee of equality of right to every person within the jurisdiction of the United States, be he black or white. It is a very common thing for me and for every Senator here, and every white man in the country, when he goes to a railroad train without his wife or some female friend, to be assigned to a car separate from some other car more privileged than the one he takes, by its female society, though not perhaps better in its fittings, which is assigned to ladies or to gentlemen who have ladies with them. Is that a violation of the fourteenth amendment? Suppose the man who is thus required to take the second car on the train instead of the first should be black instead of white, would the difference in color make a violation of the fourteenth amendment? I do not believe these things are of enough importance for us to legislate upon them here. They regulate themselves. I doubt if any white man ever felt outraged because he was told to take one car rather than another, on account of a discrimination in the car he should take. Why, then, should the black man?*

So with reference to the hotel table. In most of the hotels, in all of them I believe in New York and in the larger cities, the tables are small, circular tables where families sit, or two or three persons who happen to be friends, and the guests are assigned by the landlord to the places they take. A person entering the dining-room does not take a seat at any table he sees fit; he is put here or there, wherever the landlord pleases. And in assigning rooms at a hotel, the landlord may put him in the fourth story or the first; and if he does not like his accommodation he can go to some other hotel. He has no direction in the matter, and certainly no right to demand under the fourteenth amendment that he shall be put in the third story instead of the fourth, or the second instead of the third. These hotel illustrations fall for that very reason. The fourteenth amendment does not apply to them at all. They are simply incidents of business which have existed for years, and will exist for years whether the fourteenth amendment exists or not.

If the car to which a white man without a lady is assigned, or the black man is assigned, is just as good as any other of the train, drawn by the same engine, at an equal rate of speed, where is the harm done by that regulation? And why should we interfere with the business of railroad companies and hotel-keepers in this inquisitive way, putting our noses into the smallest details of business?

155 Id. at 4176.
race-mixing. A Tennessee Republican doubted the constitutionality of the law, and stated that colored people were content with segregated accommodations and only complained of inferior treatment.

Congressman James T. Rapier, an Alabama Negro Republican lawyer, complained that Negroes were all denied first-class railroad accommodations and replied to a prior speaker:

And I state without fear of being gain-said, the statement of the gentleman from Tennessee to the contrary notwithstanding, that there is not an inn between Washington and Montgomery, a distance of more than a thousand miles, that will accommodate me to a bed or meal. Now, then, is there a man upon this floor who is so heartless, whose breast is so void of the better feelings, as to say that this brutal custom needs no regulation?

He went on to point out that whites had a common law right to accommodations which Negroes also should have, that exclusion from first-class accommodations was the result of prejudice, and that it humiliated him. He disclaimed any desire for social equality but decried being forced into inferior cars and the fact that on railroad trips he could not get a sleeping berth.

Congressman Chester B. Darrall, a Louisiana Republican, echoed these views. After noting that the Louisiana state constitution gave Negroes equal rights in public conveyances and other licensed businesses, he reassured the House that Negroes rarely insisted on exercising them and that the state law was not rigidly enforced. He read a resolution of several leading New Orleans whites advocating nondiscrimination in public conveyances and licensed resorts; the group was headed by General G. T. Beauregard, who he had neglected to mention was a prominent Republican patronage-holder. Darrall deplored the fact that wealthy New Orleans Negroes and prominent colored officeholders could not obtain first-class accommodations in carriers and hotels, and he gave examples of this. Congressman Darrall called for an end to such discrimination by passage of the bill.

---

156 Id. at 341-44 (remarks of Congressman William B. Read of Kentucky); id. app. 417-21 (remarks of Ephraim K. Wilson of Maryland); id. app. 481 (remarks of John J. Davis of West Virginia).
157 Id. at 4595 (remarks of Congressman Roderick R. Butler).
158 Id. at 4782.
159 Id. at 4783-85. See also the remarks of Congressman Ransier, a South Carolina Negro Republican. Id. at 4786.
160 Id. app. 477-80.
III. Butler’s Valedictory

The elections of 1874 were a disaster for the Republican Party. The Senate remained Republican by a much-reduced margin due to holdovers, but the House of Representatives, where all the members ran for re-election, became Democratic by a wide margin.\(^{161}\) Even Butler lost his seat in normally Republican Massachusetts.\(^{162}\) The depression, fraud, corruption, and sundry scandals were all helpful to the Democratic Party,\(^{165}\) but it also made considerable gains based on a “white backlash” vote against the civil rights bill, especially the school clause.\(^{164}\)

When the “lame-duck” Second Session of the Forty-Third Congress met in the early part of 1875, Congressman Alexander White, an Alabama Republican, moved to amend the civil rights bill by specifically permitting segregation in schools and in public accommodations.\(^{166}\) Butler then spoke briefly, denying that the bill was intended to promote social equality in public places and noted that people who used the services of carriers, theaters, and inns did not do so to obtain the society of others.\(^{166}\) Congressman John R. Lynch, a Mississippi Republican Negro, also rebutted the social equality argument. He complained that Negro women could not get equal treatment and that he himself, when coming to Congress, was “forced to occupy a filthy smoking-car both night and day; with drunkards, gamblers, and criminals” because of color.\(^{167}\)

That evening, Congressman John B. Storm, a Pennsylvania Democrat, twitted the Republicans for inconsistency in permitting school segregation but not segregation in carriers, hotels, and theaters.\(^{168}\) Congressman Thomas Whitehead, a Virginia Democrat, said that the civil rights bill was hurting the Republican Party and stated that racial discrimination could not be proved.\(^{169}\) In response to questioning, he affirmed that Negroes could ride in Virginia in first-class railway and street cars, while a Negro Congressman, Rainey of South Carolina, denied it.\(^{170}\) Cain, a South Carolina

---


\(^{162}\) TREFOUSSE, BEN BUTLER 230 (1957).

\(^{163}\) \textit{22 Encyc. Brittanica} 775 (1963 ed.).

\(^{164}\) \textit{3 Cong. Rec.} 951, 952, 978, 982, 1001 & apps. 17, 20, 113 (1875).

\(^{165}\) \textit{Id.} at 939.

\(^{166}\) \textit{Id.} at 940.

\(^{167}\) \textit{Id.} at 944-45.

\(^{168}\) \textit{Id.} at 951.

\(^{169}\) \textit{Id.} at 952-53.

\(^{170}\) \textit{Id.} at 955.
Negro, then arose to rebut Whitehead and stated that a colored lady he knew was thrown out of a first-class railroad car into a smoking car when she reached Virginia.\textsuperscript{171} The latter interrupted him to state that Negroes could ride any Richmond street car, but Rainey said he was confined to a "colored car," while Cain added the experience of a friend in support of this.\textsuperscript{172}

When Congressman Benjamin W. Harris, a Massachusetts Republican lawyer, arose to rebut Whitehead and support the bill, the latter asked whether proprietors of hotels could, under the bill, segregate patrons:

\textbf{MR. WHITEHEAD.} I just want to know whether you are in favor of a hotel-keeper being forced by law to make white and black people sit at the same table?

\textbf{MR. HARRIS.} ... I will tell him what the Massachusetts doctrine is. It is that when any man, white or black, respectable and well-behaved, comes into any hotel in our Commonwealth and asks to have a comfortable apartment assigned him and proper food furnished him, he has a right to it, without regard to his color. But, sir, there is nothing proposed here that would authorize any colored man to force himself on the gentleman from Virginia. This law merely provides that white and black shall be alike entitled to a common hospitality.

\textbf{MR. WHITEHEAD.} That does not answer my question at all. Do you wish hotel-keepers to be bound to place white and black at the same table? ...

\textbf{MR. HARRIS.} ... I will tell the gentleman, however, that in Massachusetts we do not make all classes of white men sit at the same table or sleep in the same bed. But every man in Massachusetts, he he white or black, can have entertainment at one of our hotels, and a black man can get entertainment there equal to that afforded to any white man, if he is respectable and pays his bill.\textsuperscript{173}

A little later, the following colloquy occurred:

\textbf{MR. HARRIS.} ... We do not propose to make any man eat at any other man's table uninvited, but we do not propose that a white man, a keeper of a public hotel, shall kick a black man out of doors and refuse him food and shelter simply because he is a black man. That is the difference between us.

\textbf{MR. WHITEHEAD.} We do not either.\textsuperscript{174}

\textsuperscript{171} Id. at 956.
\textsuperscript{172} Id. at 957.
\textsuperscript{173} Id. at 958.
\textsuperscript{174} Ibid. Harris was, no doubt, thinking of the Massachusetts civil rights law. Mass. Act of May 16, 1865, ch. 277. In respect to the right to segregate under such a statute, compare People ex rel. King v. Gallagher, 93 N.Y. 438 (1883), with Ferguson v. Giles, 82 Mich. 358, 46 N.W. 718 (1890). See also id. app. 119 for the rhetoric on this subject from Congressman Epps Hunton, another Virginia Democrat.
Thereafter, Rainey urged passage of the bill because common law remedies were too "general" and disclaimed any desire for social equality. Congressman James T. Rapier, an Alabama Negro Republican lawyer who had tried to interrupt Harris' speech to answer Whitehead, then rose to endorse Harris' answer.\textsuperscript{176}

The next day, February 4, 1875, was the last day of House debate, and strict time limitations were imposed. A Democrat said that southern states already had civil rights laws and asserted that few Negroes used railroads or hotels.\textsuperscript{176} A friend of Sumner brought forth the Declaration of Independence and equality of opportunity.\textsuperscript{177} However, a New York Republican opposed the bill because few Negroes traveled in the South and because the bill would, in his view, simply stir up bad feelings.\textsuperscript{178}

White of Alabama made a long speech in which he rejected extremists on both sides. In his view the evils to be remedied were the denials of admission to Negroes by carriers, hotels, and theaters. To him, the Senate bill provided equal rights and a community of enjoyment, the House Judiciary bill provided equal rights, separate enjoyment in schools, and a community of enjoyment elsewhere, while his bill provided separate enjoyment in all places because he opposed race-mixing.\textsuperscript{179} In a long oration, he said that southern Republicans did not want race-mixing and that the bill was costing them every state in the South.\textsuperscript{180}

The last Democratic bombast came from Congressman Charles A. Eldredge, a Wisconsin lawyer, whose low opinion of Negroes had not improved since he voted against the fourteenth amendment.\textsuperscript{181} When Congressman John Y. Brown, a Kentucky Democrat whose views on Negroes were as far from the noted abolitionist's ideals as it was possible to get, arose to pour invective on Butler, the House was diverted into a party-line censuring of him.\textsuperscript{182}

The Republicans closed the debate. A Tennessee Republican asserted that without the civil rights bill, Negroes would be consigned to inferior accommodations in carriers.\textsuperscript{183} A Michigan Rep-

\textsuperscript{176} Id. at 959-60.
\textsuperscript{177} Id. at 977-78 (remarks of Congressman James H. Blount, Georgia).
\textsuperscript{178} Id. at 979 (remarks of Congressman E. Rockwood Hoar, Massachusetts).
\textsuperscript{179} Id. at 982 (remarks of Congressman Simeon B. Chittenden).
\textsuperscript{179} Id. app. 15.
\textsuperscript{180} Id. app. 17-24.
\textsuperscript{181} Id. at 982-85. See also CONG. GLOBE, 39th Cong., 1st Sess. 2545 (1866).
\textsuperscript{182} 3 CONG. REC. 985-92 (1875).
\textsuperscript{183} Id. at 998-99 (remarks of Congressman Barbour Lewis).
publican added that the bill was designed to prohibit exclusion from carriers, inns, and theaters because of color and expressed his opposition to segregation by statute. A Wisconsin Republican opposed all segregation by law in public places.

For the grand finale, Butler took the helm. Ridiculing the social equality arguments, Butler proceeded to take sweet revenge for Brown’s attack by having his ante-bellum secessionist sentiments read. Then, “waving the bloody shirt,” he concluded in an outburst of flamboyant theatrics which was to be the final notoriety of his House career.

The House first voted to strike out the whole school clause, and then voted down White’s substitute which, while providing for segregation in public facilities, also restored the school clause to the bill. It then decisively rejected a school integration substitute and thereafter passed the bill by a vote of 162 to 99. The vote strictly followed party lines, except that two Democrats voted with the majority and eleven Republicans, ten of them from the South and border states, voted with the minority.

Senate debate was brief. Senator Thomas F. Bayard, a Delaware Democrat, ridiculed the bill for requiring the federal courts to examine whether one seat in a hotel, theater, or railway was as good as another. Senator William T. Hamilton, a Maryland Democratic lawyer, urged that a theater owner should be able to select his audience. He concluded with a bombastic broadside against prejudice, racial antagonism, and race-mixing.

The debate was closed by Senator George F. Edmunds, the Radical Republican lawyer from Vermont who had voted for the fourteenth amendment. After accusing the Democrats of consistently opposing any rights for Negroes, he replied to their arguments that the bill was unconstitutional for want of power in Congress to pass it by asking rhetorically:

[W] here is the authority for saying that a State shall not have a right to pass a law which shall declare that all citizens of the German race shall go upon the right-hand side of the streets and all citizens of French descent shall go upon the left, and so on, and

---

184 Id. at 999 (remarks of Congressman Julius C. Burrows).
185 Id. at 1002 (remarks of Congressman Charles G. Williams).
186 Id. at 1005-09.
187 Id. at 1011.
188 Id. app. 105.
189 Id. app. 115.
190 Id. app. 116-17.
that all people of a particular religion shall only occupy a particu-
lar quarter of the town, and all the people of another religion
another side?191

The bill then passed by a vote of thirty-eight Republicans in
favor to twenty Democrats and six Republicans against. Of the
Republicans voting in the affirmative, eight had voted for the four-
teenth amendment as Senators and seven as members of the House.
The most significant negative Republican vote was cast by Senator
William Sprague of Rhode Island, who had voted for the amend-
ment.192

IV. SUMMARY AND CONCLUSIONS

In evaluating legislative history to determine the intent of the
body enacting a law, one deals in probabilities rather than in mathe-
matical certainties. However, propositions can range from highly
improbable to those of which one is morally certain.

The legislative history of the Civil Rights Act of 1875 shows
that Congress was principally concerned with complaints by Ne-
groes that they were excluded from railways and other carriers, inns,
and theaters or that if admitted they were consigned to substantially
inferior accommodations. These complaints of being relegated to
dirty, smoke-filled railway cars or of being unable to get hotel
rooms and meals, run like a thread throughout the debates. There
is a noticeable absence of complaints about mere segregation per se.

In determining whether the debates reflect an intent on the
part of the framers of the fourteenth amendment to abolish racial
segregation, several positions may be readily identified. The Dem-
ocrats were in favor of strict racial segregation by law to avoid race-
mixing. However, they had also opposed the fourteenth amend-
ment and would be likely to give it a very narrow construction.
We may therefore ignore their views.

Republican moderates, such as Trumbull, joined by several
Radicals, such as Senators Lot M. Morrill of Maine and William
Sprague of Rhode Island who had voted for the fourteenth amend-
ment, were of the view that states retained power even under that
amendment to segregate people by law in railways and in other
public places. They consistently voted and spoke against the civil
rights bill on the ground that it was an unconstitutional "social
equality" bill. Their position was essentially in accord with the

191 Id. at 1870.
192 Ibid.
Democratic position on this point. Trumbull even went so far as to deny that the right to ride in a railway was a civil right protected by the fourteenth amendment. Considering the fact that in 1872 Trumbull had been a member of the bar for about forty years, in public life since 1840, a justice of the Illinois Supreme Court for five years, and a United States Senator for eighteen years, over six of which he served as Chairman of the Senate Judiciary Committee, it is patent that if he did not know what he was voting for when he voted for the fourteenth amendment, no one did.

Moreover, the votes of Trumbull and the other Republican moderates were decisive in the narrowly divided Thirty-Ninth Congress. To obtain the necessary two-thirds majority after President Andrew Johnson's veto of the Freedmen's Bureau Bill\(^\text{193}\) it was necessary to persuade two marginal Republicans to switch to the majority and to expel or exclude on flimsy grounds Senator John P. Stockton, a New Jersey Democrat.\(^\text{194}\) Even so, the President's opponents were unsure of their necessary majority.\(^\text{195}\) On the key test of strength, the overriding of the veto of the Civil Rights Act of 1866, the vote was 33 to 15, with one presidential supporter absent.\(^\text{196}\) Although the vote on the fourteenth amendment was 33 to 11, the difference is accountable to the absence of presidential supporters, with only one Senator switching his position.\(^\text{197}\)


\(^{194}\) Cong. Globe, 40th Cong., 2d Sess. 823 (1868).


\(^{196}\) Id. at 1809.

\(^{197}\) Id. at 3042. An argument has been made that it was the intent of the framers of the fourteenth amendment to ban racial segregation in carriers, based on the action of Congress in forbidding exclusion of Negroes from District of Columbia streetcars in 1864. See Frank & Munro, The Original Understanding of "Equal Protection of the Laws," 50 COLUM. L. REV. 131, 150-53 (1950). These commentators are not so certain about hotels. Id. at 153. It is by no means certain that Congress intended to exclude the doctrine of "separate but equal" even in the District of Columbia. See Cong. Globe, 38th Cong., 1st Sess. 553, 817-18, 839, 3131-35 (1864). The "railroads" affected were horse-drawn streetcars. See Cong. Globe, 39th Cong., 1st Sess. 205 (1865) (remarks of Congressman Farnsworth); Cong. Globe, 40th Cong., 3d Sess. 905 (1869) (remarks of Senator Vickers); Cong. Globe, 41st Cong., 3d Sess. 1055 (1871) (remarks of Senator Sumner); Cong. Globe, 42d Cong., 2d Sess. 272 (1872) (remarks of Senator Sumner). If a Negro was compelled to wait for a "Jim Crow" car, he might be exposed to inclement weather in the meanwhile. See text accompanying note 127 supra. At any rate, even if Congress did ban segregation in District of Columbia streetcars, this does not prove that this ban was made nationwide via the fourteenth amendment. Most of Sumner's bills relating to District of Columbia streetcars did not pass by a two-thirds majority. For example, one of them originally failed in committee and then passed by a vote of 17 to 16, with such moderate Republican Senators who later voted for the fourteenth amendment as Lafayette S. Foster of Connecticut, James W. Grimes of Iowa, Henry S. Lane of Indiana, John Sherman of Ohio, Lyman Trumbull of Illinois, and Waitman T. Willey of West Virginia voting against it.
Trumbull, the virtual Republican spokesman, or any other moderates, defected, the razor-thin, two-thirds majority would have evaporated and there would have been no fourteenth amendment. Indeed, Morrill, Sprague, and Trumbull alone could, by such a defection, have destroyed the anti-Johnson majority, and they no doubt would have done so had the amendment contained an anti-segregation provision. Moreover, there were other moderates who would have added to such a group of defectors. Since the Radicals in the Thirty-Ninth Congress could have done nothing without the moderate vote, it is clear that the moderate views must be decisive.

However, it may be noted that even the Radicals did not intend in the Civil Rights Act of 1875 to eliminate the rights of carriers, innkeepers, and theaters to segregate their patrons, notwithstanding some confusion on this point in the lower federal courts. Prellinghuysen as much as admitted the right of business to segregate, as did other members of Congress. Moreover, all proponents of the bill concurred in the position that it was merely designed to re-enact the common law, which allowed businessmen to segregate their patrons if they were given equal accommodations. Finally, no complaint was made by Negroes about segregation but only about unequal accommodations.

It is true that the Radicals were against segregation by state law, a point on which Sumner and Edmunds were particularly vociferous. No doubt the Radical position was that this was a matter

CONG. GLOBE, 38th Cong., 1st Sess. 3135, 3137 (1864). A defection of a group of this size would have defeated the amendment in the Senate, and it cannot be presumed that such a provision was adopted sub silentio over such Republican hostility in the constitutional amendment, especially since Grimes was a member of the Joint Committee on Reconstruction which reported out the amendment. All during the reconstruction period, the Republican Party was badly split over the desirability of racial segregation. See the discussion regarding West Chester & Phila. R.R. v. Miles, 55 Pa. 209 (1867), in CONG. GLOBE, 40th Cong., 2d Sess. 1965 (1868), between Representatives George V. Lawrence and G. W. Scofield, both Pennsylvania Republicans who had voted for the fourteenth amendment. As the amendment was the party platform for the 1866 elections, it is unreasonable to believe that any such controversial matter was contained therein as would have split the party. See JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 110-20 (1956). Finally, the party refrained from incorporating in the fourteenth amendment even those measures which all Republicans desired and which they were prepared to enact in the District of Columbia, such as Negro suffrage. See Avins, Literacy Tests and the Fourteenth Amendment: The Contemporary Understanding, 30 ALBANY L. REV. 229 (1966); Avins, Literacy Tests, The Fourteenth Amendment, and District of Columbia Voting: The Original Intent, 1965 WASH. U.L.Q. 429. It is hardly reasonable to believe that they incorporated an even more controversial provision in the amendment such as nationwide desegregation of carriers and other public accommodations without so much as a word of discussion from the moderate Republicans.

to be left to the business proprietor, and if the state should decree such segregation by statute it would be a degrading mark of inferiority. But it is equally clear that the Republican moderates and a few Radicals, as noted above, were not in agreement on this point, and the Radicals would never have been able to muster a two-thirds vote to put across their position in 1866.

Viewed historically, therefore, the majority decision in *Plessy v. Ferguson* by a group of Justices who were contemporaries of the fourteenth amendment’s adoption is an accurate reflection of the original limitations on the scope of that amendment. The dissent of Mr. Justice Harlan is a virtual model, on the other hand, of the Radical position. Indeed, his analogy to segregated sides of a street may well have been taken from one of Edmunds’ speeches. Harlan made clear that he was concerned with segregation by law and not voluntarily or by action of a railroad in putting separate coaches on its train, as long as no legal segregation was made necessary by state statute.

While the fourteenth amendment does not prohibit states from segregating persons in public accommodations, in this author’s view this is a matter which ought to be left to the discretion of the individual business proprietor, as the Radicals contemplated. Such a proprietor will undoubtedly arrange his customers so as to provide the greatest amount of individual convenience and freedom of choice and association. In public places every person should have the fullest liberty to sit with others he finds compatible and to avoid the company of those he finds distasteful. Restoration of the common law rule by which the business proprietor and not the government determines this in accordance with the wishes of the customers will effectuate this end. Accordingly, although a state has the power to segregate persons by race or otherwise in public accommodations, in a modern society it would be highly inexpedient to exercise such power.

---

198 See text accompanying note 198 *supra*.
199 163 U.S. 537 (1896).
200 163 U.S. at 557.
202 163 U.S. at 557.
203 See *id.* at 560-61.