THE THIRTEENTH AMENDMENT AND THE NORTH'S OVERLOOKED EGALITARIAN HERITAGE*

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It is ironic during this period of celebration of the Constitution that we retain severe, dark and only partially justified misgivings concerning many of the authors of that document. Our misgivings are with respect to race, for we know that the drafters of the original document, however apologetically, however much they resorted to euphamistic language, sanctioned slavery.[1] If that were the sum total of our misgivings in this area that would be understandable, perhaps even valuable as a necessary corrective balance to our national tendency towards over-celebration. But the misgivings go deeper. The belief persists, much recent scholarship to the contrary notwithstanding, that even the Civil War amendments, designed to correct the fundamental flaw in the original Constitution, had limited purposes and nonegalitarian premises that did not completely overturn the fundamental racism found in the original document.[2]

This view represents an inaccurate but widespread consensus. It helped inhibit the development of civil rights law for much of this century. In the years after World War II the prevalence of this view cast doubt on the constitutional legitimacy of many of the legal triumphs of the civil rights movement.[3] Even today this view still enjoys amazing power and ability to distort among other things our debates on constitutional methodology. The belief that such measures as the Supreme Court's decision in *Brown v. Board of Education*,[4] or Congress' enactment of the Civil Rights Act of 1964 could only be justified by radical departures from the original purposes of the fourteenth amendment is the focus of most civil rights debate. Such measures have long been a staple in arguments of conservative commentators who have deplored such departures as distortions of the nation's fundamental charter. Ironically, many liberals have also assumed that fidelity to the intentions of the framers of the fourteenth amendment would have essentially precluded many of the judi-

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1. It is significant that the term "slave" does not appear in the original Constitution. The three sections directly bearing on slavery, the representation and slave importation clauses of Article I and the fugitive slave clause of Article IV both avoid explicit use of the term. *See* U.S. CONST. art. I §§ 2, 9 and art. IV § 2.

2. That is the view put forward by Raoul Berger, among others. He argues that the key to an understanding of the Fourteenth Amendment is that the North was shot through with Negrophobia. R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 10 (1977).

3. *Id.*

4. 347 U.S. 483 (1954).

cial and legislative remedies that have wrought a revolution in race relations in recent decades. Indeed, many cite the supposed incompatability of civil rights legislation and court decisions with the original intent of the fourteenth amendment as part of the brief against originalism as a methodological strategy in constitutional interpretation.[5]

At the center of these beliefs is the view that racism in the antebellum North was so virulent that any serious commitment to the goal of equal rights before the law on the part of northern politicians must be seriously discounted. The Civil War amendments and other Reconstruction era legislation should, according to this view, be seen primarily as attempts to insure regional and partisan hegemonies. Concern with Black rights was at best a distant and secondary consideration. Northern Republicans reflecting their own racism and the even stronger racism of their constitutents could not have had a long-term egalitarian agenda, or an idealistic commitment to Black rights. The egalitarian measures that they enacted are best explained as having been dictated by expediency and as having limited purposes.[6]

This Article seeks to address that set of beliefs. It focuses on the thirteenth amendment to the United States Constitution, in many ways the simplest and least radical of the Civil War amendments.[7] The Article explores the view that the framers of the thirteenth amendment believed that this instrument, and particularly its second section, conferred on Congress broad powers to legislate on behalf of the freedmen. These powers were not simply confined to measures that would insure minimal freedom for former slaves by alleviating their former condition as chattel. Instead, in the view of many of the amendment's supporters, the new constitutional provision would enable Congress and the executive to begin, at least in the states formerly in rebellion, fulfilling what had long been a goal of some abolitionists. That goal was not only emancipation, but a significant measure of equality for Blacks as well.[8] That many saw such broad possiblities in the amendment's purposes underscores a certain irony in the historiography of American law and thought. The authors of the thirteenth amendment believed it enabled them to change the Negro's status not merely from slave to free, but from noncitizen to citizen, from nonequal to equal. They realized that such changes could be readily nullified without constitutional support, hence the passage of the fourteenth and ultimately the fifteenth amendments.[9] Yet the belief persists that the au-

5. Perry, Book Review, 78 COLUM. L. REV. 685 (1978).

6. *See infra* note 11.

7. See *infra* note 83.

8. *See* H. HYMAN and W. WIECEK, EQUAL JUSTICE UNDER THE LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875, at 390-92. (1982).

9. Section 2 of the Fourteenth Amendment reads:

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

The Fifteenth Amendment reads:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged

thors of the Civil War amendments and accompanying statutes were relatively unconcerned with advancing the cause of racial equality. This belief has enjoyed a long life. It was nurtured by a long line of Supreme Court decisions.[10] During this century it was further fed by historians.[11] Recently, the view has been sustained in current works documenting the history of racial discrimination in the North, providing supporting evidence for the view that a region where racist sentiments were so strong could not have been enthusiastic about imposing an egalitarian agenda on the nation.[12] While historians have, in recent decades, reconsidered this view, it is still a view that many, including some lawyers, find persuasive.[13]

This Article takes the opposite view. It views the thirteenth amendment as the outgrowth of an antebellum northern egalitarian heritage, a heritage that our political and social histories have generally overlooked or under-estimated. It asserts that our political and social histories have under-estimated or overlooked the degree of egalitarian sentiment in the antebellum North. This Article maintains that in the decades between the Revolution of 1776 and the Civil War a northern view of emancipation developed which saw free Blacks as citizens with rights under law. This view is at sharp variance with the southern vision. Furthermore, this Article argues that a significant minority of ordinary White northerners, and not simply abolitionist activists, supported the concept of equality before the law, regardless of their private prejudices. This history must be examined and understood if we are to fully comprehend the import of the thirteenth amendment.

This Article is divided into three sections. The first, "Equality: Gained, Lost and Partially Restored," examines the equal rights struggle in the North as a part of the heritage of the thirteenth amendment. The second section, "Towards Citizenship, Towards Freedom" looks at Congressional and executive efforts to bestow citizenship upon free Blacks during the Civil War. "The Necessary Corollaries," the third section, assesses the framers' view that the thirteenth amendment enabled Congress to enact far reaching legislation to establish legal equality for Blacks, particularly in the rebellious states. It ex-

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by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

10. The Supreme Court's invalidation of the public accommodations provision of the Civil Rights Act of 1875 was the beginning of a long line of Supreme Court decisions that thwarted the intentions of the framers of the Civil War amendments. *See* The Civil Rights Cases, 109 U.S. 3, 19 (1883).

11. The "Dunning School" dominated the historiography of Reconstruction for at least the first half of this century and it has had influence on popular opinion that has persisted into present times. Its basic view was that Radical Republicans were a cynical group with little concern for Black equality but a great desire to dominate the South and maintain Republican rule. According to this view, any gains made by Blacks during Reconstruction were incidental, a by-product of the true radical agenda. It should also be added that from the "Dunning School" perspective any advances made by Blacks were also undesirable because they advanced inferior blacks into positions of political equality or dominance over their superior, White southerners. *See* W. DUNNING, RECONSTRUCTION, POLITICAL AND ECONOMIC (1906); *see also* W. FLEMING, CIVIL WAR AND RECONSTRUCTION IN ALABAMA (1905).

12. L. LITWACK, NORTH OF SLAVERY (1961); L. CURRY, THE FREE BLACK IN URBAN AMERICA 1800-1850: THE SHADOW OF THE DREAM (1981).

13. *See, e.g.,* D. BELL, RACE, RACISM AND AMERICAN LAW 33 (2nd ed. 1980). *See also*, Perry, *supra* note 5.

plores the Civil Rights Act of 1866 and the Freedmen's Bureau Act as examples of this legislation.

I. EQUALITY: GAINED, LOST AND PARTIALLY RESTORED

Let me begin with a startling proposition. We have severely under-estimated the extent of racial egalitarianism in the antebellum North. That under-estimation is understandable. One need not look far to find examples of strident racism in northern states before the Civil War. The legal historian cannot help but notice statutes prohibiting Black settlement in northern states,[14] limiting the right of Blacks to vote,[15] or others mandating separate schools for Black children.[16] Those who study court decisions will have no difficulty finding numerous examples of northern jurists who clearly affirmed the view that while Blacks were free, they were not equal before the law.[17] Social historians recount vicious anti-Black riots in antebellum northern cities reminding us that racial bigotry knew no geographic boundaries.[18] Political historians have long noted that Blacks in many northern cities served as a "negative reference group," enabling White politicians to garner votes simply by appealing to the baser prejudices of the White electorate.[19] Historians of social thought relate numerous examples of statements that readily convince us that even many White abolitionists subscribed to the racial philosophies of their day.[20] All of this may be found through even the most preliminary examination of the history of Afro-Americans in the North.

Yet, the question of race in the antebellum North is more complicated than that preliminary examination suggests. An appreciation of that complexity is necessary to a complete understanding of what many northern Whites thought emancipation involved. One must realize that despite the very real virulence of northern racism, despite the northern free Negro's unequal status before the law and the often harsh conditions that Blacks lived under in northern cities, the view that Black and White should be equal before the law had a long history in the North. A substantial portion, albeit not a majority, of White northerners supported the principle. Theirs was a view that a concomitant incident of freedom was legal equality. It was a view that began with the American Revolution and it enjoyed some political successes but suffered many more failures. The fortunes of this view waxed and waned, influenced by geography, partisan politics, the spirit prevalent in different decades, sectional conflict, the fortunes of the anti-slavery movement, ethnic and religious divisions among Whites and, not least of all, the political activities of northern Blacks. The struggle for equal rights in the North was vivid in the minds of the framers of the thirteenth amendment. Clearly, the leading proponents of

14. Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415, 424-25 (1986).

15. *Id.*

16. *See, e.g.* R. COTTROL, THE AFRO-YANKEES: PROVIDENCE'S BLACK COMMUNITY IN THE ANTEBELLUM ERA 90-101 (1982).

17. *See, e.g.*, Hobbs v. Fogg, 4 Watts 553 (Pa. 1837).

18. CURRY, *supra* note 12, at 96-111.

19. L. BENSON, THE CONCEPT OF JACKSONIAN DEMOCRACY: NEW YORK AS A TEST CASE 318-20 (1973).

20. G. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY 1817-1914, 33-42 (1971).

the amendment were influenced by this struggle as the amendment was being drafted.

The American Revolution first raised the question of whether Black freedom meant legal equality with Whites. The close of the Revolution saw the beginning of the end for northern slavery.[21] While individual free Negroes had always lived in northern colonies, the Revolution and its libertarian ideals helped create a new free Negro class in the North.[22] Questions of legal status were immediately raised. Would this group be entitled to the same legal rights as Whites? Would they enjoy the same freedom of movement? Were they citizens? Strong social prejudice existed and discriminatory legislation was enacted.[23] But, in answer to the question of whether the northern freedmen would be viewed as citizens—equal, at least in theory, before the law—the egalitarian view won the day. The newly enacted state constitutions and statutes allowed Black men to vote on the same basis as White men.[24] This was not done by accident. Measures that would have restricted the ballot to White men were proposed, debated and defeated in constitutional conventions, legislatures and in at least one referendum.[25] This move to include newly freed Blacks within the body politic, among the ranks of citizens, was not confined to state governments. When a proposal was made to count only free Whites as citizens under the Articles of Confederation, that measure was defeated.[26] In the North, in the late eighteenth century, the initial impulse was to view legal equality as part of general emancipation. However, this impulse changed.

The egalitarianism of the post-revolutionary era yielded, after the War of 1812, to a new spirit of virulent racism. Racial tensions increased. Vicious anti-Black riots occurred in cities with significant free Negro populations.[27] Day to day life became harsher for northern Blacks. They increasingly found themselves victimized by violence and prevented from working in occupations Whites found desirable.[28] Jim Crow made its debut as a growing number of public facilities were either closed to Blacks or open only on a segregated basis.[29] States established common school systems but restricted their entry to White children, forcing Black children into separate and unequal facilities.[30] Some new states passed legislation that prohibited Black settlement alto-

21. Cottrol, *Law, Politics and Race in Urban America: Towards a New Synthesis*, 17 RUTGERS L.J. 483, 503-05 (198)).

22. *Id.*

23. *Id.* at 516.

24. *Id.* at 503-505. It should also be noted that most of southern states also allowed free Negro suffrage immediately after the Revolution. Delaware, Maryland, North Carolina, Kentucky and Tennessee permitted free Black men who met the requisite property ownership requirements to vote. Eugene Genovese informs us that enfranchisement of free Blacks in Tennessee was deliberate. All of which suggests that Justice Curtis, in his dissent in *Dred Scott*, had the better view of the original framer's intentions with respect to the citizenship of free Blacks. *See* Dred Scott v. Sanford 60 U.S. (19 How.) 393, 595 (1856) (Curtis, J., dissenting). *See also* I. BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH 91 (1974); E. GENOVESE, ROLL JORDAN ROLL: THE WORLD THE SLAVES MADE (1974).

25. In a referendum held in Massachusetts in 1778 a proposed state constitution that would have restricted the ballot to White men was rejected.

26. *See* Dred Scott v. Sanford, 60 U.S. (19 How) 393, at 575 (Curtis, J., dissenting).

27. *See* CURRY, *supra* note 12.

28. CURRY, *supra* note 12, at 19-22.

29. *Id.* at 90-92.

30. *Id.* at 147-73; J. HORTON AND L. HORTON, BLACK BOSTONIANS: FAMILY LIFE AND COMMUNITY STRUGGLE IN THE ANTEBELLUM NORTH 75-76 (1979).

gether.[31] And, most ironically, in the 1820's and 1830's as property requirements were being eliminated as a prerequisite for suffrage for White men, Black men were denied voting rights which they had previously exercised in a number of states.[32] Also, the western states admitted after the War of 1812 largely denied suffrage to Black men.[33] Some even passed legislation prohibiting Black settlement.[34] In the era of Jacksonian democracy, the North moved away from its earlier egalitarian impulses. Racial distinctions became firmly imbedded in both the laws and custom of most northern states, and many forgot or ignored the recent egalitarian history.

But for others, that earlier legacy was remembered.[35] The Jacksonian era limitations on Black rights met with resistance on the part of both Blacks and Whites.[36] It also met with a partially successful effort to reverse those limitations and secure recognition of citizenship for northern Blacks. One effort, the attempt to secure or regain Black voting rights, is particularly useful for our purposes. That issue should serve to caution us against overly broad generalizations concerning antebellum racial attitudes in the North. The historical record is clear. The voting rights that Black men lost in the decades following the War of 1812 were, with few exceptions, not recovered until after the Civil War.[37] The record provides convincing evidence as to the strength of anti-egalitarian sentiment among northern Whites. But the record reveals more. It also shows that there was still a degree of support for formal legal egalitarianism that was both longstanding and fairly widespread. This support extended beyond the small number of abolitionist activitists we usually associate with the northern equal rights movement. Finally, focusing upon the suffrage issue can assist us in developing an elementary political sociology of both racism and egalitarian in the antebellum North. A review of the efforts to secure Black voting rights can help us better understand the actions and motives of the framers of the thirteenth amendment.

First, it should be recognized that disenfranchisement measures were highly controversial in northern states and that movements to restore or extend suffrage to Black men enjoyed considerable, though not universal support. The history of Black suffrage in New York State can help illustrate the political and social complexities of both egalitarianism and racist sentiment in the antebellum North. Black men were enfranchised by statute in 1785.[38] They were permitted to vote on the same basis as White men. Males of both races were required to own property valued at $100 or more.[39] Black males who could satisfy that requirement voted and tended to vote for the Federalist candidate.[40] Their partisanship was partly a reflection of relative Federalist

31. Finkelman, *supra* note 14, at 443.
32. Cottrol, *supra* note 21, at 508-12.
33. Finkelman, *supra* note 14, at 424-25.
34. *Id.*
35. *See* notes 21, *supra* and 80, *infra*.
36. CURRY, *supra* note 12, at 217-24.
37. Black men in Rhode Island recovered voting rights in 1842. *See* Cottrol, *supra* note 15, at 68-77. Also, although a statute in Ohio restricted the vote to white men, Ohio courts interpreted the statute to permit voting on the part of mulattoes. Michigan allowed Black men to vote in local school board elections. *See* Finkelman, *supra* note 14, at 425.
38. Cottrol, *supra* note 21, at 505.
39. *Id.* at 508.
40. Fox, *The Negro Vote in Old New York*, 32 POL. SCI. Q. 255, 258 (1917).

enlightenment on racial matters and partly a reflection of patron-client ties between newly freed Blacks and upper class White males in New York.[41] By the 1810's, Democrats were sharply questioning the wisdom of allowing Black suffrage. During the New York Constitutional Convention of 1821, Democratic politicians made a concerted effort to both disenfranchise Blacks and to eliminate the property qualification for White men.[42] These efforts had limited success. Property qualifications were eliminated for White voters. Federalist sympathizers who supported Negro suffrage were able to stave off total disenfranchisement, but after 1821 only Black men who could satisfy an increased $250 property ownership requirement were allowed to vote.[43]

Throughout the antebellum period, supporters of equal rights made efforts to eliminate the differential property requirement. The battle was drawn along partisan lines. Whig and later Republican politicians, for reasons of both principle and self interest, supported an egalitarian franchise,[44] while Democrats opposed equal sufferage.[45] Two state referenda, one held in 1846, and the other in 1860, indicate popular sentiment on the issue. In the 1846 referendum roughly 28% of the electorate supported equal suffrage.[46] By 1860 equal suffrage was supported by 36% of the electorate.[47] The New York data also reveal which groups of Whites were more likely to support equal rights. The 1846 referendum drew the support of roughly 15% of the voters in New York City,[48] but by 1860 the percentage of New York City voters supporting equal suffrage had fallen to less than 14%, despite the rise in support for equal suffrage in the state as a whole.[49]

Clearly White voters in New York City were significantly less inclined than their upstate counterparts to support equal rights for Blacks. The striking difference between upstate and city support for equal rights suggests one way of reconciling our essentially accurate picture of the often strident racism expreienced by northern free Blacks within the egalitarian agenda of Civil War era Republicans. When we study race relations in the antebellum North, we quite naturally look at the cities where the vast majority of northern free Negroes lived. Urban life was often quite harsh for Blacks, reflecting the social, economic and political tensions that existed between Blacks and working class Whites in northern cities. Anti-Black and anti-egalitarian sentiment ran high among Whites in those cities, especially in cities like New York with large immigrant populations and strong Democratic political organizations.[50]

But, if New York State is a good example, an accurate picture of northern racial sentiment cannot be gained solely by examining White behavior and opinion in those areas where Blacks were concentrated. A state's posture with respect to formal legal rights for Blacks was as much influenced by the political dynamics in small towns and rural areas where relatively few Blacks lived

41. *Id.*
42. *Id.* at 258-64.
43. *Id.*
44. P. FIELD, THE POLITICS OF RACE IN NEW YORK: THE STRUGGLE FOR BLACK SUFFRAGE IN THE CIVIL WAR ERA 85-113 (1982).
45. *Id.*
46. *Id.* at 239.
47. *Id.* at 127.
48. CURRY, *supra* note 12, at 218.
49. *Id.*
50. *Id.*

as it was by political sentiment in large cities. The New York experience indicates substantial support for the cause of equal rights on the part of Whites who had relatively limited day-to-day contact with Blacks. The suffrage movement in other states suggests similar patterns.[51]

Ultimately the importance of the antebellum equal suffrage movement lies not in the record of its limited successes and many failures. Instead, that movement's importance lies in its ability to serve as an indicator of the social base supporting egalitarian politics. That base was large enough to make egalitarian politics possible. Politicians could publicly express sympathy for the idea of equal rights under law and survive politically. That made possible, towards the close of the antebellum era, Republican Party politics that were openly, if often apologetically, egalitarian.[52] While the goal of equal rights under law was achieved in only a handful of states before the Civil War, the egalitarian position had captured the imagination of the North's rising political party. This could only have been possible with widespread, albeit minority, support.

While minority support was not powerful enough, in most states, to realize its vision of full equality of Black and White before the law, it was strong enough to secure to northern free Blacks legal rights largely denied in the South. First, Blacks in northern states were presumed free, the reverse of southern law.[53] Free Negroes were generally allowed the right to live in or travel through northern states without the need for passes or other special documents.[54] Most northern states allowed Blacks to testify against Whites in court and to bring suits in their own name.[55] Usually northern states made provisions for the education of black children, most often in segregated schools in the large cities where Blacks were concentrated, sometimes in the common schools in rural areas and small towns.[56] Blacks in northern states

51. In an 1849 referendum in Wisconsin, 56% of voters approved a proposal to grant sufferage (5,265 to 4,075). Officials discounted the vote because large numbers of voters did not vote on the question. *See* Finkelman, *supra* note 14, at 478. Phyliss Field presents evidence that substantial precentages of northern Whites supported Black sufferage in referenda held after the war:

State or Territory	Year	Percentage of pro-suffrage vote
Colorado Territory	1865	10.6%
Connecticut	1865	44.6%
Wisconsin	1865	46.0%
Minnesota	1865	45.2%
Kansas	1867	34.9%
Ohio	1867	45.9%
Missouri	1868	42.7%
Iowa	1868	56.5%
Minnesota	1868	56.8%

See Field, *supra* note 44, at 199. In one state, Rhode Island, an equal suffrage provision actually won by a 3 to 1 margin. This occurred in 1842; the Black suffrage referendum carried by 3,157 to 1,004 votes. The lopsided pro-suffrage margin occurred for three reasons. First, nearly 700 Black men were allowed to participate in the vote. Second, opponents of Black suffrage had to write-in the word White on the proposed suffrage provision, and finally, there was a boycott of the election by the Suffrage Party, many whose supporters opposed Black suffrage. *See* Cottrol, *supra* note 15, at 108.

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

53. Finkelman, *supra* note 14, at 479.

54. *Id.*

55. *Id.* at 479-80.

56. Cottrol, *supra* note 16, at 63.

met with few legal restrictions in their choice of profession.[57] Blacks in northern states could own firearms and occasionally formed private militia companies.[58] Most importantly, the free Negroes of the North, whether they were in the handful of states that permitted Black suffrage or the larger number that did not, were usually able to combine with White egalitarians to press the cause of equal rights.[59]

In short, northern egalitarian sentiment was strong enough not only to make egalitarian politics possible, but also to support a legal status for free Blacks that was radically different from the one found in the slave states. Where southern law deemed free Blacks as people with minimal rights, rights only protected, if at all, by benevolent White men,[60] northern law saw free Negroes as people with a wide array of rights, rights nearly equal to those of Whites. Northern law recognized Blacks as having the right to organize politically, to press for even greater rights. Southern law severely limited that right.[61] Southern law regarded free Blacks with great suspicion, as an unwelcome, indeed unnatural group whose very existence challenged the existence of slavery. Indeed there were serious attempts throughout the antebellum period to either re-enslave or expel free Blacks in most southern states.[62] The debate over emancipation was, in large part, a clash of those conflicting visions.

II. Towards Citizenship, Towards Freedom

That clash was visible early during Abraham Lincoln's presidency. Lincoln's abhorrence of slavery had not, at least by the beginning of his presidency, transformed him into an advocate of Black rights. Quite the contrary, Lincoln feared that emancipation would bring pressure for equal rights and a resulting increase in racial friction. He turned to a solution that had long been advocated by those somewhat sympathetic to emancipation but stridently opposed to Black equality and citizenship — colonization. In 1862, Lincoln addressed a free Black audience in Washington, recommending that they accept colonization in the western hemisphere.[63] Using money appropriated in the District of Columbia Emancipation Statute, the Lincoln administration began a test program of voluntary colonization in Haiti.[64]

But the Lincoln administration moved in different directions with respect to the status of free Blacks. In 1862, the same year Lincoln made the case for colonization to a free Black audience, Attorney General Edward Bates issued the first of his opinions that free Blacks were citizens and therefore entitled to military commissions, ships' licenses and pay and bounties equal to those given White troops.[65] Bates' view challenged Justice Taney's opinion in Dred Scott and confirmed the view long urged by free Blacks and northern White

57. Finkelman, *supra* note 14, at 476.
58. Cottrol, *supra* note 16, at 63.
59. *See* Curry, *supra* note 12, at 217-24.
60. Berlin, *supra* note 23, at 339.
61. *Id* at 182-3; Genovese, *supra* note 24, at 399.
62. J. McPherson, The Negro's Civil War: How American Negroes Felt and Acted During the War for the Union 89-92 (1965).
63. *Id.*
64. *Id.*
65. 10 Op. Att'y Gen. 382 (1862); 11 Op. Att'y Gen. 37 (1864).

egalitarians.[66] His view helped move the executive branch further towards the egalitarian posture.

Perhaps no issue or set of issues prior to the passage of the thirteenth amendment better illustrates the clash of the two visions of Black freedom than the debates concerning emancipation and civil rights in the District of Columbia and other federal jurisdictions. The District of Columbia had been slave territory before the Civil War and the status of free Negroes there had followed general southern patterns. Blacks, slave and free, could not testify against Whites.[67] Blacks were subject to status legislation, specifying curfews and discriminatory punishments for offenses against public order.[68] Public supported education was denied free Black children and a bill to establish public schools for the children of Washington's free Negro community failed in Congress just before the Civil War.[69] Although free Blacks were taxed, Black men were prohibited by statute from voting or serving as jurors.[70]

Those legal disabilities began to meet serious challenge in the Thirty-seventh Congress. The District of Columbia Emancipation Bill, which was debated in the spring of 1862, was as much a contest between proponents of the egalitarian view of emancipation and that view's opponents as it was a simple contest over abolition in the nation's capital. As the bill was debated, a range of proposals were offered. One measure would have required forced colonization of District of Columbia freedmen. Another would have removed limitations on Black testimony, allowed Black children access to public education and eliminated special curfews and punishments for Blacks. Democratic Senator Garret Davis of Kentucky proposed a forced colonization amendment to the emancipation bill arguing that Blacks would not voluntarily leave and that once emancipation occurred the freedmen would sink into idleness and vice. His proposition failed to pass the Senate by a vote of 19 to 19.[71]

The failure of Davis' forced colonization measure was only part of a larger set of victories garnered by pro-egalitarian forces in the spring of 1862. In May, a bill establishing public schools in the District of Columbia for Black children was passed.[72] Attached to that legislation was an equal rights provision that eliminated special curfews for Blacks and different penalties for Blacks and Whites.[73] Further legislation passed in July of 1862 allowed Blacks to testify as witnesses against Whites in court proceedings and permitted Blacks to sue Whites, eliminating previous civil disabilities.[74]

Other measures passed during the war illustrate the breadth of the egalitarian vision. An 1863 act extending the charter of the Alexandria and Washington Railroad Company prohibited racial discrimination in seating.[75] Similar legislation, passed in 1865, prohibited racial discrimination in seating

66. *See supra* note 23.

67. THE RECONSTRUCTION AMENDMENTS DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH AND 15TH AMENDMENTS (A. Avins ed. 1967) [hereinafter RECONSTRUCTION DEBATES].

68. *Id.* at 33-34.

69. *Id.* at 20-28.

70. *Id.* at 34.

71. *Id.* at 32-39.

72. Act of May 21, 1862, ch. 83, 12 Stat. 407 (1862).

73. *Id.*

74. *Id.*

75. RECONSTRUCTION DEBATES *supra* note 67, at 805.

in Washington D.C. streetcars.[76] An 1864 statute made Blacks competent as witnesses and parties in all federal courts, reversing the previous practice of following the state law in which a federal court was situated.[77] In 1865, legislation limiting employment as mail carriers to White men was repealed.[78]

These Congressional enactments, while important in their own right, are even more important as indicators of what Republican Congressmen who subscribed to the egalitarian vision believed emancipation allowed them to do, at least in territory where Congress held municipal authority. The debates over these measures and others that failed to pass, illustrate the strong Republican commitment to two propositions. First, free Blacks were citizens and indeed had been since the founding of the Republic[79] and secondly abolition of slavery perforce meant of civil rights—the right to travel to or through any state, the right to contract, the right to have families, the right to testify against Whites in court and the right to sue and be sued—were to be granted.[80] Even more remarkable was the forthright embrace of Black suffrage by many Republicans in Congressional debates despite the often strong opposition suffrage proposals met in northern states and despite the jeers of their Democratic colleagues, particularly those from the border states.[81]

The Republican position concerning emancipation and civil rights in federal jurisdictions during the Civil War should again cause us to reconsider long held notions that the triumph of equal rights under law that was Reconstruction can simply be explained as a power play, an effort to punish the South and insure Republican hegemony through Black enfranchisement.[82] These notions are true in part. Still, the measures passed during the war, before the passage of the thirteenth amendment must be seen largely as the product of the egalitarian vision. Strong advocacy of Black rights, constant reiterations of the view that Blacks were citizens, and of course, expressing opinions that Black suffrage was desirable, scarcely advanced partisan Republican interests. Indeed a Black suffrage measure for the District of Columbia was proposed and debated before the 1864 elections, at a time when it could only hurt Republican interests.[83] These measures illustrate the depth of commitment to the egalitarian vision. The view that emancipation conferred citizenship, an undeniable minimum of civil rights and the ability to legislate, at least in federal jurisdictions, for full legal equality was a grafting of the northern vision of free Black status onto the nation at large. Understanding this is critical to our understanding of what the leading proponents of the thirteenth amendment believed that provision enabled them to do.[84]

76. Act of March 3, 1865, ch. 119, § 5, 13 Stat. 537 (1865).

77. *Id.* at 361.

78. *Id.* at 515.

79. *See* note 24, *supra*. Justice Curtis' point was constantly reiterated by Republican Congressmen during the debates. For example see Representative Bingham's remarks during the District of Columbia Emancipation debates on April 11, 1862. RECONSTRUCTION DEBATES *supra* note 67, at 37-38.

80. RECONSTRUCTION DEBATES *supra* note 67, at 44-56.

81. *Id.* at 70-75.

82. *See supra* note 10.

83. *See* RECONSTRUCTION DEBATES *supra* note 67, at 70-5.

84. The Thirteenth Amendment reads:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

A. *The Necessary Corrollaries*

By 1865, the year of the thirteenth amendment's adoption, considerable progress had been made towards acceptance of the northern egalitarian view. Lincoln had changed. The antislavery racist who assumed office in 1861 had softened his views considerably. The war, the efforts of 200,000 Black troops serving with union forces, perhaps even his personal friendship with Fredrick Douglas had turned the conservative Republican into a qualified egalitarian.[85] By 1864 he had abandoned his efforts at Negro colonization.[86] His War Department had granted military commissions to 100 Black men, not counting chaplains, a recognition of free Negro citizenship that would have been inconceivable earlier in the war.[87] He even gave some thought to appointing Fredrick Douglas as a general in charge of recruiting Black troops.[88] Shortly before he was assassinated he expressed support for limited Black suffrage, a strong indication of the intellectual and moral distance he had travelled during and because of the war.[89]

Others had travelled a similar distance. The debates over the thirteenth amendment that year indicated that both the provision's opponents and proponents recognized it as something more than a simple emancipation amendment. In the House of Representatives, Mallory, a Union Democrat from Kentucky, who had previously argued that the real purpose of the thirteenth amendment was to permit the Republicans to pass legislation exempting the freedmen from state law, argued that the amendment would authorize Congress to interfere with state authority through Reconstruction measures ostensibly designed to protect the freedmen.[90] Representative Cox, a Democrat from Ohio, argued against the amendment on the grounds that abolition for all intents and purposes had been achieved as a result of the war. He argued that the amendment was simply a subterfuge designed to permit Black enfranchisement and he expressed his fear that section 2 of the amendment would permit Congress to void White only suffrage statutes.[91] In the debates, he invited Pennsylvania Republican Thaddeus Stevens to give up his support for racial equality and accept an inferior, though free status for Blacks, Stevens refused.[92]

Both the debates and subsequent legislation indicate that the opponents of the thirteenth amendment were correctly reading the intentions of the leading proponents of the constitutional provision. During the debates on the amendment, the advocates of constitutional change stressed their view that the amendment went beyond simple abolition.[93] Some indicated that abolition would restore freedom to Whites as well as Blacks as they recalled the history of the South's denial of free speech rights to abolitionists before the war.[94]

Section 2. Congress shall have power to enforce this article by appropriate legislation.

85. Cottrol, *Static History and Brittle Jurisprudence: Raoul Berger and the Problem of Constitutional Methodology*, 26 B.C.L. REV. 353, 367 (1985).

86. *Id.*

87. *Id.*

88. P. FONER, FREDERICK DOUGLAS 217 (1969).

89. *Id.*

90. RECONSTRUCTION DEBATES *supra* note 67, at 76.

91. *Id.* at 81. *See also supra* note 84.

92. *Id.*

93. *Id.* at 76-86.

94. *Id.*

Others stressed that in order for abolition to be given full effect Congress would have to guarantee and guard the rights of the freedmen against a predatory south.[95] During the debates, Representative William Kelly, a Pennsylvania Republican, made the case for viewing the thirteenth amendment as a device that would permit broad Congressional protection of both freedmen and White southern unionists:

> Where will they find an unprejudiced judge and an impartial jury to vindicate their innocence when falsely accused or maintain their right to character and property? We must remember that it is the power and not the spirit of the rebellion that we are conquering . . . The truly loyal White men of the insurrectionary districts need the sympathy and political support of all the loyal people among whom they dwell, and unless we give it to them we place them as abjectly at the feet of those who are now in arms against us as we do the Negro whom their oppressors so despise . . . .
>
> This is felt in the South. The black man already rejoices in the fact that, if we are guilty of so great a crime as this, he will not be alone in his suffering; it will not be his prayers or his curses only that will penetrate the ear of an avenging God against those who had been false to his teaching and every principle they professed. . . .[96]

B. *Southern Fear*

The view that the thirteenth amendment authorized Congress to take measures that went beyond simple abolition found expression in measures taken early on by the 39th Congress. A report presented to Congress in December of 1865 by Carl Schurz reaffirmed the worst fears of those who believed the South would not acquiese in emancipation but would instead try either to reinstate slavery or impose the severe civil disabilities of the antebellum South on free Negros.[97] Schurz' report revealed southern efforts to force freedmen to continue working for their former masters, southern reluctance to allow education for Black children and the unwillingness of southern Whites to consider Black suffrage or the right of Blacks to testify in court.[98] That same month, Republican Senator Henry Wilson of Massachusetts introduced legislation that ultimately formed the basis of the Civil Rights Act of 1866. The proposed legislation called for the elimination of discriminatory statutes in the formerly rebellious states.[99] Wilson expressed the opinion that the rebellious status of the southern states coupled with the enabling provisions of section 2 of the thirteenth amendment permitted Congress to overturn discriminatory state legislation.[100]

Others supported Wilson's view that section 2 of the amendment gave Congress what was then regarded as revolutionary powers to interfere with state law. John Sherman, a Republican Senator from Ohio, agreed with Wilson, however, he sought official confirmation from the Secretary of State that the thirteenth amendment had in fact been ratified.[101] In his view, without Congressional action emancipation would be meaningless:

95. *Id.* at 85.
96. *Id.*
97. *See supra* nn. 59-61 and accompanying text.
98. RECONSTRUCTION DEBATES *supra* note 67, at 88-94.
99. *Id.* at 95.
100. *Id.* at 97.
101. *Id.*

> This section secures to every man within the United States liberty in its broadest terms. The second section provides that:
>
> Congress shall have the power to enforce this article by appropriate legislation.
>
> Here is not only a guarantee of liberty to every inhabitant of the United States, but an express grant of power to Congress to secure this liberty by appropriate legislation. Now, unless a man be free without the right to sue and be sued, to plead and be impleaded, to acquire and hold property and to testify in a court of justice, then Congress has the power by the express terms of this amendment to secure all these rights. To say that a man is a freedman and yet is not able to assert and maintain his right, in a court of justice, is a negation of terms. Therefore the power is expressly given to Congress to secure all their rights of freedom by appropriate legislation.[102]

Sherman went on to explain why lack of similar enforcement provisions had rendered the privileges and immunities clause useless.

> This clause gives to the citizen of Massachusetts, whatever may be his color, the right of a citizen of South Carolina, to come and go precisely like any other citizen. There never was any doubt about the construction of this clause of the Constitution . . . but the trouble was in enforcing this constitutional provision.[103]

III. CONCLUSION

Ultimately the thirty-ninth Congress, would go a long way towards realizing the Republican egalitarian vision. Using section 2 of the thirteenth amendment and Congress' municipal authority over federal territory, including the recently rebellious South, Congress began to institute the antebellum northern egalitarian agenda throughout the nation. The Civil Rights Act of 1866 unambiguously specified a nonracial definition of citizenship and guaranteed certain civil rights to the freedmen, state law notwithstanding.[104] Legislation passed later that year granted suffrage to Blacks in the District of Columbia and federal territories.[105] Legislation passed in 1867 granted Black males the right to vote in the southern states as these states were being readmitted into the union.[106] These legislative victories stand as convincing testimony to the far reaching vision of the thirteenth amendment.

102. *Id.*
103. The Civil Rights Act, ch. 31, 14 Stat. 27 (1866).
104. RECONSTRUCTION DEBATES at 372-376.
105. *Id.* at 429.
106. *Id.* at 429.