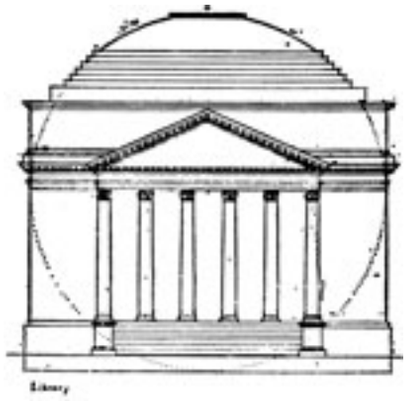

ANTI-MISCEGENATION LAWS AND THE FOURTEENTH AMENDMENT: THE ORIGINAL INTENT

*Alfred Avins**

THE Supreme Court's 1964 decision in *McLaughlin v. Florida*[1] seems to portend the demise in that Court of state laws forbiding interracial marriage. These laws represent one of the oldest categories of legislation in this country, antedating by a considerable period of time in some instances the American Revolution.[2] Such laws were widespread on the books of the states during the Reconstruction period and for a long time thereafter, and they still exist in many states today.[3] They have been upheld as constitutional by every appellate court which has considered the point,[4] with the single exception of the Supreme Court of California, which split four-to-three on the question.[5] But the Court's decision in *McLaughlin* to overrule *Pace v. Alabama*[6] evidently means that the Justices intend to raze every constitutional landmark, however ancient and once-respectable, which permits the states to draw distinctions between the races. It requires no special perspicacity to see that anti-miscegenation laws are in jeopardy.

In my opinion, the framers and not the Supreme Court should have the final say on the scope of a constitutional provision. Therefore, I

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1 379 U.S. 184 (1964).

2 See, *e.g.*, Laws of Md. ch. 44, § 25 (Bacon 1765); 1 Laws of N.C. ch. 35, § 15, at 157 (Potter, Taylor & Yancey 1821); 3 Stats. of S.C., No. 383, § 21 (Cooper 1838); 6 Laws of Va. 361 (Hening 1819).

3 See FLA. CONST. art. 16, § 24; N.C. CONST. art. XIV, § 8; S.C. CONST. art. III, § 33; TENN. CONST. art. XI, § 14; ALA. CODE tit. 14, § 360 (1958); ARK. STAT. ANN. § 55-104 (1947); GA. CODE ANN. § 53-106 (1961); KY. REV. STAT. ANN. § 402.020 (2)(Supp. 1966); LA. CIV. CODE ANN. art. 94 (West 1952); MD. ANN. CODE art. 27, § 398 (1957); MISS. CODE ANN. § 459 (1956); TEX. REV. CIV. STAT. ANN. art. 4607 (1960); VA. CODE ANN. § 20-54 (1960); W. VA. CODE ANN. § 4701 (1961).

4 Stevens v. United States, 146 F.2d 120 (10th Cir. 1944): State v. Tutty, 41 Fed. 753 (C.C.S.D. Ga. 1890); State v. Pass, 59 Ariz. 16, 121 P.2d 882 (1942); Long v. Brown, 186 Okla. 407, 98 P.2d 28 (1939); Eggers v. Olson, 104 Okla. 297, 231 Pac. 483 (1924); see State v. Miller, 224 N.C. 228, 29 S.E.2d 751 (1944); Estate of Walker, 5 Ariz. 70, 46 Pac. 67 (1896); *cf. In re* Takahashi's Estate, 113 Mont. 490, 129 P.2d 217 (1942); Grant v. Butt, 198 S.C. 298, 17 S.E.2d 689 (1941).

5 Perez v. Sharp, 32 Cal. 2d 711, 198 P.2d 17 (1948).

6 106 U.S. 583 (1883).

believe that a look at what the framers of the fourteenth amendment thought about that amendment's impact on anti-miscegenation laws is warranted before we consign these laws to a judicially created doom. Although the position is not in fashion on today's Court, I believe that once the original understanding and intent of the framers is ascertained, the inquiry should be at an end. Though this may create occasional practical difficulties, under no circumstances whatever can it be legitimate for any body to change the scope of any constitutional provision except through the amendment process. If a new situation, unknown to and unforeseen by the framers, should arise, which fits within the scope of the amendment's known and intended principles, of course the amendment applies. However, if the case in point is beyond the pale of the amendment as the framers saw it, then it must be held to fall outside the amendment, regardless of whether subsequent circumstances have undercut the broad popular support for the framers' position. Otherwise, if the Court were permitted to deviate from the original understanding and to change the meaning of the Constitution from time to time, it would become in effect a permanent floating constitutional convention. This would render Article V of the Constitution, which provides an elaborate and explicit amendment procedure, superfluous. The presence of this prescribed method of amendment necessarily implies that it shall be the exclusive method of amendment. Moreover, the existence of a power residing in the Court to change the thrust of the Constitution without resort to the process of Article V nullifies the basic value justifying the existence of a written constitution—the fact that it cannot be altered except in a manner which requires the consensus of an extraordinary majority. Indeed, judicial amendment may reflect a minority view. It is doubtful whether Congress today could be induced to pass a statute eliminating anti-miscegenation laws. Yet all too evident is the very real possibility that the Court will impose upon the country its own views of what is desirable.

Nor will it do to say that adherence to the original understanding of the meaning of a constitutional provision may cause inconvenience in the light of new conditions. If the original Constitution is out of step with present needs it can be amended in the manner prescribed in Article V. Experience shows that if public opinion is sufficiently united behind a particular amendment, it can be passed quite rapidly. The twenty-first amendment, repealing Prohibition, was proposed and ratified in a matter of months. If, on the other hand, the country is

not agreed on an amendment, then it flouts the constitutional plan for the Court to devise one under the guise of "interpretation."

Some, of course, have argued that the fourteenth amendment is drafted in language so general as to confer on the Supreme Court *carte blanche* to shape it into a tool for the accomplishment of what it conceives to be desirable social ends. But when the amendment is read in light of the prevailing law and conditions of the time, its language is in fact reasonably precise; at least we can say with safety that it has no reference to anti-miscegenation laws. Present day attacks on these laws involve no new constitutional principle, and it cannot be said that they involve any questions to which the framers did not in fact address themselves in 1866. Quite the contrary, nothing really new has been said on the subject of race relations in general, and on miscegenation in particular, in the last century.

If our inquiry, then, is purely historical, it is relevant at this point to consider what materials we should consult in seeking out the intent of the framers of the fourteenth amendment with respect to anti-miscegenation laws. Congressional materials will provide essentially all the relevant data, since Congress proposed the amendment and the states were required either to accept it or reject it as it stood, with no power to modify it. Accordingly, debates in state legislatures are relevant only to the extent that they reflect the intent of Congress. Since those debates, in the few cases where they are extant, are even less illuminating than the congressional debates, they have been ignored. Debates in the country at large are likewise of secondary significance to the debates in Congress, as are speeches reported in newspapers of the time, even if made by members of Congress to their constituents. Since the material of primary importance consists of speeches made in Congress and the committee reports, and since this material is abundant, it has been considered exclusively.

In choosing from this voluminous material in the *Congressional Globe* of the period, we are guided by common sense and common historical knowledge. First, of course, are the statements made by Representative John A. Bingham of Ohio, the draftsman of the privileges and immunities, due process, and equal protection clauses. Next in importance are statements by two members of the Joint Committee on Reconstruction who explained the amendment to the two houses of Congress, Representative Thaddeus Stevens and Senator Jacob M. Howard. The statements of other prominent Republican lawyers and

proponents of the amendment are next to be considered, especially Senator Lyman Trumbull of Illinois, Chairman of the Senate Judiciary Committee, and Representative James F. Wilson of Iowa, Chairman of the House Judiciary Committee, who steered the Civil Rights Bill to passage, since the first section of the amendment was deemed to be a constitutional reenactment of the provisions of the Civil Rights Bill.[7] The views of the moderate Republicans, whose votes were necessary to passage, are important in considering the outermost limits of the amendment, since the Radicals alone lacked enough votes to pass the amendment, and if the amendment had been made too radical these marginal votes would have been lost.[8] As for the opponents of the measure, especially the Democrats, their attacks must be largely discounted, since they were made for political effect, and are of significance only when realistically rebutting the majority position.

Debates in the first session of the 39th Congress are of prime importance, but prior debate on the problem is also of assistance since it helps in understanding the current of debate in the 39th Congress itself. Moreover, subsequent debate, at least during the Reconstruction era, is of value for reflected light which it may throw on the original understanding of the amendment. However, such subsequent debate may be colored by later political considerations, and is therefore not as important as debate during 1866. In this Article, relevant debate until 1875 has been considered.

Finally, preliminary mention should be made of the context in which much of the discussion of miscegenation and anti-miscegenation laws arose. The spectre of miscegenation was then, as it is at times today, a bugaboo which the southerners in Congress and their northern sympathizers overworked at every opportunity.[9] It became the *reductio ad absurdum* of the congressional debates. Whenever anyone proposed measures for the protection of Negro rights, the cry "Do you want your daughter to marry a Negro?" was raised. In context these posturings must be read for what they were: political smokescreens, which everyone discounted at the time, and which are merely indicative of what the Congress clearly thought it was not doing.

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7 See Tansill, Avins, Crutchfield & Colegrove, *The Fourteenth Amendment and Real Property Rights*, in OPEN OCCUPANCY VS. FORCED HOUSING UNDER THE FOURTEENTH AMENDMENT 68, 81 (1963).

8 See Avins, *Literacy Tests, The Fourteenth Amendment, and District of Columbia Voting: The Original Intent*, 1965 WASH. U.L.Q. 429, 431-34.

9 *Cf.* Avins, Book Review, 5 How. L.J. 278, 279 (1959).

Anti-Slavery Debates

The question of miscegenation came up occasionally during the debates on the abolition of slavery. Senator James H. Lane, a Kansas Republican, who later voted for the fourteenth amendment, declared in a February 1864 speech advocating the colonization of freed Negroes in Texas:

> This question, sir, after all, is a question of majorities—to remain such through all coming time; for the prejudice, unfortunate as it may appear to some, which the white race entertains to a legal and honorable amalgamation of the African with the people of this country, will preserve a dividing line between them as long as the world stands; nor should Senators hide from their eyes the fact that without this legal and honorable admixture of the African blood with that of our race the former can attain to neither social nor political equality. I give it here as my opinion that the individual politician or political party that comes before the country on the platform of amalgamation, either expressed or implied, will be crushed as by an avalanche.[10]

Several days later Senator Willard Saulsbury, a Delaware Democrat, debated the subject with Lane. Saulsbury mentioned that a colored soldier was punished in Delaware for having the "insolence" to tell a respectable white storekeeper, without provocation, that the soldier expected to have a white wife in three years. Saulsbury added that he was afraid that social equality was being carried so far that in Kansas he would actually find such a wife. Lane replied that the people of Kansas were "pretty unanimous" in favor of sending Negroes to western Texas, and that the white women there were only going to marry white men, even without laws. Lane added that "I . . . am now opposed to the amalgamation of the two races, believing, as I do, that the product is inferior to either race."[11] Lane taunted the Democrats

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10 CONG. GLOBE, 38th Cong., 1st Sess., pt. 1, at 673 (1864).

Senator James R. Doolittle, a Wisconsin Republican and advocate of colonization had previously observed: "By the laws of Massachusetts intermarriages between these races are forbidden as criminal. Why forbidden? Simply because natural instinct revolts at it as wrong." CONG. GLOBE, 37th Cong., 2d Sess., pt. 2, app. at 84 (1863). He warned that unless Negroes were colonized, racial amalgamation would result in the South, as it had in Mexico. *Id.*, pt. 2, app. at 85. Senator Orville H. Browning, an Illinois Republican, observed that social prejudices against intermarriage showed how unrealistic was discussion about equality. *Id.*, pt. 2, at 1521.

11 CONG. GLOBE, 38th Cong., 1st Sess., pt. 1, at 841 (1864).

with the fact that they had chosen Colonel Richard M. Johnson, a Democratic Senator from Kentucky, as Vice-President from 1837 to 1841, and had nominated him for that office again in 1840, although he was living with a Negro wife, and had a large family by her.[12]

Senator Reverdy Johnson, a Maryland Democrat, brought the point up again during a debate on the use of Washington, D.C., streetcars by Negroes. He argued that since all were agreed that the marriage of white women to Negro men was undesirable, they should not have to sit next to each other on the streetcar.[13] This logic did not impress the Republicans, who shared the antipathy toward amalgamation but hacked away at the *ad terrorem* argument. Thus John Henderson, a Missouri Republican, referred to the "evils of amalgamation and consequent deterioration of the race"[14] in a Senate speech arguing that the abolition of slavery would not lead to miscegenation. In a similar speech, another Republican made a slashing attack on the morals of southern slaveholders.[15] The tack taken by the Republicans is best represented in a speech by Representative Farnsworth also urging passage of an anti-slavery amendment:

> Mr. Speaker, I am not afraid of "*miscegenation.*" If my colleague over the way is afraid of it, if he requires the restraining influences of a penal statute to keep him and his party from running into miscegenation, I will willingly vote it to them. But we do not want it; we do not practice miscegenation; we do not belong to that school; that is a Democratic institution; that goes hand in hand with slavery. Why, sir, some of the very best blood of the Democracy of Virginia may be found in the contraband village at Arlington today; the blood of the Masons, the Hunters, the Garnetts, the Carters, and the Haxalls; their lineal though natural descendants are among the contrabands.[16]

There was only passing reference to miscegenation in the second session of the 38th Congress, in which the thirteenth amendment was

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12 *Ibid.*

13 *Id.*, pt. 2, at 1157.

14 *Id.*, pt. 2, at 1465; *cf. id.*, pt. 2, at 1490 (remarks of Senator McDougall).

15 *Id.*, pt. 4, at 2948 (remarks of Representative Shannon). He said:

> I love the white race too well willingly to see their blood miscegenating with the African, and must protest against any institution, however patriarchal, under which such things are profitable, and too generally, on that account, called respectable.

Ibid.

16 *Id.*, pt. 4, at 2979.

finally proposed. A New Hampshire Republican ridiculed Democratic arguments that emancipation would increase miscegenation,[17] but a Brooklyn, New York, Democrat expressed apprehensions that this would occur.[18]

Fourteenth Amendment Debates

The Democrats' propensity for injecting the question of miscegenation into every racial discussion, no matter how irrelevant it might be, resulted in a number of discussions of this topic during the debates preceding and related to the fourteenth amendment. The general course of debates on this amendment has been sufficiently outlined elsewhere,[19] so that we may confine our attention to those parts which relate specifically to miscegenation.

During the House debate on Negro suffrage in the District of Columbia, Congressman Glenn W. Scofield, a Pennsylvania Republican, accused the Democrats of raising the alarmist cry of miscegenation at every turn:

> Again, it is said it will lead to amalgamation. This cry has been too often raised to alarm even the most ignorant. . . . This is a standing argument with the Opposition, and is brought out on all occasions when any legislation is proposed touching the interest of the colored population. . . . Let our sensitive friends compose their nerves and try to tell us how a little enlargement of the elective franchise . . . will result in marriage between the two races. It is fright that makes you mistake a ballot for a billet-doux. It cannot be possible that any man of common sense can bring himself to believe that marriages between any persons, much less between white and colored people, will take place because a colored man is allowed to drop a little bit of paper in a box . . . It is too trifling for argument.[20]

This, of course, did not deter the Democrats in the least from dragging the "amalgamation" argument into the debates. Congressman Andrew J. Rogers, a New Jersey Democrat and a minority member

17 CONG. GLOBE, 38th Cong., 2d Sess., pt. 1, at 484 (1865) (remarks of Representative Patterson).

18 *Id.*, pt. 1, at 530 (remarks of Representative Kalbfleisch).

19 See, *e.g.*, Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (19[illegible] Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949); Tansill, Avins, Crutchfield & Colegrove, *supra* note 7.

20 CONG. GLOBE, 39th Cong., 1st Sess., pt. 1, at 179-80 (1866).

of the Joint Committee on Reconstruction, noted that Massachusetts had passed an anti-miscegenation law in its Revised Code of 1836, which nullified interracial marriages and made them criminally punishable.[21] A Republican from that state interjected that the law was repealed under the leadership of a prominent Democratic legislator, and the repealing act was approved by a Democratic governor.[22] Rogers, however, was undaunted. In his peroration he asserted that Negro voting would lead to miscegenation, and that it was hypocritical for New England representatives to advocate Negro suffrage, since the Rhode Island statutes of 1822 and 1844 made miscegenation criminal.[23] This reasoning was so obviously specious, as were many of Rogers' other points, that the Republican majority treated Rogers with obvious contempt, letting him continue for hours, baiting him as he proceeded.[24] In addition, Congressman John F. Farnsworth, an Illinois Radical Republican lawyer who later voted for the fourteenth amendment, replied:

> [Rep. Rogers] . . . refers to another bugbear with which to scare ignorant people, that of amalgamation. He recites the statutes of various States against the intermarriage of blacks and whites. Well, sir, while I regard that as altogether a matter of taste, and neither myself nor my friends require any restraining laws to prevent us from committing any error in that direction, still, if my friend from New Jersey and his friends are fearful that they will be betrayed into forming any connection of that sort, I will very cheerfully join with him in voting the restraining influence of a penal statute. I will vote to punish it by confinement in the State prison, or, if he pleases, by hanging—anything rather than they should be betrayed into or induced to form any such unnatural relations.[25]

Several days later, Senator Garrett Davis of Kentucky treated the Senate to a lengthy pseudo-scientific and anthropological discourse on Negroes.[26] He accused the Massachusetts Radicals of promoting miscegenation in the South in order to produce "degeneracy" and to

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21 *Id.*, pt. 1, at 200.
22 *Ibid.* (remarks of Representative Dawes).
23 *Id.*, pt. 1, at 201.
24 See, *e.g.*, *id.*, pt. 1, at 202-03.
25 *Id.*, pt. 1, at 204-05.
26 *Id.*, pt. 1, at 245-51.

make the South "a permanent colony" of New England.[27] Nobody paid any attention to this fantastic harangue, although an Indiana Radical Republican later remarked that amalgamation was an incident of slavery, not freedom.[28]

When the Senate took up the Freedmen's Bureau Bill, Senator Thomas A. Hendricks, an Indiana Democrat, noted that his state's laws forbade miscegenation, and asked rhetorically whether the right to marry a white woman was a civil right of a Negro protected by the bill.[29] To this Senator Lyman Trumbull, the Illinois Republican who was in charge of the bill as Chairman of the Senate Judiciary Committee, replied:

> I beg the Senator from Indiana to read the bill. One of its objects is to secure the same civil rights and subject to the same punishments persons of all races and colors. How does this interfere with the law of Indiana preventing marriages between whites and blacks? . . . Does not the law make it just as much a crime for a white man to marry a black woman as for a black woman to marry a white man, and *vice versa?* I presume there is no discrimination in this respect, and therefore your law forbidding marriages between whites and blacks operates alike on both races. This bill does not interfere with it. If the negro is denied the right to marry a white person, the white person is equally denied the right to marry the negro. I see no discrimination against either in this respect that does not apply to both. Make the penalty the same on all classes of people for the same offense, and then no one can complain.[30]

Senator Garrett Davis, the unreconstructed Kentucky Democrat, was the next to ride the favorite minority "hobby-horse." He defied the Republicans to force his state to change its law which punished a Negro who raped a white woman with death, but merely imprisoned a white man found guilty of the same offense.[31] Davis also decried the bill for overriding state anti-miscegenation statutes.[32] Trumbull again said:

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27 *Id.*, pt. 1, at 250-51. For another specimen of this, see *id.*, pt. 1, at 538-42 (remarks of Representative Dawson).

28 *Id.*, pt. 1, at 258 (remarks of Representative Julian).

29 *Id.*, pt. 1, at 318.

30 *Id.*, pt. 1, at 322.

31 *Id.*, pt. 1, at 397, 418.

32 *Id.*, pt. 1, at 418.

> The Senator says the laws of Kentucky forbid a white man or woman marrying a negro. . . . [I]t is a misrepresentation of this bill to say that it interferes with those laws. . . . The bill provides for dealing out the same punishment to people of every color and every race; and if the law of Kentucky forbids the white man to marry the black woman I presume it equally forbids the black woman to marry the white man, and the punishment is alike upon each. All this bill provides for is that there shall be no discrimination in punishments on account of color; and unless the Senator from Kentucky wants to punish the negro more severely for marrying a white person than a white for marrying a negro, the bill will not interfere with his law.[33]

At the same time Trumbull pressed his civil rights bill, which was to be a permanent, nationwide statute. Senator Reverdy Johnson, the respected Maryland Democrat and former Attorney General of the United States, objected to the sweeping terms of the bill. By way of example, he argued that the provision giving every person without regard to race the same right to make contracts might be construed as repealing the numerous anti-miscegenation laws.[34] Trumbull and Senator William P. Fessenden, Republican from Maine and chief Senate member of the Joint Committee on Reconstruction, strongly denied Johnson's assertions.[35] Johnson then made an elaborate argument in support of such a construction of the bill. He concluded that even if his argument was erroneous, the bill's language was so ambiguous that it might be interpreted as an implied repeal of all these laws. He added:

> You do not mean to . . . [repeal all anti-miscegenation laws]. I am

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33 *Id.*, pt. 1, at 420.

34 *Id.*, pt. 1, at 505.

35 *Ibid.* The following colloquy occured:

> Mr. FESSENDEN. Where is the discrimination against color in the law to which the Senator refers?
>
> Mr. JOHNSON. There is none; that is what I say; that is the very thing I am finding fault with.
>
> Mr. TRUMBULL. This bill would not repeal the law to which the Senator refers, if there is no discrimination made by it.
>
> Mr. JOHNSON. Would it not? We shall see directly. Standing upon this section, it will be admitted that the black man has the same right to enter into a contract of marriage with a white woman as a white man has, that is clear, because marriage is a contract. I was speaking of this without reference to any State legislation.
>
> Mr. FESSENDEN. He has the same right to make a contract of marriage with a white woman that a white man has with a black woman.

> sure the Senate is not prepared to go to that extent; and . . . I submit to the honorable chairman of the Judiciary Committee whether he had not better make it so plain that the difficulty which I suggest in the execution of the law will be obviated.[36]

Davis returned to the fray with a long harangue attacking the civil rights bill for, *inter alia*, overruling state anti-miscegenation laws.[37] Trumbull replied disgustedly that he had already answered the point several times, and when Davis interrupted him to inquire why Illinois had such a law, he sarcastically shot back that it was to restrain natives of Kentucky who had recently moved into his state.[38]

The opponents of the bill were not deterred by these replies from continuing to make as much political capital as they could. Senator Edgar Cowan, a conservative Pennsylvania Republican who broke with the majority to support the President's Reconstruction policy, continued to predict that dire penalties would befall state judges who enforced anti-miscegenation laws.[39]

The House Democrats were equally keen on squeezing political dividends out of the miscegenation argument. Congressman Samuel S. Marshall of Illinois argued that the Freedmen's Bureau Bill would overturn state anti-miscegenation laws,[40] and another of his Democratic colleagues arose to endorse this line of argument.[41] However, two Illinois Republicans, Burton C. Cook and Samuel W. Moulton, both of whom supported the bill, rebutted this line of attack. The latter declared: "I deny that it is a civil right for a white man to marry a black woman or for a black man to marry a white woman,"[42] adding: "I insist that marriage is not a civil right, as contemplated by the provisions of this bill."[43] Since the charge was being made for political effect, denials by leading Republicans were ignored. Another opponent promptly made the same charge,[44] which was again denied.[45]

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36 *Id.*, pt. 1, at 506.

37 *Id.*, pt. 1, at 598.

38 *Id.*, pt. 1, at 600.

39 *Id.*, pt. 1, at 604.

40 *Id.*, pt. 1, at 629.

41 *Id.*, pt. 1, at 632 (remarks of Representative Thornton).

42 *Ibid.*

43 *Id.*, pt. 1, at 632-33.

44 *Id.*, app. at 69 (remarks of Representative Rousseau).

45 Congressman Phelps of Maryland declared:

> Efforts have been made, and very ingeniously, by gentlemen opposed to the bill, to bring it within the last-named specification, [interference with the details of social relations] by arguing from the language used . . . an inference of a design

When the first drafts of what was later to become the fourteenth amendment were considered by the House, Rogers, the long-winded New Jersey Democrat, engaged in another lengthy harangue, addressed more to political sympathizers in the galleries than to members on the floor.[46] Once again, Republicans sat back and baited him.[47] His onslaught included a familiar charge that the privileges and immunities clause would ban state anti-miscegenation laws,[48] but the majority treated the charge with scorn. Several days later Rogers was back on his feet to denounce the civil rights bill for overturning anti-miscegenation laws.[49] Congressman Cook brushed aside his latest peroration, observing: "This general denunciation and general assault of the bill . . . seems to me not entitled to much weight."[50]

In his message explaining his veto of the civil rights bill, President Andrew Johnson disclaimed any intent to allege that the bill abrogated anti-miscegenation laws, but pointed to them by analogy as instances of racial discrimination in state laws, and reasoned that since Congress could not eliminate these laws it had no power to eliminate any other discriminatory state statutes.[51] It is interesting to note Trumbull's

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to control State laws in respect to the marriage relation. Such a construction is not warranted by the terms employed.

Id., app. at 75.

46 *Id.*, app. at 135-40.

47 *Id.*, app. at 139-40.

48 *Id.*, app. at 134.

49 *Id.*, pt. 2, at 1121. He said:

> The laws of nearly all the States prohibit a colored man from marrying a white woman. . . . As a white man is by law authorized to marry a white woman, so does this bill compel the State to grant to the negro the same right of marrying a white woman; and the judge who should declare the marriage void, in pursuance of the law of his State, is liable to be indicted, imprisoned, and fined.

He added somewhat later: "Could Congress twenty years ago . . . have passed a law repealing the statute of a State which made it penal for a negro to marry a white person?" *Id.*, pt. 2, at 1122.

50 *Id.*, pt. 2, at 1123.

51 President Johnson argued:

> I do not say this bill repeals State laws on the subject of marriage between the two races, for as the whites are forbidden to intermarry with the blacks, the blacks can only make such contracts as the whites themselves are allowed to make, and therefore cannot, under this bill, enter into the marriage contract with the whites. I cite this discrimination, however, as an instance of the State policy as to discrimination, and to inquire whether, if Congress can abrogate all State laws of discrimination between the two races in the matter of real estate, of suits, and of contracts generally, Congress may not also repeal the State laws as to the contract of marriage between the two races?

Id., pt. 2, at 1680.

angry answer to this in his lengthy speech on behalf of the Senate Republicans in reply to the veto message. He first quoted from a speech made six years earlier by then-Senator Andrew Johnson attacking a veto message of President James Buchanan for resting on a "mere quibble" and for sounding more like the declamation of a "mere politician or demagogue, than a grave and sound reason to be offered by the President of the United States in a veto message upon so important a measure as the homestead bill." Trumbull continued:

> That is probably the best answer to this objection, though I should hardly have ventured to use such harsh language in reference to the President as to accuse him of quibbling and of demagoguery, and of playing the mere politician in sending a veto message to the Congress of the United States.
>
> The President also makes some other allusions in this veto message of a similar character. For instance, he speaks of the impropriety of marriages between whites and blacks, and then he goes on to say, "I do not say that this bill repeals State laws on the subject of marriage between the two races." Then for what purpose is it introduced into this message? Not surely as an *ad captandum* argument to excite prejudice—the argument of a demagogue and a politician? Mr. Johnson could not do that, having condemned such "quibbles" in Mr. Buchanan.[52]

Trumbull thus expressed his annoyance at the President for parroting Democratic use of the amalgamation argument for political gain.

The principles of the civil rights bill were ultimately embodied in the first section of the fourteenth amendment,[53] and particularly in the equal protection clause. The opposing Democrats found other things on which to make political capital, and so paid scant attention to their favorite amalgamation theme.[54]

When the Senate resumed consideration of Negro suffrage in the District of Columbia after passage of the fourteenth amendment, Senator Waitman T. Willey, a West Virginia Republican who supported the proposal, attacked the Democratic "outcry against negro equality" as "an unmeaning clamor, addressed to the passions and prejudices of the unthinking rather than the respectful consideration of the states-

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52 *Id.*, pt. 2, at 1757.

53 See Tansill, Avins, Crutchfield & Colegrove, *supra* note 7, at 81.

54 See, *e.g.*, CONG. GLOBE, 39th Cong., 1st Sess., app. at 231-43 (speech by Senator Davis).

man."[55] He then pointed out that the intermarriage argument was even more trivial, and had no relation to voting. He added:

> Moreover, it creates no barrier to the interposition of legislative prohibitions against such intermarriage. Every State, I suppose, has statutory provisions inhibiting the marriage relation between persons within certain degrees of kindred. The same policy might be observed in reference to these races, if the good of society should render it necessary.[56]

Willey then pointed out that illicit miscegenation flourished under slavery, and that "one of the most beneficial results of the abolition of slavery will be the decline of miscegenation."[57] Coming from a Republican who two and a half weeks before had voted for the passage of the fourteenth amendment,[58] this statement takes on added significance.

Early Reconstruction Period Discussion

Discussion of miscegenation during the early Reconstruction period is scanty, but what there is indicates that the Democrats were chiefly interested in the subject for the political dividends it might pay. Thus, during consideration of Negro suffrage in the District of Columbia, Senator Davis of Kentucky delivered an extended harangue on Negro inferiority, including a dire warning on the evils to be anticipated from miscegenation as illustrated by the Latin American experience, and accusing northern Radicals of hypocrisy for not marrying colored women.[59]

The following year, Senator Charles Sumner, the egalitarian Radical Republican from Massachusetts, pressed a bill to allow Negroes in the District of Columbia to hold office and to serve on juries.[60] Another Radical, Senator Samuel C. Pomeroy of Kansas, complained that Sumner was proceeding "piecemeal," and giving Negroes rights a little at a time rather than all at once. He wanted to abolish the entire old Maryland code inherited by the District of Columbia which placed special restrictions on Negroes, including prohibitions against mis-

55 *Id.*, pt. 4, at 3437.
56 *Ibid.*
57 *Ibid.*
58 See *id.*, pt. 4, at 3042.
59 CONG. GLOBE, 39th Cong., 2d Sess., pt. 1, at 78-81 (1866).
60 See CONG. GLOBE, 40th Cong., 2d Sess., pt. 1, at 38 (1867).

cegenation.[61] However, Sumner replied that although he agreed with Pomeroy, "it was not expedient to raise any further question."[62]

In the House Congressman James Brooks, a Democrat from New York, delivered a lengthy pseudo-scientific discourse on Negro inferiority and the dangers of miscegenation shortly after the opening of the second session of the 40th Congress.[63] In January 1868, after President Johnson had delivered his state of the Union message, Congressman Hamilton Ward, a New York Republican, took the occasion to attack the President and the Democrats, including Davis and Brooks, for their use of the Negro "ethnographical argument" as a "fraud" and "appealing to the lowest prejudices of our nature . . . ." Ward also attacked the sex morals of "rebel autocrats" for causing miscegenation, and said that abolition of slavery would end such illicit relations. Significantly, he added: "I concede all the gentleman claims of the evil effects of amalgamation . . . ."[64]

In March the use of the miscegenation argument as an irrelevant smokescreen was once again illustrated. Congressman James P. Knott of Kentucky, in the course of a long speech attacking Negro suffrage, read from a portion of *Kent's Commentaries* which condemned miscegenation.[65] A Michigan Republican promptly declared that this had nothing to do with the right to vote.[66]

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61 *Id.*, pt. 1, at 39. Senator Pomeroy stated that under the law of the District of Columbia, "a man of my complexion . . . is prohibited from contracting matrimony with a person of a darker complexion." *Ibid.*

62 *Ibid.*

63 *Id.*, app. at 69-73 (1867). See also a similar discourse by Representative Mungen at CONG. GLOBE, 40th Cong., 1st Sess., pt. 1, at 519-22 (1867). For some rebuttals of this type of argument, see CONG. GLOBE, 40th Cong., 2d Sess., pt. 1, at 267 (1867) (remarks of Representative Stevens); *id.*, pt. 1, at 456-59 (1868) (remarks of Representative Baldwin).

64 *Id.*, pt. 1, at 465. See also *id.*, pt. 2, at 1408-09, where Senator Patterson, a New Hampshire Republican, observed that "the blood of the white man has been so generally transfused into their veins that it would baffle the double sight of a seer to decide whether they are entitled to the blessing of Shem or the curse of Ham."

65 *Id.*, pt. 2, at 1963. See also *id.*, pt. 3, at 2869 (Senator Doolittle quoting Abraham Lincoln).

66 *Id.*, pt. 2, at 1970 (remarks of Representative Beaman). Congressman Beaman said:

> And, should your ballot and that of a black man happen to be placed in juxtaposition, would you for that reason at once deem it incumbent on you to give your daughter in marriage to the "American citizen of African descent?" Why, on the same principle, are you not bound to become the father-in-law of one of those other voters who, though white, is somewhat more debased than the negro? Why, by parity of reasoning, are you not bound to inaugurate practical amalgamation by

When the Third Session of the 40th Congress met in December, 1868, to consider giving the Negro the ballot by constitutional amendment, the Democrats continued to ride their favorite "hobby-horse." A Kentucky Democrat raised the amalgamation argument and pointed to the 1836 Massachusetts anti-miscegenation law as an illustration of northern inconsistency.[67] A Tennessee Republican sarcastically told him that there was nothing to worry about since Republicans were not planning to marry Negroes and the latter were smart enough not to marry Democrats.[68]

When the fifteenth amendment was considered by the Senate, a Delaware Democrat raised the same point. He declared that Mexico was the perfect illustration of the national degeneracy to be apprehended from race-crossing.[69] Davis, too, pointed to the fact that the Republican senators did not marry Negro women, as a demonstration that there was nothing wrong with racial prejudice, and therefore that Negroes should not be permitted to vote.[70] The Republicans simply retorted with sarcasm.[71]

Senator James R. Doolittle, a "lame-duck" Wisconsin conservative and ardent opponent of the Republican policy of Reconstruction, likewise made a speech discussing the racial theories of "ethnologists," and the physical characteristics of Negroes. He claimed that mulattoes could not propagate their species indefinitely, and concluded: "It is the fiat of the Almighty which is stamped upon this very idea of forcing an amalgamation of the races against nature and against the laws of God."[72] He therefore concluded that Negroes should be shipped to the West Indies, rather than being given the vote, a proposition which did not impress the Republicans.[73] Saulsbury of Delaware added his own warning about racial hybrids and the resulting national degeneracy, exemplified by Mexico, to be apprehended from allowing Negroes to vote.[74] He made a humorous speech suggesting that a constitutional

sending your daughter into a wigwam as the wife of the half-tamed savage and the prospective mother of children of the forest.

Ibid.

67 CONG. GLOBE, 40th Cong., 3d Sess., pt. 1, at 691 (1869) (remarks of Representative Beck).

68 *Id.*, app. at 129 (remarks of Representative Mullins).

69 *Id.*, app. at 169 (remarks of Senator Bayard).

70 *Id.*, pt. 2, at 998-99.

71 *Ibid.*

72 *Id.*, pt. 2, at 1010.

73 *Ibid.*

74 *Id.*, app. at 163.

amendment be passed eliminating all distinctions of color,[75] and Davis chimed in to suggest that Congress require all races "to enter into universal miscegenation."[76] Finally Senator Oliver P. Morton, an Indiana Republican, complained:

> I am willing to submit it to the experience and observation of every Senator here to-night of any party whether a single Democratic speech was made in any State during the late canvass that was not devoted principally to the subject of the negro—negro equality, amalgamation, social equality—if the people were not warned that their daughters were about to be married to negroes, and if the Democratic party did not throughout the late canvass at every meeting and in every speech, in season and out of season, keep the whole question of negro equality, politically, socially, and in every other way, constantly before the people? And yet they now complain that the subject has not been discussed before the people.[77]

When the second session of the 41st Congress considered a bill to enforce the fifteenth amendment, Senator George Vickers, a Maryland Democrat, once again found a way to refer to miscegenation in the course of demonstrating that Negroes did not need to vote.[78] Congressman Thomas Swann, another Maryland Democrat, likewise linked up Negro suffrage with amalgamation.[79]

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75 *Id.*, pt. 2, at 1310-11.

76 *Id.*, pt. 2, at 1311.

77 *Id.*, pt. 2, at 1315.

78 CONG. GLOBE, 41st Cong., 2d Sess., pt. 4, at 3484 (1870). See also *id.*, app. at 420: "The day of race legislation [in Tennessee] has passed forever; hereafter it will be for the people without reference to race, except the intimate and more sacred social relations of the family." (remarks of Senator Fowler).

79 *Id.*, app. at 433. Representative Swann said:

> His success is not with the white man, nor is amalgamation a remedy for the barriers which rise between us and must always keep him separate and distinct. Equality is the result of natural affinities. The two races may coexist, but the negro will never be permitted to occupy relations of perfect equality. Impressed with these views, I have opposed his participation in the governmental control of this country. . . .
>
> The present status of the negro race is not by any means flattering to the advocates of equality and amalgamation. Look at them as they appear in idleness in the thoroughfares of this Federal city, as they stand in groups around political club-houses, tippling-shops, places of amusement, or institutions where alms are distributed to the poor and helpless. You may trace it all to the political rights which you have conferred upon them.

Ibid.

The next year, when a proposal was made to integrate the schools of the District of Columbia, Senator Allen G. Thurman, an Ohio Democrat, once again raised the cry of intermarriage.[80] Vickers, too, in a speech against a federal law enforcing voting rights, contended that Negro suffrage was leading to "social equality and amalgamation."[81]

Sumner's Amnesty Bill Amendment

On May 13, 1870, Senator Charles Sumner introduced a supplementary civil rights bill.[82] The first section forbade racial discrimination by carriers, inns, places of amusement, schools, churches, cemeteries, and other benevolent incorporated institutions. The fifth section provided "that every law, statute, ordinance, regulation, or custom, whether national or State, . . . making any discriminations against any person on account of color, by the use of the word 'white,' is hereby repealed and annulled."[83] The bill was reported adversely by Senator Trumbull, Chairman of the Judiciary Committee, and died.[84] The next year Sumner reintroduced it, and again it died at the Judiciary Committee's hands.[85] Some committee members thought the bill unconstitutional, while others believed it to be unnecessary.[86] Sumner introduced it for a third time in the first session of the 42d Congress but again it died in the face of Senate apathy.[87] In spite of these rebuffs, Sumner persisted. In the second session of the 42d Congress in the winter of 1872, Sumner moved to tack his bill on as a rider to the amnesty bill,[88] a proposal authorized by the third section of the fourteenth amendment to remove the remaining disabilities of most ex-Confederates. The amnesty bill was supported by the President, by all of the Democrats and by the southern Republicans, and had nominal support from most other Republicans.[89] The two-thirds

80 CONG. GLOBE, 41st Cong., 3d Sess., pt. 2, at 1057 (1871).

81 *Id.*, pt. 2, at 1637.

82 CONG. GLOBE, 41st Cong., 2d Sess., pt. 4, at 3434 (1870).

83 CONG. GLOBE, 42d Cong., 2d Sess., pt. 1, at 244 (1871).

84 CONG. GLOBE, 41st Cong., 2d Sess., pt. 6, at 5314 (1870).

85 CONG. GLOBE, 41st Cong., 3d Sess., pt. 1, at 619 (1871); *id.*, pt. 2, at 1263. See also CONG. GLOBE, 42d Cong., 2d Sess., pt. 1, at 822 (1872).

86 *Id.*, pt. 1, at 731.

87 CONG. GLOBE, 42d Cong., 1st Sess., pt. 1, at 21 (1871). See also CONG. GLOBE, 42d Cong., 2d Sess., pt. 1, at 822 (1872).

88 *Id.*, pt. 1, at 240-41.

89 See *id.*, pt. 1, at 237.

majority required[90] for the passage of the bill in the Senate seemed likely until other Republicans opposed to amnesty decided to use Sumner's rider as a means of defeating the bill by inducing Democrats to vote against the combined measure.[91]

The fifth section of Sumner's bill was less popular with the Republicans than any other. It was objected to as unconstitutional on the ground that Congress had no power to repeal state laws;[92] it was called uncertain in scope,[93] and it was strenuously opposed because it would permit the naturalization of the Chinese on the west coast, which many Republicans were against.[94] It was ultimately eliminated from the bill.[95] However, the Democrats saw in this section, as well as in the first section, some good grist for their amalgamation arguments.

As soon as Sumner proposed his rider, Senator Joshua Hill, a Union Republican from Georgia and an opponent of the bill, raised the amalgamation argument. He said that the states could regulate intermarriages between races. He said that he did not know whether Sumner intended to include this right in the bill,[96] but Sumner did not answer him on this point. Senator Thomas M. Norwood, Hill's Democratic colleague, also made an elaborate attack on the fifth section for repealing state anti-miscegenation laws.[97] Senator Henry Wilson, Sumner's Republican colleague, answered Norwood with a thinly veiled attack on southern sex morals, pointing to the large number of mulattoes in the gallery.[98] Senator Frelinghuysen also pointed out that the provision was not "subject to the criticism which has been made upon it by the Senator from Georgia" because "the Congress of the United States cannot reach State legislation in that way, annulling and repealing their acts."[99]

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90 Section 3 of the fourteenth amendment requires a two-thirds majority in each house of Congress to remove such a disability.

91 The machinations are described in Kelly, *The Congressional Controversy Over School Segregation, 1867-1875*, 64 AM. HIST. REV. 537, 550-52 (1959).

92 Senator Frelinghuysen, a New Jersey Republican and former Attorney General of that state, supported the bill generally, but had this to say about § 5: "I understand that Congress have no power to repeal a State statute any more than we have to enact a State statute. That provision of the law is unconstitutional, and is entirely unnecessary." CONG. GLOBE, 42d Cong., 2d Sess., pt. 1, 436 (1872).

93 *Id.*, pt. 1, at 871 (remarks of Senator Sherman).

94 *Id.*, pt. 1, at 845-46, 871-73, pt. 2, at 901, 909-12.

95 *Id.*, pt. 1, at 871 (proposal to strike the section made); *id.*, pts. 1 & 2, at 898-99 (substitute passed).

96 *Id.*, pt. 1, at 242 (1871).

97 *Id.*, pt. 1, at 819 (1872).

98 *Id.*, pt. 1, at 820.

99 *Ibid.*

Norwood then replied to Frelinghuysen that the statute could be construed as repealing anti-miscegenation laws. Pomeroy, who was not a lawyer, chimed in:

> I did not know that they had any such law in Georgia, but I have known for many years since we commenced the agitation of this anti-slavery struggle our Democratic friends were always afraid that we should bring about a state of things whereby people of one color would be allowed to marry those of another, and I have known them to go so far as to pass a law restraining themselves from marrying black women. I have never felt the necessity of any such statute, [laughter] and I think it is a sort of imposition upon a man to place him under any such restraint. In any State or country that I ever lived in men were in the habit of choosing their wives and marrying them. If anybody wants a law to restrain him on that subject, I do not know that I should object to his having it, and yet I could never see the necessity for one.[100]

Pomeroy added that he did not think that Sumner's bill should be opposed if it repealed anti-miscegenation laws because "I think [miscegenation] should not be regulated by law." He concluded: "I cannot conceive that this amendment . . . can be open to any such objection as has been made by the Senator from Georgia; but, if it is open, I say then there should be no obstacle placed to its passage, because if anyone in Georgia is suffering from a law of that kind it ought to be repealed."[101]

Two days later, several Republicans who supported his bill generally asked Sumner to strike the fifth section from it because of the effect on the naturalization laws. Sumner said he was unwilling to do so because he wanted to eliminate all legal distinctions based on race in order to realize "the great promise of the Declaration of Independence."[102] Norwood then asked him whether this section would not repeal the state anti-miscegenation laws, and Sumner replied that

> if in that way the legislation, which the Senator now calls attention to, is repealed or annulled, so much the better. Nor can I doubt the power of Congress. . . . Out of what has the inhibition to which he alludes originated? The prejudice of color which was the very basis of slavery. Therefore in abolishing

100 *Id.*, pt. 1, at 821.
101 *Ibid.*
102 *Id.*, pt. 1, at 872.

> slavery Congress must, would it complete its work, abolish all the off-shoots of slavery, all that grows out of slavery.[103]

Senator James Harlan, an Iowa Republican, also answered Norwood and declared that such laws were futile. He reasoned that if miscegenation was not going to take place, such laws were unnecessary, and if it was going to happen, then laws would not stop it. He concluded:

> They make the father a nominal criminal, the mother a legal prostitute, and the children legal bastards in the arms of their recognized parents. They deprive the mothers and innocent children of the proper protection of the laws of their country, and nothing more. . . . These State laws prohibiting the intermarriage of the two races do not prevent amalgamation, but encourage prostitution and abandonment of offspring. They are, therefore, evil, and only evil.[104]

Senator Hill then asked:

> Does the Senator believe that the Congress of the United States has the power to repeal a statute of the State of Georgia which is not obnoxious to the Constitution of the United States? He cannot think so. He is too good a lawyer for that.[105]

Several months later, when the Senate resumed consideration of amnesty and Sumner's amendment, Senator Francis P. Blair, a Missouri Democrat, warned of the evils of amalgamation, and said that natural instincts would keep Negroes and whites apart in spite of Sumner's bill.[106] To this Senator Henry Wilson, Sumner's Republican colleague, replied:

> The Senator talks to us about the doctrine of amalgamation and forcing people together, of mixing races. I have heard it before. We heard it in this Chamber in the years that are past; in the good old times. We heard it before the war, during the war, and since the war. Whenever a proposition has been made in these Halls to secure liberty, equality, justice, humanity, to throw the shield of the protection of the law over men, we have had this doctrine proclaimed. I maintain that . . . just in proportion

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103 *Ibid.*

104 *Id.*, pt. 1, at 878.

105 *Id.*, pt. 1, at 879-80.

106 *Id.*, pt. 4, at 3252.

> as you have lifted up the colored race and put them on the plane of equality, just in that proportion you have separated the races and maintained the social virtues. I believe that under freedom there is not a tenth part of the improper associations between the races that existed before the war. There is less, far less mixing of races now than before the war, and I am sure the Senator from Missouri must see and admit this to be so.[107]

Meanwhile, a bill similar to Sumner's had been introduced in the House.[108] A Kentucky Democrat attacked the section repealing discriminatory state laws because it might annul anti-miscegenation statutes. He said that this section was beyond Congress' power to pass.[109] A Missouri Democrat protested that the House Judiciary Committee had not reported his constitutional amendment to prohibit miscegenation.[110] Another Kentucky Democrat quoted from Charles Darwin to prove how detrimental miscegenation, which the fifth section would allow, might be.[111]

The Civil Rights Act of 1875

Since Sumner's amendment had failed in the previous session, he reintroduced it in the first session of the 43d Congress as an independent measure.[112] However, debate first commenced in the House of Representatives, where a copy of Sumner's bill had previously been introduced.[113] The Democrats were quick to raise their amalgamation argument. Congressman James B. Beck, a Kentucky Democrat, observed:

> I suppose there are gentlemen on this floor who would arrest, imprison, and fine a young woman in any State of the South if she were to refuse to marry a negro man on account of color, race, or previous condition of servitude, in the event of his making her a proposal of marriage, and her refusing on that ground. "That would be depriving him of a right he had under the amendment, and Congress would be asked to take it up, and say, This insolent white woman must be taught to know that

107 *Id.*, pt. 4, at 3253.
108 See *id.*, pt. 2, at 1116.
109 *Id.*, app. at 219 (remarks of Representative McHenry).
110 *Id.*, app. at 383 (remarks of Representative King).
111 *Id.*, app. at 599.
112 2 CONG. REC., pt. 1, at 10 (1873).
113 *Id.*, pt. 1, at 97, 340.

> it is a misdemeanor to deny a man marriage because of race, color, or previous condition of servitude;" and Congress will be urged to say after a while that that sort of thing must be put a stop to, and your conventions of colored men will come here asking you to enforce that right.[114]

He was answered by Congressman Joseph H. Rainey, a Negro Republican from South Carolina, who said:

> Now, gentlemen, let me say the negro is not asking social equality. We do not ask it of you, we do not ask of the gentleman from Kentucky that the two races should intermarry one with the other. God knows we are perfectly content. I can say for myself that I am contented to be what I am so long as I have my rights; I am contented to marry one of my own complexion, and do not seek intercourse with any other race . . . .[115]

Congressman Alonzo J. Ransier, Rainey's Negro Republican colleague, also sarcastically rebutted the "bugbear of 'social equality' . . . used by the enemies of political and civil equality for the colored man in place of argument." He made some sarcastic insinuations about southern white sexual morality in response to Beck's speech.[116]

A third attack on Beck's argument was made by the only Negro Republican *lawyer* from South Carolina, Congressman Robert B. Elliott. After referring to "the many illogical and forced conclusions . . . [and] vulgar insinuations which further incumber the argument of the gentleman from Kentucky," Elliott added: "Reason and argument are worse than wasted upon those who meet every demand for political and civil liberty by such ribaldry . . . ."[117]

Of course, these rebuttals did not deter the Democrats. A Georgia lawyer who spoke right after Elliott immediately raised the same argument.[118] A Tennessee Democrat pointed to anti-miscegenation laws of

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114 *Id.*, pt. 1, at 343.

115 *Id.*, pt. 1, at 344.

116 *Id.*, pt. 1, at 382 (1874). See also CONG. GLOBE, 42d Cong., 2d Sess., pt. 1, at 858 (1872) (remarks of Representative Kelley).

117 2 CONG. REC., pt. 1, at 409 (1874).

118 *Id.*, pt. 1, at 411, where Congressman Blount said:

> Sir, the whites naturally view this as an attempt at ultimate amalgamation. This necessarily involves their degradation. A mean alliance always begets a progeny below the level of the better parent. If this is not true, why, when equal facilities for mental improvement are accorded to each race, demand they shall be placed side by side in the same school-room? The pride of the southern whites deserves admiration rather than execration.

Massachusetts, Maine, and other Northern states.[119] But a Florida Negro Republican once again denied any desire for intermarriage.[120]

Southern Republicans opposed to the bill also found the miscegenation argument convenient. Congressman William Crutchfield, a Tennessee Republican, offered the following amendment to the bill:

> That any white female who shall, by reason of the race, color, or previous condition of servitude of any negro who shall make to her any proposal of marriage, refuse such proposal, shall, on conviction thereof, be fined not less than $1,000 nor more than $5,000 for each such offense.[121]

To this, Congressman Benjamin F. Butler, Republican Chairman of the Judiciary Committee, who had charge of the civil rights bill, retorted: "I object to the reception of that amendment. This is an insult to the House and to the race."[122] Congressman John D. Atkins, a Tennessee Democrat, also raised the amalgamation theme. He pointed to the recently-enacted Pennsylvania constitution which prohibited miscegenation and noted that "sound public policy and the well-being of both races forbid the commingling of the blood of totally distinct races." Atkins declared that the fourteenth amendment did not prohibit state anti-miscegenation laws, and therefore reasoned that it did not prohibit school segregation.[123] He concluded that the

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119 *Id.*, pt. 1, at 415 (remarks of Representative Bright).

120 Referring to Beck's speech, Congressman Walls said: "His expressed conviction that such conventions will be called in future to enforce miscegenation is alike unworthy the gentleman's intelligence and his experience." *Id.*, pt. 1, at 417.

121 *Id.*, pt. 1, at 452.

122 *Ibid.* Butler said sarcastically that if Crutchfield understood that promoting social equality and mixed marriages was the purpose of the bill then

> to some men the debate has been futile and fruitless. If he does not understand we are not enacting any such proposition, then he could never even appreciate the answer a lady of the North would make to his addresses when she answers "no," which after fathoming his capabilities would assuredly be given.

Id., pt. 1, at 455.

123 *Id.*, pt. 1, at 453. He said:

> Pennsylvania wisely declines to allow her manhood to be emasculated by the degeneracy which always marks a mongrel race. Has not Tennessee the same right, and did she not exercise it? Upon what ground was it done? Upon the ground of color and of race. But gentlemen argue that the fourteenth amendment permits no such thing as Pennsylvania and Tennessee has [*sic*] done. Does the fourteenth amendment undertake to go into the States and declare what shall be their internal and domestic policy, or does it simply mean to confine its jurisdiction and application to the enforcement of rights of citizens of the United States acquired under the Federal Constitution? . . . Where in the Constitution of the United States is it declared that the Anglo-Saxon and the African race may marry? . . .

civil rights bill would lead to social equality, amalgamation, and "moral and political decay" brought about by "degeneracy." He pointed to Mexico as an unhappy example of this.[124] Butler's reply to these arguments was a sarcastic reference to illicit southern miscegenation with slaves before the Civil War.[125] But this did not deter yet another southern Democrat from asserting that school integration would lead to miscegenation.[126]

Two weeks later, a North Carolina Democrat returned to the miscegenation theme. He blamed the government instability and frequent revolutions in Mexico and in Central and South America on their lack of racial unity and the fact that they were "mongrel nations." He suggested that all Negroes should be shipped to Latin America or Africa.[127] Congressman Richard H. Cain, a South Carolina Negro Republican, answered this with an attack on southern white sex morals and a declaration that Negroes were not going anywhere.[128]

When the Senate resumed consideration of the civil rights bill, Norwood harangued the chamber in a lengthy oration which stretched over two days. He attacked northern Republicans for hypocritically banning racial discrimination and yet refusing to allow their daughters to marry Negroes. He asserted that the integration which the bill contemplated would lead to increased miscegenation among the poor.[129] He also cataloged the several anti-miscegenation laws in New England.[130] A Texas Republican answered him by pointing out that Vice President Richard M. Johnson, elected by the Democrats in 1837,

> All statesmen of all parties—indeed, the public sentiment of the colored people themselves—approve of the ordinance and statutes, now common in many of the States, which forbids intermarriage of the races. God has stamped the fiat of his condemnation upon the issue of such marriages too unmistakably to be denied—the original progenitors of both races being superior [in] every way to the mixed offspring. If, then, the marriage of the races brings decay and death, and must be prohibited by law—leaving out of view for the present its impolicy—why have not the States the power to keep the races apart in the schools and elsewhere?

124 *Id.*, pt. 1, at 454-55. He declared: "Nationalities have commingled until almost the entire population is mongrel, and at best Mexico is a nation of castes." *Id.*, pt. 1, at 455.

125 See *id.*, pt. 1, at 457, where Butler retorted: "[Y]our children sucked the same mother with your servants' children; had the same nurse; and, unless tradition speaks falsely, sometimes had the same father."

126 *Id.*, pt. 1, at 556 (remarks of Representative Vance).

127 *Id.*, pt. 1, at 900 (remarks of Representative Robbins).

128 *Id.*, pt. 1, at 902.

129 *Id.*, app. at 236-37. He declared: "If you would not marry them, then coerce no conditions in life among the poor, who cannot protect themselves, by which you increase the danger of such relation." *Id.*, app. at 237.

130 *Id.*, app. at 239.

lived for many years with a colored woman and sired several mulatto children. He caustically added that where a Negro married a white woman, the Negro would get the worst of the bargain.[131]

Southern Democrats were not the only ones to use the amalgamation theme. Senator John P. Stockton, a New Jersey Democrat whose exclusion in 1866 made possible Republican control of that chamber by the requisite two-thirds majority necessary to pass the fourteenth amendment,[132] gleefully read the resolution of a Negro Tennessee state convention denouncing Senator William G. Brownlow, a Tennessee Republican, for opposing integrated schools, and resolving to raise funds to carry to the United States Supreme Court the case of a Negro imprisoned for marrying a white woman. He also read Brownlow's reply charging the Negroes with "base ingratitude," saying that the Tennessee Republican party could get along without the colored vote, and reminding them that it was he who gave the Negroes the vote in the first place.[133] Stockton asserted that school integration would lead to intermarriage,[134] as did Senator Eli Saulsbury, a Deleware Democrat.[135]

During the course of a midnight filibuster, Senator Augustus S. Merriman, a North Carolina Democrat, again raised the same theme. He asserted that the policy of the bill would

> contravene the natural law of races itself, in the end hybridize the races, and produce to a material degree, degeneracy and extinction of race. The uniform experience of the human race goes to show that the Almighty curses that people who defy the course of nature.[136]

Merriman then launched into a long pseudo-scientific discourse on racial differences and the degeneracy and ultimate extinction of hybrid races. He, too, warned that the policy behind the proposed bill was already leading to the evils of miscegenation.[137]

When the House reconsidered the bill, Congressman William B. Read, a Kentucky Democrat, also read the Tennessee Negro resolu-

131 *Id.*, app. at 374.

132 See CONG. GLOBE, 40th Cong., 2d Sess., pt. 1, at 823 (1868); 40th Cong., 3d Sess., pt. 3, 1630 (1869).

133 2 CONG. REC., pt. 5, at 4143 (1874).

134 *Id.*, pt. 5, at 4169.

135 *Id.*, pt. 5, at 4160-61.

136 *Id.*, app. at 315.

137 *Id.*, app. at 316-17.

tion denouncing Brownlow as proof that they wanted "social equality." He quoted at length the portion of the resolution condemning the Tennessee courts for imprisoning a Negro for marrying a white woman and calling for funds to be raised to take the case to the United States Supreme Court.[138] He argued:

> Now, what does all this mean but mixed schools and perfect social equality? It is nothing more or less; and the next step will be that they will demand a law allowing them, without restraint, to visit the parlors and drawing-rooms of the whites, and have free and unrestrained social intercourse with your unmarried sons and daughters. It is bound to come to that—there is no disguising the fact; and the sooner the alarm is given and the people take heed the better it will be for our civilization. I am no alarmist; I speak from conviction.[139]

Congressman Roderick R. Butler, Tennessee Republican who opposed the civil rights bill, also had some harsh comments about the Negro convention which proposed to challenge the state anti-miscegenation law. He said that all but a few of the state's colored people opposed intermarriage and were satisfied with the law, and that Tennesseeans of all parties were startled at the convention's resolution, "as it was a departure from all that had been said by the advocates of the colored people from the first step taken to advance and educate them up to the assembling of that convention." He added:

> Sir, if that doctrine had been proclaimed in 1865 the colored people in my State would have stood isolated and alone. The

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138 *Id.*, app. at 343. The resolution read, in pertinent part:

> And whereas our fellow-citizen, David Galloway, of the State of Tennessee, and a citizen of the United States of America, is now condemned to a felon's life through the barbarous decisions of the unjust code and constitution of the State of Tennessee, for having in civil life married, by the laws of Tennessee, the wife of his choice, a white woman of mature age, and every way competent to contract with whomsoever she pleased; and whereas his marriage was in conformity with his privilege as an American citizen in the land of his birth, . . . but who . . . has been outraged by the judicial farce of a trial in two courts of Tennessee, and deprived of his liberty and divested of his manhood and the enjoyment of his personal rights: Therefore,
>
> *Resolved*, That we, his fellow-citizens, feel bond with him in the outrages he has received, and do pledge our efforts to raise sufficient means to employ counsel to bring his case before the Supreme Court of the United States and vindicate the rights of the colored citizens of Tennessee to the civil rights of marriage with whomsoever they may contract and choose, and strip him of the outrage and odium placed on him and us by the unjust and barbarous constitution and laws of Tennessee.

139 *Ibid.*

> boldest white man of the bold would not have dared to advocate the doctrine of intermarriage of the blacks and the whites, and if that is the ultimatum of the colored race their best friends in Tennessee and several of the other Southern States must bid them adieu.
>
> Mr. Speaker, I do not believe that said convention at Nashville spoke the sentiments of the colored people of my State. I cannot believe it. I have too much confidence in the good sense and judgment of our colored people. They cannot afford to take such a fatal step. They cannot, and in my opinion will not, place themselves and friends in the position of favoring such a suicidal policy.[140]

The assertion that the bill would lead to interracial mingling and ultimately to miscegenation was also made by a Maryland Democrat.[141] Congressman James T. Rapier, a Negro Republican from Alabama, rebutted these assertions by protesting that the civil rights bill

> has been debated all over the country for the last seven years; twice it has done duty in our national political campaigns; and in every minor election during that time it has been pressed into service for the purpose of intimidating the weak white men who are inclined to support the republican ticket. I was certain until now that most persons were acquainted with its provisions, that they understood its meaning; therefore it was no longer to them the monster it had been depicted, that was to break down all social barriers, and compel one man to recognize another socially, whether agreeable to him or not.
>
> I must confess it is somewhat embarrassing for a colored man to urge the passage of this bill, because if he exhibit an earnestness in the matter and express a desire for its immediate passage, straightway he is charged with a desire for social equality, as explained by the demagogue and understood by the ignorant white man.[142]

Rapier also made an uninhibited attack on the sex morals of southern whites who opposed the bill.[143]

In the second session of the 43d Congress, which was held after

140 *Id.*, pt. 5, at 4593.

141 *Id.*, app. at 419-20 (remarks of Representative Wilson).

142 *Id.*, pt. 5, at 4782.

143 *Id.*, pt. 5, at 4784.

the Democratic landslide in the 1874 elections, and in which the civil rights bill was again discussed, a southern white Republican said that Negroes as well as whites in the South were adverse to race mixing, but "among the whites . . . [it exists] to an extent formidable beyond any conception of it which I have heard expressed in any discussion of the subject public or private among our nothern friends."[144]

Several Negro congressmen attempted once again to refute the amalgamation argument. One contented himself with observing that intermarriage would not be increased by the bill.[145] Cain renewed his caustic observations about southern sex morals by referring to the number of mulattoes.[146] Rainey echoed this charge, and added:

> Reference has been made, for the purpose of arousing public opposition and resentment upon the ground that it would signalize the overthrow of opposing barriers, to unrestrained association between the races and thus inaugurate intermarriage of whites and blacks. Such argument shows the weakness of this supposed salient point adduced by the opposition. It is a mere subterfuge, and unworthy of those who announce it. If their arguments are of any value and force, it reflects unfavorably upon those whose cause they are supposed to defend. Need I say it is unknown to the spirit of our Constitutions, Federal or State; the possible enactment of any compulsory law forcing alliance between parties having no affinities whatever?[147]

Taking the helm at the close of the House debate, Congressman Benjamin F. Butler also made some searing comments about southern white sex morals to refute the "social equality" argument. He read a Mississippi statute which legitimated seven children which one white man had fathered by six different colored women, and said that "the only equality the blacks ever have in the South is social equality." He also read a letter from a Negro mother protesting the outrage of colored girls by white men.[148] Nothing further was said in the debates on this subject.

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144 3 CONG. REC., app. at 15-16 (1875) (remarks of Representative White).

145 *Id.*, pt. 2, at 947 (remarks of Representative Lynch).

146 *Id.*, pt. 2, at 957. See also *id.*, app. at 108 (remarks of Representative Carpenter).

147 *Id.*, pt. 2, at 960.

148 *Id.*, pt. 2, at 1006.

Conclusion

There has been only one scholarly review of the legislative history of the fourteenth amendment vis-à-vis anti-miscegenation laws. R. Carter Pittman concluded that the amendment was not intended to affect such laws, but he treated debate on the topic as if there really was a serious question in the minds of the opposition that state anti-miscegenation laws might be stricken down.[149] I agree with Professor Pittman's ultimate conclusion, but on a somewhat different ground—I do not believe that anyone ever seriously thought that these state laws were within the pale of the amendment's prohibitions; rather, the whole amalgamation issue was raised by the Democrats throughout the Reconstruction period as a political smokescreen.

In the anti-slavery debates, it is clearly demonstrated that the Republicans were as much opposed to miscegenation as the Democrats. This attitude persisted throughout Reconstruction. No Republican member of Congress advocated miscegenation, and the Negroes said they did not desire it. It was not treated like the right to vote or other rights which should be encouraged.

The Democrats injected the cry of amalgamation into every conceivable debate, no matter how irrelevant it actually was. It is clear that this was done for political advantage. The Republicans protested this use of the miscegenation issue. Moreover, the nature of their other retorts is equally instructive. Their favorite tack was to accuse southern Democrats of being promiscuous with colored women. This, of course, was simply a charge of hypocrisy. It certainly did not amount to a commendation of miscegenation or an assertion that it ought to be lawful.

A few Republicans, especially during the debates preceding the fourteenth amendment, said that they would support anti-miscegenation laws. Trumbull, in particular, vigorously denied that his proposals, which were later embodied in the fourteenth amendment, would overturn state anti-miscegenation laws, and angrily criticized President Andrew Johnson for even alluding to them in his veto message.

It is true that a few Radicals later in the Reconstruction period expressed personal opposition to anti-miscegenation laws, but this,

149 See Pittman, *The Fourteenth Amendment: Its Intended Effect on Anti-Miscegenation Laws*, 43 N.C.L. Rev. 92 (1964).

of course, does not prove that the fourteenth amendment necessarily embodies these extended views.[150] It was not until Sumner's civil rights bill was debated in 1872 that the Democrats even had any serious point to make on the subject. The fifth section of Sumner's bill was so broad that it might have affected such laws, although even the Republicans who supported the bill were not sure, and several denied it. But even Sumner was not especially interested in overturning such laws. As late as 1867, he told Pomeroy, who suggested repeal of the applicable District of Columbia law, that it would be best not to press the point. Moreover, he was prepared to sacrifice this section for the rest of the bill.[151] None of the Republicans wanted to create just the issue the Democrats were hoping for by trying to overturn state anti-miscegenation laws, and certainly it would have been suicidal for them to have attempted it in the fourteenth amendment, which served as a party platform for the crucial 1866 elections.[152] At any rate, there is not a shred of evidence that anyone believed that this amendment justified the fifth section of Sumner's bill. Sumner was clearly pursuing his personal notion of the meaning of the Declaration of Independence, which there is no evidence that any other Republican of the period shared. Indeed, Sumner's Republican colleagues deemed him a wild-eyed theorist who rarely got his ideas embodied in legislation.[153] His ideas were rebuffed when the thirteenth amendment was

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150 By way of analogy, it may be pointed out that Mr. Justice Holmes' famous observation in Lochner v. New York, 198 U.S. 45, 75 (1905) (dissenting opinion), that the fourteenth amendment does not enact Herbert Spencer's *Social Statics* is not disproved by the fact that this book was quoted with approval in Congress during this period. See CONG. GLOBE, 41st Cong., 2d Sess., app. at 121 (1870) (speech by Senator Fowler); CONG. GLOBE, 39th Cong., 2d Sess., pt. 1, at 76 (1886) (remarks of Senator Brown).

151 CONG. GLOBE, 42d Cong., 2d Sess., pt. 1, at 873 (1872).

152 See JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 118-20 (1956).

153 Senator William M. Stewart, a Nevada Radical Republican who had been Attorney General of California before his election to the Senate, and who, as an influential member of that body had voted for the fourteenth amendment and guided to passage the fifteenth amendment, said of Sumner:

> It is easy to make speeches in and out of Congress. . . . But where is the statute that the Senator has incorporated this principle in? . . . He is a theorist, a grand, georgeous [*sic*], extensive theorist, but he is not a practical man, and my experience is that he has failed utterly to help us to get practical measures. There is hardly any Senator who has been here for the last five years that has not got more of his work in the statute-book than the Senator from Massachusetts.

CONG. GLOBE, 41st Cong., 2d Sess., pt. 2, at 1183 (1870). Trumbull called Sumner "an impracticable and an obstacle in the way of legislation." *Id.*, pt. 1, at 638. He also said of Sumner: "it has been over the idiosyncracies, over the unreasonable propositions, over the impracticable measures of the Senator from Massachusetts that freedom has been

framed,[154] and there is no reason to believe that he would have fared any better if he had tried to influence the framing of the first section of the fourteenth amendment.

I therefore am led to conclude that the fourteenth amendment does not forbid state laws preventing interracial marriage or extra-marital sexual relations. The matter remains subject to the state police power. Whatever the fate, therefore, of these laws in the present United States Supreme Court, the abiding Constitution of the United States, which I believe will ultimately prevail, makes these anti-miscegenation laws completely valid.

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proclaimed and established. His impracticable, unreasonable, unconstitutional, and ineffectual measures would never have accomplished the object." *Id.*, pt. 1, at 422.

154 See Avins, *Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Antidiscrimination Legislation*, 49 CORNELL L.Q. 228, 234-35 (1964).