Ball State University

DESIGN AND DISTORTION:
AN HISTORICAL ANALYSIS OF THE
EQUAL PROTECTION CLAUSE

- Lesley A. Meade

May 28, 1974

Submitted in partial fulfillment of the requirements of the University Honors Program.
"'All men are created equal,' not in stature, not in intellectual power, not in wealth, not in social position, not in political privileges, but equal in respect to those rights which are as universal as the material structure of man, as imperishable as his immortal nature, and to protect, not to confer which, all good Governments are instituted among men."

--Rep. John A. Bingham
The element of egalitarianism in our democratic system of government has, in the last 108 years, come to center upon a much-misinterpreted clause of the first section of the Fourteenth Amendment. That section states that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Italics mine.)

By interpretation and reinterpretation the Supreme Court has managed to manipulate the meaning of these words so as to permit interference by the federal government into areas of state and personal liberties. The courts have become the judges of not only our civil disagreements, but of the conduct of our daily lives as well.

The right of the citizens of a state to determine for themselves the construction of their own state government, the right of citizens to send their children to the schools of the district in which they live, the right of the individual to be free from racial discrimination by governmental agencies, and the right of the state to enact and enforce such laws as it deems necessary and proper for the protection of its citizens' safety and well-being have all been intruded upon by the gradual centralization of governmental power at the federal level. By tracing the interpretation of the Equal Pro-
tection Clause from its inception to the present, it will be shown how the Supreme Court has, in the name of equality, progressively encroached upon what had previously been understood to be state and individual rights.

There can be little doubt that what has attracted the Court, and modern egalitarians in general, to the Equal Protection Clause is the presence of the word "equal." With this weapon in hand, they are able to bludgeon the society at large into acceptance of their doctrines of wholesale equality in areas of personal liberty to which the concept of equality simply does not apply. The Court's interpretations and applications of the Equal Protection Clause run counter to the American libertarian tradition. By focusing their attention upon just one word, the Court has seriously distorted the original meaning given to it by the framers.

The Setting of the Fourteenth Amendment. As the most tragic chapter in American history drew to as close, the changes that it had wrought were too numerous to be counted. Hundreds of thousands of men had died - not to mention civilian women and children, over a million soldiers had been listed as casualties, the war debt for the Union alone would eventually total $17 billion, and the loss in personal property was beyond estimate. But the greatest changes would come about in the eleven states which had claimed secession rather than submit to the authority of the federal government. On these states the vengeance of the rest of the country would fall.
Reconstruction assumed two forms - presidential and congressional (or radical). With the death of Abraham Lincoln, the dominating moral force in the country, and the succession of Andrew Johnson, the balance of power swung heavily in favor of the Congress. Reconstruction would be administered from the Capitol, and Presidential attempts to control it were destined to fail. Once Congress convened in December of 1965, all but one of Johnson's attempts to moderate Reconstruction were in vain.

On December 4, 1865, on the motion of Thaddeus Stevens, of Pennsylvania, the House of Representatives passed as resolution providing:

That a joint committee of fifteen members shall be appointed, nine of whom shall be members of the House, and six members of the Senate, who shall inquire into the condition of the States which formed the so-called Confederate States of America, and report whether they, or any of them, are entitled to be represented in either House of Congress . . . and all papers relating to the representation of said States shall be referred to the said Committee without debate.

On December 12, 1965, the Senate passed a similar resolution, the amendments to which the House concurred the next day.

The membership of the Committee included William Fessenden, of Maine, who would serve as chairman; James W. Grimes, of Iowa; Ira Harris, of New York; Jacob M. Howard, of Michigan; Reverdy Johnson, of Maryland; and George H. Williams, of Oregon, from the Senate. House members included Stevens; Elihu B. Washburne, of Illinois; Justin S. Morrill, of Vermont; Henry Grider, of Kentucky; John A. Bingham of Ohio; Roscoe Conkling, of New York; George S. Boutwell, of
Massachusetts; Henry T. Blow, of Missouri; and Andrew J. Rogers, of New Jersey. Of these, Stevens, Bingham, Conkling, and Boutwell were all avowed Radical Republicans, and in the months following they would, for a number of reasons, be joined in attitude by many of the moderates on the Committee.

Having suffered through four years of war, many Northerners were ready to exact payment for their hardships from the vanquished southern states. They were not about to see the fruits of victory thrown away by a liberal Reconstruction policy. They saw the "Black Codes" adopted throughout the south as a covert attempt to undermine the recently-passed Thirteenth Amendment. The murder of President Lincoln was considered by many Northerners a southern plot.

But perhaps more than any other reason, the North in general and its representatives in Congress began to side to a greater degree with the Radicals as a reaction to the political blundering of President Johnson. Accused of being an alcoholic after delivering his inaugural address partially inebriated, embarrassing not only Lincoln but also the Republicans who had managed to put him on the ticket, Johnson found himself President and fighting with Congress for control of Reconstruction only a month later. Struggling to carry out the program of moderation initiated by Lincoln, Johnson simply lacked the character and personality which would have been necessary to offset the public clamor for a vindictive Recon-
struction. His coarse manners, the bitterness of his speech, and his attacks on all who differed with him drove many a moderate into the arms of the Radicals. Indeed, by February 22, 1866, he had come to the point of calling Charles Sumner, Wendell Phillips, and Stevens "traitors" and hinted that they were plotting his assassination. 5

On the Saturday before Congress resumed in December of 1865, a caucus of Republican members of the House was held, with Thaddeus Stevens assuming leadership. He presented a three-part plan to the caucus which was agreed to without objection. The plan called for Congress to assert that:

(1) the business of Reconstruction was its own exclusively,
(2) the measures taken thusfar by President Johnson were temporary and subject to review by Congress, and
(3) each house should exercise its function in the approval or disapproval of representatives elected to it from the southern states. 6 Thus, the stage was set for the fight between the President and Congress for the power to determine Reconstruction policy.

Early Attempts to Formulate an Amendment. On December 5, 1865, the second day of the session of Congress, Stevens introduced a joint resolution proposing an amendment to the Constitution which stated that:

All national and state laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race or color. 7

But the following day, another joint resolution was proposed, this time by John A. Bingham, which stated:
The Congress shall have power to make all laws necessary and proper to secure to all persons in every state within this Union equal protection in their rights of life, liberty and property.

Stevens' proposal was generally forgotten and the Committee would focus their attention on Bingham's amendment.

By February 3, 1866, the Committee had reached a general understanding of Bingham's proposed Amendment which at this point read, due to various amendments:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty and property.

On February 26, 1866, this proposal was introduced by Representative Bingham on the floor of the House. In his remarks, Bingham left no doubt as to what his construction of the proposed Amendment was. He intended this Amendment to alleviate the defect of the Republic which had existed since the inception of the Constitution; that there had been no express grant of power to Congress to enforce the requirements of the Constitution. Instead, the enforcement had been left to the fidelity of state governments, Bingham argued, which had often been lax in their duty. In other words, it would give Congress the power to enforce the Bill of Rights - a construction which would be given to the Fourteenth Amendment many years later by Justice Hugo Black.

Congressman Bingham's proposal met strong opposition
in the House. Representative W. D. Kelley, of Pennsylvania, objected on the grounds that the power which the Amendment would confer already existed in the federal government, but had lain dormant all these years. Representative R. S. Hale, of New York, objected, declaring that the Amendment was vague, general, and undermined state rights to enact legislation and bring about reform. Representative T. T. Davis agreed with Rep. Hale, but Representative G. W. Hotchkiss thought that it did not go far enough. He wanted to restrict the states in discriminating against any group of citizens, not just Negroes. It was finally decided to postpone the measure until April, but in April it was never brought up. This proposal thus died on the table and Bingham was left to reformulate his ideas in committee.

The Freedmen's Bureau Bill and the Civil Rights Bill. The first major move by Congress to assume control of Reconstruction was the Freedmen's Bureau Bill of 1866. Introduced by Senator Lyman Trumbull, of Illinois, the bill was sent not to the Joint Committee of Fifteen on Reconstruction, but rather to the Judiciary Committee, of which Trumbull was chairman. It was reported back just six days later, on January 11, 1866.

The bill would have extended the life of the Freedmen's Bureau indefinitely. The Bureau had been created ten months earlier for the relief of the newly-freed Negro. But the
new bill greatly expanded the powers and duties of the Bureau. The seventh section of the bill ordered that the President now had the duty to extend military protection and jurisdiction to all Negroes who were denied any civil rights or immunities which white men held by local law or custom. It also made it a misdemeanor for any person to deprive another of the various civil rights which the bill enumerated. These included the right to make and enforce contracts; to sue, be parties in a suit, and give evidence; to inherit, purchase, sell, hold, and convey property; and to have the full and equal benefit of all laws and proceedings for the security of person and estate. In other words, any person accused (an indictment or presentment was not necessary, incidentally) of depriving any of these civil rights to freedmen would automatically be tried by a military tribunal. Moreover, these provisions of the bill were to apply only in those areas of the country which had had their regular judicial proceedings interrupted by the war—i.e., the southern states. What had originally been an emergency wartime measure for the relief of former slaves, had been expanded to fit the schemes of a vindictive North.

The constitutional objections to the bill were not long in coming. First, the bill violated the Fifth Amendment which established procedural protections for those accused of a crime. Second, it violated the implied guarantee of a civil tribunal except in time of war. And lastly, it pre-
sumed to protect rights and liberties which had clearly been left to state protection in the Constitution. These objections and others were cited by President Johnson when he vetoed the bill. The veto was upheld in Congress by a narrow margin. Johnson still held the last vestiges of Presidential control over Reconstruction, but that was soon to change.

Senator Trumbull had offered a companion bill to the Freedmen's Bureau Bill, which had also been assigned to his committee. Insenced by the failure of the first bill, the "Radicals were determined to see that the Civil Rights Bill should become law. To this end, the party whip was used to bring Republicans into line with telling effect."

The main provision of the Civil Rights Bill which had not been incorporated into the Freedmen's Bureau Bill declared that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed," were citizens. This ran in direct contradiction to the Dred Scott decision, which held that Negroes could not hold federal citizenship. It is important to bear in mind that for Congress to overturn a Supreme Court ruling, a Constitutional amendment is necessary because any subsequent act of Congress to the contrary will just be held unconstitutional. However, the Radicals evidently believed that the passage of this bill would overturn the Dred Scott decision.

Several conservatives, Reverdy Johnson among them, pointed out that the provisions for bringing private rights
under federal jurisdiction were open to the same constitutional objections that the Freedmen's Bureau Bill had fallen to.\(^\text{17}\) Indeed, President Johnson shared the opinion of the conservatives and vetoed the bill, but this time the Radicals had drummed up sufficient support to override the veto. With the passage of the Civil Rights Bill of 1866, the President lost all control over Reconstruction to Congress. Senator Trumbull's ego was satisfied by the passage of the second bill, and the power fell into the hands of the Radical-dominated Joint Committee of Fifteen on Reconstruction. The Committee now had the power, and Johnson was on the road to impeachment.

Representative Bingham had joined with Democrats in challenging the constitutionality of the Civil Rights Bill on the grounds that Congress had no constitutional power to protect citizens with a penal code.\(^\text{18}\)

The protection of the citizen in that respect was left to the respective States, and there the power is today . . . I have always believed that the protection in time of peace within the States of all the rights of persons and citizens was one of the powers reserved to the States.\(^\text{17}\)

Bingham clearly held to his earlier purpose of securing the necessary governmental changes through constitutional amendment. He did not differ so much in goals with Trumbull and his supporters, but rather in means.

Bingham's big move came on April 21, 1866, while the Committee was working on an omnibus constitutional amendment which would prohibit discrimination by the states, particularly in the area of suffrage; disclaim any debts incurred in aid of the confederacy; and give Congress power to enforce
States debt, including debts incurred for payment of pensions and bounties, the repudiation of all rebel debts and a constitutional denial of the validity of claims for slaves emancipated or property destroyed during the war;

(3) Exclusion of the more prominent rebels from office;

(4) A more equitable basis of representation, so that the vote of a southern "traitor" should not equal the votes of two loyal soldiers in the North.21

Of these four goals, only the first is truly important for this consideration because it was to this end that the Equal Protection Clause was directed. It was the first section of the Amendment that would, in the minds of the framers, rectify the injustice of unequal civil rights. But what were these civil rights which the Congress sought to protect for the freedman from the hostility and cruelty of southern whites? It is in this context that the meaning of the Equal Protection Clause first comes clear.

Thaddeus Stevens opened the debate on the resolution on May 8, 1866, saying that the resolution was not what he personally would have wanted, but rather was the product of compromise and concession, the normal give and take of the Committee. Nor was it actually what the Committee wanted. It was, in effect, simply what would pass. Stevens would have preferred an Amendment prohibiting any and all discrimination in state or federal legislation on the grounds of race or color, but feared that the states would not ratify it.22

Stevens stated that the first section embodied nothing
that was not already embodied in the Constitution or the Declaration of Independence.

But the Constitution limits only the action of Congress, and is not a limitation on the States. This Amendment supplies that defect and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all.

He continued by stating that the provisions of the first section had already been enacted by the passage of the Civil Rights Act; it would serve to abolish the Black Codes which had been established throughout the South. But it was necessary, from Stevens' point of view to place these provisions beyond the reach of Congress so that the Democrats, when they might regain Congressional control, could not repeal them.

Stevens also gave construction to the Equal Protection Clause. When asked of its meaning, he answered that it provided that:

Whatever law protects the white man shall afford "equal protection to the black man. Whatever means of redress is afforded to one shall be afforded to all."

The key here is the emphasis placed upon protection, a concept that will be dealt with in detail later.

The debate on the resolution that followed for the next two days reveals many of the sentiments of the day. Representative W. E. Finck, from Ohio, declared that if it was necessary to pass the first section in order to give Congress the power to legislate in matters involving the pro-
tection of citizens from state laws which might deprive them of Constitutional liberties, then the Civil Rights Bill was very clearly unconstitutional. Representative James Garfield answered Finck by contending, along with Stevens, that section one was designed only to put these provisions beyond any chance of repeal. In this sense, the first section merely incorporated the Civil Rights Bill into the Constitution, they asserted. Representative M. R. Thayer, of Pennsylvania, also chimed in to endorse the section in this regard.

The first Democrat to address comments to the amendment's first section was Representative Benjamin M. Boyer, of Pennsylvania. He objected to the section by saying that it did more than just incorporate the Civil Rights Bill into the Constitution; it was designed instead to ultimately secure the political equality of Negroes. This he found highly objectionable. Another Democrat found the Amendment objectionable in comments the next day. Representative George S. Shanklin declared that the purpose of the first section was very clearly to destroy the distinction made by the founding fathers as to which powers should be yielded to the federal government and which should be retained by the states. It was a deliberate attempt to undermine the state governments and to vest all power in the General Government.

The next day, Representative Rogers, of New Jersey, a minority member of the Joint Committee of Fifteen, rose to make his party's concluding statements. Rogers criticized
each section of the Amendment, but attacked the first most of all.

I have come to the conclusion that the first section of this programme of disunion is the most dangerous to liberty. It saps the foundation of the Government; it destroys the elementary principles of the States; it consolidates everything into one imperial despotism; it annihilates all the rights which lie at the foundation of the Union of the States, and which have characterized this Government and made it prosperous and great during the long period of its existence.

Rogers continued, saying that it was an "attempt to embody in the Constitution of the United States that outrageous and miserable Civil Rights Bill." Should it ever become a part of the Constitution, he warned, section one would "prevent any State from refusing anything to anybody." Rogers went so far as to suggest that it would give the federal government the power to interfere in areas of law previously controlled by the states such as voting rights, marriages, the right to contract, and jury selection. In each case, as will be seen later, Rep. Rogers' prophecy was accurate.

Not long after Rogers had taken the first section of the proposed Amendment to task, its author rose to its defense. The provisions of section one, Bingham said, were intended to give Congress the power to do what it previously had no power to accomplish. It would alleviate the lack in the Constitution of the power of the people to accomplish by congressional enactment what they previously could not do. That is:
to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any state.

The states had not protected its citizens in regard to life, liberty, and property, and this section was intended to insure equal protection in the future.  

Answering Rep. Rogers, Bingham asserted that the first section gave no power to Congress to regulate suffrage. Instead, the purpose was to make it possible for Congress to enforce the Federal Bill of Rights in the states.

... many instances of state injustice and oppression have already occurred in the state legislation of the Union, of flagrant violations of the guaranteed privileges of citizens of the United States, for which the National Government furnished and could furnish by law no remedy whatever.

Bingham's design for the first section of the resolution was clearly the same as that of the resolution he had introduced in February - to make the Bill of Rights applicable to the states. Bingham stated that "contrary to the express letter of your Constitution, 'cruel and unusual punishments' have been inflicted under state laws" for which the federal government had no power to provide a remedy. His citation of the Eighth Amendment lends credence to the argument that the first section of the resolution would also apply to Amendments One through Seven.

The vote was taken immediately after Bingham's speech,
so it may be assumed that the members were aware of the author's construction of the first section. Indeed, the debate shows that there was little, if any, difference of opinion as to what the first section was designed to do. Rogers and Bingham were, in effect, in agreement that it was to incorporate the Civil Rights Bill into the Constitution and to make the Constitution and the Bill of Rights applicable to the states. On these facts they agreed. But they were diametrically opposed as to the wisdom of such a reform and its consequences.

The joint resolution was then put to a vote in the afternoon of May 10, and was passed by a vote of 128 to 37 in the form in which it was reported from committee. Conservative Democrats had sided with Radical Republicans to end all debate and prevent amendments in order to make the resolution as objectionable as possible to the Senate and the states, but their strategy failed.

Debate on the resolution began in the Senate on May 23, 1866. Senator Fessenden had planned to take charge of the measure which had come from his committee, but an untimely illness caused that responsibility to fall initially on Senator Howard, a member of the Joint Committee.

Howard began by stating that the intention of the first section was to impose a prohibition upon the states "from abridging the privileges and immunities of the citizens of the United States." He quoted at length from the decision
in Corfield v. Coryell\textsuperscript{32} to show what those privileges were. "To these privileges and immunities," he continued, "should be added the personal rights guaranteed and secured by the first eight Amendments to the Constitution." Congress had no power to insure that the states would not violate the provisions of the Bill of Rights.

The great object of the first section of this Amendment is, therefore, to restrain the power of the states to respect these fundamental guarantees.

Congress was in need of a Constitutional provision making it possible for it to enact laws protecting citizens from arbitrary and unjust state action, he argued.\textsuperscript{33}

Questions developed out of the uncertainty of the word "citizens," so on May 29, Howard moved by way of amendment that a definition precede the rest of section one reading,

\begin{quote}
All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside.
\end{quote}

This was the only change to section one as it now stands in the Constitution from the way it was introduced in the Committee by Rep. Bingham. Howard's definition of citizenship points out once again the intent of the resolution to render the states subservient to the national government. Just as federal law would determine the validity of state law, citizenship of a state would be determined by citizenship of the United States and mere residency. Previously, the states had deter-
mired their own citizenship and subsequently the citizenship of the United States. Law was now to emanate from the center, rather than grow from the roots.

The debate in the Senate was less remarkable than that of the House. Comments were more often than not trivial matters of detail or questions directed to Howard about the impact of the resolution on this or that. The Senate voted on the measure on June 8, 1866, and by a vote of 33 to 11 approved the Amendment. The House concurred in the amendments made by the Senate by a vote of 120 to 32, and the resolution was sent to the states for ratification.

The Reasoning Behind the Amendment. It is important to delve more thoroughly into the intent of the resolution and consider what its effect was designed to be. An understanding must be drawn as to what the new amendment would equalize and protect.

It has been shown that the Freedmen's Bureau Bill of 1866 was designed to provide military protection to all Negroes who were denied any civil rights or immunities which white men of that particular area held. Among these civil rights were the right to make and enforce contracts; the right to sue, be parties in a suit, and give evidence; the right to inherit, purchase, sell, hold, and convey property; and to have "full and equal benefit of all laws and proceedings for the security of person and estate."34 It has also been shown that Bingham's intention in the first section of the joint resolution was to remedy the constitutional flaws which had
made both the Freedmen's Bureau Bill and the Civil Rights Bill unconstitutional acts of Congress. He wanted to amend the Constitution in order to grant Congress the power to enact such legislation, and he wanted to implant these principles in the Constitution so that future Congresses could not undo his work. He shared Stevens' fear of the Democrats in this regard. But he also had some very definite ideas about what the Amendment, when ratified, would do.

In 1857, Bingham had made a distinction between "civil" rights and "mere political or conventional" rights. Civil rights were, for Bingham, the free and equal enjoyment of life, liberty, and property, which is the product of labor, subject only to restriction and deprivation by due process of law (judicial proceedings). Civil rights were far different from political rights. Civil rights were the "rights of human nature which belong to each member of the State, and cannot be forfeited but by crime." Political rights, on the other hand, were "subject to the control of the majority." Foremost among these political rights would be the right to vote, the right to run for public office, the right to attend public schools, and the right of access to public property and conveyances. Again, the Fourteenth Amendment was to protect "civil" not "political" rights.

In this light it can clearly be seen that the Equal Protection Clause was designed not to grant any new or additional rights. Citizens of the United States already held
civil rights. Instead, the Equal Protection Clause was intended to protect these rights from state action which might restrict their exercise. The emphasis on protection will be considered shortly.

Bingham also made a major point of the fact that the Constitution makes use of the word "person" rather than "citizen" in the Fifth Amendment.

The Constitution provides, ... that no person shall be deprived of life, liberty, or property without due process of law. It makes no distinction either on account of complexion or birth - it secures these rights to all persons within its exclusive jurisdiction. This is equality.

Consequently, civil rights had belonged to Negroes in the South ever since the ratification of the Constitution, according to Bingham. Now, however, Congress would have the power to ensure that those civil rights would be protected. Upon ratification of the Fourteenth Amendment, Congress would have the power to prohibit state interference in the exercise by Negroes of their rights to life, liberty, and property, subject only to the restraints of due process of law. Aliens would also be considered within the purview of "persons."

Traditionally, in any consideration of the Equal Protection Clause, the emphasis has fallen on the word "equal." This is, of course, why the clause has drawn the attention of the twentieth-century movement of egalitarianism. But a very good case can be made that the emphasis of the framers was on the word "protection," instead. Indeed, the clause takes on an entirely different meaning when read as "equal protection"
of the laws." In this light, the word "equal" becomes merely a modifier of the word "protection" and carries a meaning much closer in understanding to "not unfair" or "the same."

"Protection of the law," therefore, carries a completely different meaning from the way, as will be seen, it has been interpreted by the Supreme Court in the last century. It takes on a meaning not of guaranteeing that the law should not fall harder on one person than another, but rather that all persons should be equally protected by it. All persons (whites, Negroes, men, women, adults, children, rich, poor, citizens, and aliens, according to Bingham) would be equally entitled to the protection of their civil rights by the police and the courts - these being the agents of "protection."

Schools have nothing to do with civil rights and moreover do not "protect" anyone, so it is reasonable to assume that schools are not meant to be included. Buses, trains, and streetcars do not "protect" anyone's civil rights, so it is also reasonable to assume that they were not meant to be included either. The application of the Equal Protection Clause to these areas and to others, therefore, amounts to nothing more than the deliberate misinterpretation of the clause to meet a specific need of the Court to support its decisions. 39

Such, therefore, was the original understanding and the intent of the framers of the Equal Protection Clause of
the Fourteenth Amendment. It will be seen, however, that the Supreme Court in its application of the clause in the years since 1866 has clearly not felt itself bound to the authors' intentions. The Court has roamed far afield in its application of the Equal Protection Clause in order to justify and legitimate its decision. The intrusion of arbitrary judicial decision-making, which has developed along with the school of sociological jurisprudence, into a tradition of constitutionalism has served to produce an abomination of both.
PART TWO
The Fourteenth Amendment was ratified by the required three-fourths of the states and formally adopted on July 28, 1868. From this point on, the Equal Protection Clause meant whatever nine (or ten) men sitting on the Supreme Court said it meant.

The interpretation of the Equal Protection Clause has undergone a number of major changes. The following are a number of the more outstanding cases turned upon the clause. Rather than approaching the cases in strict chronological order, they have been grouped into areas of application. In this way, the enormous scope of the clause as it has been applied will be readily apparent. By keeping in mind the points made in the first part of this paper, it will also be apparent how drastically the Court has misapplied the Equal Protection Clause in order to secure civil, social, and political reforms that it deemed necessary or advisable.

The Early Cases. The first cases brought under the Fourteenth Amendment were the Slaughter-House Cases in 1873. The plaintiffs were owners of slaughter-houses in Louisiana who had been forced out of business by an unquestionably corrupt Reconstruction state government which had granted a monopoly in the slaughter-house business to just one firm. The plaintiffs argued that, among other things, the Louisiana statute abridged their privileges and immunities as citizens of the United States, and that it denied to them equal pro-
tection of the laws. But the Court declared that it lacked jurisdiction since the privileges and immunities that had been violated were those associated with state citizenship and were, therefore, not subject to interference in the granting of and care for by the federal government.

The Court apparently was merely ducking the issue. According to the language used by Rep. Bingham and others, the Court should have held with the plaintiffs. Their right to make contracts had clearly been unequally impaired as compared to other citizens. But to the Court the provisions of the Fourteenth Amendment were not meant to protect white Southerners. As Mr. Justice Miller stated in the decision:

We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class . . . will ever be held to come within the purview of this provision.

Justice Miller proved to be a very poor prophet, but in his and the Court's behalf it should be stated that the enormous scope of the first section of the Fourteenth Amendment was not popularly realized. The political sections of the Amendment had drawn far more attention all along and it might have been natural to give the first section a similarly narrow construction.

Ten years later, the Court once again turned its attention to the Fourteenth Amendment in its deliberation of the Civil Rights Cases. The cases involved the refusal of two theatre owners to admit Negroes, two hotel managers to accommodate Negroes, and a railroad conductor to allow a Negro woman to ride in the ladies' car. In each case the
Court held that the Fourteenth Amendment did not protect Negroes from private discrimination because just as the Bill of Rights places restrictions on the agencies of the federal government, the Fourteenth Amendment places restrictions on state governments. Nothing in the Constitution restricts the private citizen. Consequently, victims of "private discrimination" could seek no recourse in the courts.

An important dissenting opinion was that of Mr. Justice Harlan. His dissent was based on the premise that common carriers, places of temporary residence, and places of amusement were not "private persons." Their close cooperation with state governments and dependence upon them for licenses brought them within the scope of the Equal Protection Clause. Though this decision has never been formally reversed, the Court has developed means of circumventing it and adopting Justice Harlan's argument.

Perhaps one of the most well-known decisions handed down by the Court was that in the case of Plessy v. Ferguson. This case carried the reasoning of the Civil Rights Cases a step further by ruling that "separate but equal" accommodations in schools, parks, waiting rooms, public conveyances, rest rooms, etc. did not constitute a violation of equal protection. Again Justice Harlan, a Southerner incidentally, wrote a strong dissenting opinion. The rule established in this case would stand for almost sixty years.

Though this decision would become the focus of attack
for egalitarians in later years, the decision was entirely within the original understanding of the Equal Protection Clause. Had the Fourteenth Amendment stated that all segregation in schools, parks, and streetcars would become illegal, it is certainly doubtful at best that it would have even passed its initial test in the House. Thaddeus Stevens would have preferred such an amendment, but admitted that the resolution before the House was not it. The Equal Protection Clause in no way intended to put an end to segregation.

**Alien Discrimination.** One area of interpretation has only just recently acquired a construction similar to that of the framers; that is the area of discrimination against aliens. Rep. Bingham, as previously noted, intended aliens to be included in the offer made by the Fourteenth Amendment within the meaning of "any persons." That construction, however, has been a long time in evolving.

The first case in which the Supreme Court considered discrimination against aliens was McCready v. Virginia. In this case the Court upheld the right of Virginia to deny to all non-citizens (aliens and citizens of other states, alike) the right of its citizens to fish for oysters in its waters. This construction is very obviously a complete reversal of what Bingham and others had intended.

Yick Wo v. Hopkins represented the beginning of a
long transition. The city of San Francisco had passed an ordinance which required a license for those people running a laundry in a wooden building. Since nearly every building was wooden, this ordinance applied to nearly all laundries in the city. Oddly enough, the Court found that all of the laundries run by Chinese persons were denied licenses. The Court held the ordinance to be a violation of the Equal Protection Clause because it was applied so unequally. This was the first time that the Court held a state law or city ordinance to be unconstitutional under the Equal Protection Clause.

In Patstone v. Pennsylvania the Court retreated to its position in the McCready case by upholding the right of a state to prohibit aliens from hunting its game. The following year it also upheld the right of a state to limit employment on its public works to United States citizens in Heim v. McCall. But another case decided in the same term, Truax v. Raich, held that a state could not deny to an alien the right to employment in common occupations. A state could not deny to aliens the means of earning a livelihood. However, in Ohio ex rel. Clarke v. Deckebach the Court upheld a state law which denied to aliens the right to operate a pool hall. This, the Court determined, was not a "common occupation" within their meaning and claimed that the state might have a valid purpose of which the Court was not aware.
The state received the benefit of the doubt.

Alien discrimination has also been the objective of various state property statutes. In Terrace v. Thompson the Court upheld the alien land laws of the west coast states which forbid any person ineligible for United States citizenship to acquire agricultural land. To get around these laws, alien parents were paying for property acquired in the name of a native-born child. The states then moved to prohibit this practice by enacting legislation which prohibited persons ineligible for citizenship to pay for land sold to citizens. These laws, however, were held to be unconstitutional in the decision in Oyama v. California.

In 1948, the Court also returned to the ruling of the Patstone case in Takashi v. Fish and Game Commission. In this case the Court denounced the discriminatory distinctions in the state laws which had been upheld in the past and held unconstitutional a state law prohibiting ineligible aliens from obtaining commercial fishing licenses. The obiter dictum of the decision carried a statement which, in effect, extended to aliens the full protection of the Equal Protection Clause as its framers had intended.

Most recently, the Court in Sugarman v. Dougall held that the shelter of equal protection includes aliens who make their living in the common occupations of a community. The protection extended to such aliens would be as complete as that extended to citizens. As an expansion of the Truax decision, it involved more than just the right to
Discrimination in Public Facilities - Schools. After the decision in Plessy v. Ferguson, one would naturally assume that the Court would take it upon itself to see that the separate facilities were in fact equal. But in Cumming v. County Board of Education, decided only three years later, the Court found no denial of equal protection to sixty Negro children for whom the county had not built a high school. Though the county maintained a high school for white children, it contended that it could not afford to provide the Negro children with their own school. This argument that the county could not afford a black high school seemed sufficient for the Court and it held for the School Board. Likewise, in Gong Lum v. Rice the Court held that a Chinese child could be required to attend a school for Negro children in another school district, instead of being allowed to attend one for white children nearby. The injustice of being forced into another school district for racial reasons has been continued and only reversed in recent times.

The landmark case in the area of discrimination in the schools was Brown v. Board of Education of Topeka, decided in 1954. This decision stated that "separate educational facilities are inherently unequal." The Court held that segregation in public education is a deprivation.
of equal protection of the laws guaranteed by the Fourteenth Amendment. This case overturned and did away forever with the "separate but equal" rule of Plessy v. Ferguson. In a companion case, Bolling v. Sharpe, the Court applied the same rule to the District of Columbia.

This decision is open to attack from an historical viewpoint, because the framers of the Fourteenth Amendment in general did not consider the right to an education in the public schools a "civil right." Indeed, Bingham himself considered it to be a "conventional (or political) right" in the context previously discussed. However, in the eighty-six years between ratification of the Fourteenth Amendment and the Brown case, the education of children had become a requirement by law enforced upon parents. Consequently, as education became more and more widespread it came to be considered a right. Though not a "civil right" in the context already used, it was a "social right;" that is, a right acquired by membership in and bestowed by one's society. Social norms and standards to be enforced by Court decree began their sweep into Constitutional law through the opening provided by this decision.

The decision in Brown v. Board of Education of Topeka was widely denounced as being contrary to the principles of states' rights, state sovereignty, and local control of public education. Many states enacted statutes designed to circumvent the decision. Faced with a desegregation order, Prince Edward County in Virginia closed its public
schools entirely and provided financial support for segregated private schools. In Griffin v. School Board of Prince Edward County\textsuperscript{56} the Court held that the plan violated the Equal Protection Clause because it was constructed for the sole purpose of insuring that white and black children would attend separate schools.

But the desegregation order of Brown v. Board of Education has been interpreted by the lower courts as an order to \textit{integrate}, not \textit{desegregate}. From this twist have come the bussing orders. Once again children are being forced to attend a particular school simply because of their race. In Addabbo v. Donovan\textsuperscript{57} the parents of white children being bussed to a predominantly Negro school in order to achieve racial balance contended that their children were being moved solely on the basis of race. This, they argued, was in violation of the rule of Brown v. Board of Education. But the Warren Court denied certiorari and in effect upheld the lower court bussing order.

Discrimination in state colleges and graduate schools have had a separate development. In 1908, in Berea College v. Kentucky\textsuperscript{58} the Court held that a state could validly prohibit a private college from teaching whites and blacks together. This amounted to an extension of the "separate but equal" rule to education.

The big change came in 1938 with the decision in Missouri \textit{ex rel.} Gaines v. Canada.\textsuperscript{59} The state of Missouri
did not maintain a separate law school for blacks, but by state law the state would provide payment of tuition at the State University law schools of any adjacent state for its black citizens until such time as Missouri built a Negro law school. Gaines had applied to the Missouri Law School and had been refused admission, but was offered the tuition payments to any state law school in an adjoining state. The Court determined that Gaines had been rejected solely because he was black and that he had been denied equal protection.

The Court reaffirmed this ruling in Sipuel v. University of Oklahoma, stating:

>The petitioner is entitled to secure legal education afforded by a state institution . . . The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment.

This case was identical to the Gaines case except for the fact that the plaintiff was a female.

In 1950, the Court gave a hint of the coming Brown case in Sweatt v. Painter. In this case the Court held that under the Equal Protection Clause a Negro student could not be denied admission to graduate or professional education at a state university because of race, even if separate facilities are offered. The Court examined the facilities, faculty, and reputation of the Negro law school and found it to be lacking in substantial equality to that of the white state law school.
Decided in the same term of the Court as Sweatt v. Painter was McLaurin v. Oklahoma State Regents. McLaurin, a Negro, was admitted to the University of Oklahoma Graduate School, but was forced to sit in a specially designated row in the classroom, at a designated table in the library, and at a designated table in the cafeteria. The Court held that a Negro student must receive the same (my emphasis) treatment as other students. This case brought students under the protection of the Equal Protection Clause.

Discrimination in Public Facilities - Non-School. The Supreme Court was slightly better at insuring the equality of separate facilities outside of education in the years following Plessy v. Ferguson. In McCabe v. Atchison, T. & S. F. Ry. the Court held as a violation of equal protection an Oklahoma law allowing a railroad to carry sleeping, dining, and chair cars for the exclusive use of white passengers without providing the same accommodations for Negroes. Similarly, in Henderson v. U. S. the Court held that a railroad which reserved ten tables for white passengers and one for Negroes did so in violation of a federal law by subjecting the Negro passengers to undue prejudice and disadvantage. In 1955, the Court applied the desegregation rule of Brown v. Board of Education to public beaches in Baltimore v. Dawson and to public golf courses in Holmes v. Atlanta. But unlike the manner in which the rule was
applied in education, swimmers, sunbathers, and golfing foursomes were never subjected to the quotas of forced integration.

In the will of Stephen Girard, probated in 1831, a sum of money was left for a college to be established which would educate "poor white male orphans." The city of Philadelphia was named as trustee. In Pennsylvania v. Philadelphia,67 however, the board operating the college was determined by the Court to be an agency of the state of Pennsylvania. Consequently, the board's refusal to admit Negroes (and, I presume, women as well, though the case did not mention it) was a discriminatory act in violation of the Fourteenth Amendment.

In the cases Peterson v. Greenville68 and Lombard v. Louisiana69 the Court applied the Shelley doctrine (to be discussed more fully later) to luncheon counters. The doctrine prohibited enforcement by the state of private discrimination, because this would make the state a party in the discrimination. This amounted to an adoption of Justice Harlan's dissent in the Civil Rights Cases.

Jury Selection. One area in which the Court has been consistently true to the intentions of the framers of the Fourteenth Amendment is that of jury selection. It would appear that this is one area in which the guiding principles of the Constitution are truly ongoing and not subject to forces
of racial prejudice and historical reactionarianism.

Three important cases involving jury selection were decided in 1880. In *Strauder v. West Virginia*\(^7\) the Court held that a Negro was entitled to be tried by a jury from which Negroes had not been systematically restricted because of their race. But in *Virginia v. Rives*\(^1\) the Court held that a Negro is not entitled to have other Negroes on the jury hearing his case. In other words, the process of jury selection must be blind to the race of the prospective juror. In the third case, *Ex parte Virginia*\(^2\) the Court upheld the conviction of a county circuit court judge who had excluded Negroes from jury lists solely on the basis of race. The conviction had been made under a federal law prohibiting racial discrimination in the selection of jurors.

In 1935, in *Norris v. Alabama*\(^3\) the Court held that the petitioner, along with eight other Negro boys, had been denied equal protection of the laws due to the fact that Negroes had been systematically barred from jury duty in state courts. According to uncontradicted testimony, no Negro had been called for jury duty in the history of Jackson County. The Court held this to be a prima facie case of denial of equal protection.

The Court carried the rule of the Norris case on and in *Hill v. Texas*\(^4\) ruled that the burden of proof in a case charging racial discrimination in jury selection was not to be borne by the Negro defendant. Instead, the state
bore the obligation of proving otherwise. In this case, the fact that no Negro had served on a grand jury in the county for at least sixteen years constituted a prima facie case of discrimination. But two years later the Court reasserted the Rives rule saying in Akins v. Texas\textsuperscript{75} that no race or group is entitled to proportional representation on juries in order to insure equal protection. Once again the Court was establishing a balance between one rule and the other.

In Cassell v. Texas\textsuperscript{76} the Court once more reached back to the Stauder doctrine by holding that jury commissioners had denied equal protection even though Negroes had appeared on jury lists. Equal protection had been denied, the Court held, because the commissioners selected jurymen from personal acquaintances, and they had failed to acquaint themselves with the qualifications of prospective Negro jurors.

Three years later, however, in Brown v. Allen\textsuperscript{77} the Court took a more conservative tone and held that juries selected from tax rolls with those with the most property chosen first, does not constitute racial discrimination even though more whites appear on the jury lists than Negroes. Later in the same year, the Court tempered this ruling with the decision in Avery v. Georgia.\textsuperscript{78} In this case the Court found evidence of racial discrimination in the fact that the jury selection had been administered by distinguishing between white and Negro persons listed on the tax rolls.
This was determined to be prima facie evidence of discrimination. Hernandez v. Texas\textsuperscript{79} applied this same rule to Mexican and Latin-Americans. In the Hernandez case the Court found that no person with a Mexican or Latin-American name had served on a jury in twenty-five years.

The most recent major case in regard to jury selection is Swain v. Alabama.\textsuperscript{80} In this case the Court held 5 to 4 that the system of peremptory challenges was established to gain a fair jury and the intrusion by the Court into the prosecutor's motives for challenging and dismissing the six Negroes called in the venire would destroy an essentially fair system. The decision came in the face of evidence which showed that no Negro had ever served on a jury in that particular county. The Court ruled that evidence would have to show a systematic statewide exclusion of Negroes in order to establish a prima facie case of discrimination.

**Discrimination in Housing Codes.** Outside of education, perhaps no area of law to which the Fourteenth Amendment has been applied is as emotionally charged as housing codes - that is, the right to maintain the status quo of one's own neighborhood.

The Supreme Court made its first ruling in the area of discriminatory housing codes in 1917, in Buchanan v. Warley.\textsuperscript{81} The city of Louisville, Kentucky had enacted an
ordinance establishing restrictive zones for white and black residences. The Court held that this was a clear violation of the Fourteenth Amendment in that an agency of the state was enforcing a law which was, on its face, discriminatory. But landowners developed their own system of discrimination through the institution of restrictive covenants. White property-owners would form a covenant in which a promise to sell at a later time only to whites became a condition for buying the land in the first place.

In Corrigan v. Buckley the Court upheld the validity of these covenants. The decision stated that:

The Fifth Amendment is a limitation only on the powers of the general government, and is not directed against the action of individuals.

The case was brought in the District of Columbia, consequently the decision was made under the Fifth Amendment rather than the Fourteenth which would have applied in a state. The effect of the decision was to protect private discrimination and make it enforceable in the courts. But this was changed by the decision in Shelley v. Kraemer. In this decision the Court cut the legs off of restrictive covenants by rendering them unenforceable. The Court held that although restrictive could be made, the Constitution having no power over private discrimination, enforcement of the covenants in the state courts would make the state a party to the racial discrimination in violation of the Fourteenth Amendment. In
the companion case, Hurd v. Hodge,84 the Court applied the same rule to the District of Columbia and the federal courts.

In 1967, the Court held in Reitman v. Mulkey85 an amendment to the constitution of the state of California to be unconstitutional. The amendment, which had been supported by real estate interests, forbad state or local limitations on the right of any person to sell, lease, or rent, or decline to do so, to any person he may choose. This was held to be unconstitutional on the grounds that it would have involved the state in private racial discrimination contrary to the Fourteenth Amendment.

Protection of Defendants. Since 1956 the Supreme Court has applied the Equal Protection Clause to a new area of law. The clause has taken within its purview the protection of defendants in felony as well as misdemeanor judicial proceedings.

In Griffin v. Illinois86 the Court held unconstitutional a statute which required a person wishing to appeal his conviction of a noncapital crime to purchase a transcript of the lower court proceeding. This was impossible for the defendant to do because of the enormous cost of having such a transcript made. The Court held that the statute made financial ability to purchase the transcript a condition for gaining access to the appellate courts,
which is not in any way related to the administration of justice in an impartial manner. Making financial ability to pay for the transcript a requirement for appeal constituted in the eyes of the Court a denial of due process and the equal protection of the laws.

In Williams v. Oklahoma City\textsuperscript{87} the Court expanded the doctrine of Griffin v. Illinois to include "petty offenses." The defendant, an indigent, was convicted of drunken driving and sentenced to 90 days and a $50 fine. The Court held that for such a conviction and sentence, the state was required to provide a free transcript to an indigent appealing his case.

The Court has also used the Equal Protection Clause in the area of imprisonment of indigent defendants. In Williams v. Illinois\textsuperscript{88} the Court held that the confinement of a convicted person beyond the statutory limit of confinement for involuntary nonpayment of a fine or court costs constitutes a violation of equal rights to indigents. Tate v. Short\textsuperscript{89} applied this rule to misdemeanor convictions as well. Texas law limited punishment for traffic violations to fines, but allowed for unpaid fines to be converted into a sentence at $5 per day. The Court held this to be discriminatory and in violation of the Equal Protection Clause.

In Jackson v. Indiana\textsuperscript{90} the Court held that Indiana's indefinite commitment of incompetent defendants without
the procedural protections given to civil commitments denied equal protection of the laws. This case raised concern in some circles because in such cases the court takes the role of parens patria (in place of parent) just as it would in a juvenile proceeding. Some fear was expressed that the Supreme Court would later prohibit this stance even in juvenile proceedings, but thusfar no other decision has even hinted at such a move.

Reapportionment. No other area of interpretation of the Equal Protection Clause represents a more willful abuse of its language than does reapportionment. It is without a doubt the most unwarranted and uncalled for intrusion by the judiciary into the sphere of politics. Moreover, the Court has established itself and the rest of the federal judiciary as the sole determinants of the construction of state governments.

The initial intrusion was made in Baker v. Carr91 in which the Court granted certiorari (thus claiming jurisdiction) in a case disputing the fairness of apportionment. The Court claimed jurisdiction under the Equal Protection Clause. The decision set as the only requirement that the apportionment be "fair."

Gray v. Sanders92 was the first case to define fairness in apportionment. In its decision the Court stated that:

Once the geographical unit for which a representative is to be chosen is designated, all
who participate in the election are to have an equal vote - whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment requires no such thing. Indeed, the doctrine of "one-man - one-vote" is nothing more than a product of the Court's imagination. In this particular case it was mathematically possible for one-third of the populace of Georgia to elect a state official.

Wesberry v. Sanders carried the equal-vote doctrine to congressional districts. The state of Georgia was ordered to redraw its congressional districts so that "as nearly as it is practicable one man's vote in a congressional election is to be worth as much as another's." But later it would be the courts that would determine what was and was not practicable. In Sailer v. Kent Board of Education, the Court held that the one-man - one-vote principle did not apply to school board elections and in Avery v. Midland County it held that the principle did not apply to local governments such as counties, cities, and towns. No definitive reason was given for the exemption of lower governmental bodies from this rule, but had the Court taken on the responsibility of insuring equal apportionment at these levels as well, the case load would have been enormous. The distinction appears to be both arbitrary and for
the sake of expediency.

The Court began to really put the screws to the states in Kirkpatrick v. Preisler\(^97\) and Wells v. Rockefeller,\(^98\) which challenged the reapportionment plans in Missouri and New York, respectively. In Missouri the difference in population between the least and most populous districts under the plan was 25,802. In New York the difference was 53,603. In both cases the Court held that the congressional reapportionment plans did not meet the standards established in Wesberry v. Sanders. Neither plan was "a good faith effort to achieve precise mathematical equality."

Later in 1968, the Court held in Kramer v. Union Free School District\(^99\) that a New York statute providing that in certain school district elections an otherwise eligible voter could vote only if he owned or leased taxable real property within the district or was the parent of a child attending a district school was in violation of the Equal Protection Clause. The statute was held to be unconstitutional because it did not meet the test of promoting a "compelling state interest." Though this decision has never been elaborated upon, an argument could be made that it applied the Wesberry doctrine to school board elections and had the effect of overturning Sailors v. Kent Board of Education.

The Court has also used its interpretations of the
Equal Protection Clause in ordering reapportionment to alter by Court decree the structure of state governments. This represents the most abominable of all intrusions into the sphere of political issues. The intrusion began with Reynolds v. Sims. The Alabama state legislature at that time was bicameral and legislators were elected from districts which had not been redrawn in sixty-one years. Consequently, the Court found that rural voters were "over-represented," and that 25% of the populace could control both houses of the legislature. Going beyond ordering reapportionment as in Wesbery v. Sanders, the Court declared that:

... as a Constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral legislature must be apportioned on a population basis.

In other words, if the Court had control over the construction of Congress, the Senate would have to be apportioned according to population, as the House is. No longer could a state use the structure of the federal government as a model for its own.

Five other cases were decided along with Reynolds v. Sims. The first four were rather cut and dried by the Reynolds decision, but the fifth was far more involved. In the first four cases, WMCA v. Lomenzo, Mayland Committee v. Tawes, Davis v. Mann, and Roman v. Sincock, the Court applied the Reynolds rule to New York, Maryland, Virginia, and Delaware, respectively. The percent of the populace that could theoretically control the legislatures varied from 41% in New York and Virginia to 18.5% in Delaware. The
Court held that none of the states offered any political remedy to the apparent inequity.

The fifth case decided along with Reynolds v. Sims was Lucas v. Colorado General Assembly. Only two years earlier, in 1962, by a vote of two-to-one, the citizens of Colorado had voted down a proposal to establish equal representation by population in both houses of the legislature. In 1964, the theoretical majority of the state House was 45.1% (very close to equality by the Court's own standards) and 33.2% in the Senate. The people of Colorado had determined overwhelmingly that they wanted one house (the Senate) to continue to represent geographical interests. But the Court looked past the very evident desire of the people and held that the "overall legislative representation in the two houses" was not "sufficiently grounded on population to be constitutionally sustainable under the Equal Protection Clause." Even though a political remedy was available, the Court ordered that judicial effectuation of the remedy take place. The decision smacks of judicial usurpation of political power.

The Court reneged slightly in regard to protection of geographical interests by the guarantee of geographical representation in Dusch v. Davis. The Court held valid a plan for the election of an eleven-man city council, each elected at large, but requiring that one councilman from each of the seven districts serve on the council. The
Court admitted that this would insure membership on the council of some members with a knowledge of rural problems.

**Political Rights - Voting and Candidacy.** The Supreme Court has also ventured into the areas of voting rights, the processes of running for public office, and service in the position to which one has been elected.

In 1966, The Court held in Harper v. Virginia State Board of Elections\(^{107}\) that poll taxes as a requirement for voting in state elections constitute a violation of the Equal Protection Clause. Poll taxes in federal elections had been banned by the ratification of the Twenty-fourth Amendment in 1964. In this decision the Court presumed to end poll taxes in state elections as well. Voting rights was also the thrust of Dunn v. Blumstein.\(^{108}\) In this case the Court held that Tennessee's residency requirements for voters of one year in the state and three months in the county constituted a violation of the Equal Protection Clause. The Court decreed that thirty days was ample time to prevent fraud in voting. With this decision, state control of voting requirements virtually went out the window.

In 1964, in Anderson v. Martin\(^{109}\) the Court held that a Louisiana election law requiring that a candidate's race be placed in parentheses after his name on the ballot was unconstitutional. The Court stated that such a pro-
vision served no purpose other than to encourage voting along racial lines. In Bullock v. Carter the Court held that the Texas requirement of payment of filing fees in order to run for certain state offices was unconstitutional under the Equal Protection Clause because it was not necessary to accomplish a legitimate state interest.

Membership of elected legislative bodies on both the state and national levels has also drawn the Court's attention. In Bond v. Floyd the Court denied the right of the Georgia legislature to refuse to seat a duly-elected member on the grounds of his anti-war statements. Likewise, Congress refused to seat Adam Clayton Powell after a committee reported, in 1968, that: (a) he had claimed an unwarranted immunity from the courts of New York; (b) he had wrongfully diverted House funds for his own personal use; and (c) he had made false reports of expense to the Committee on House Administration. However, in Powell v. McCormack the Court held that Congress' power to exclude duly-elected members was limited to the qualifications established in Article I, Section 2 of the Constitution.

In Fortson v. Morris the Court held that the Georgia legislature had the right to determine the outcome of an indecisive election for governor as per the state constitution. This was a 5-4 decision which fairly clearly bent the one-man - one-vote doctrine. Justices Warren, Douglas, Brennan, and Fortas dissented.
Social Rights. Though clearly not within the context of the framers, the Supreme Court has included "social rights" within the shelter of the Equal Protection Clause. By the term "social rights" would be meant the rights exercised or made available to all members of a given society and the freedom of action, within limits, therein.

In 1883, in Pace v. Alabama the Court held unconstitutional an Alabama statute which made illegal adultery and fornication in general and specifically between a white and a Negro. Inter-racial adultery and fornication carried a more severe penalty. The Court saw this as a violation of equal protection because it created a punishment for the same offense (adultery or fornication) which was lesser or greater depending on the race of the participants.

In McLaughlin v. Florida, decided in 1964, the Court took a new approach by stating that classification must be based on some valid legislative purpose, and that all racial classifications are immediately suspect. Florida criminal law prohibited any Negro and white from "habitually occupying the same room in the night time." No sexual act needed to be proven. Though both races were treated equally, the Court held that no valid statutory distinction could be found and held the statute unconstitutional.

Loving v. Virginia represents the landmark in regard to interracial socialization. Robert Loving and his wife were convicted of violation of the Virginia antimisce-
The Court held that the law was unconstitutional. Chief Justice Warren stated in the decision that:

The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discrimination. Under our Constitution, the freedom to marry, or not to marry, a person of another race resides with the individual and cannot be infringed by the State.

It is interesting to note that whereas in this case the Court upheld the right of the individual to choose (an admirable position in defense of personal liberty), in regard to employment practices the Court has given the employer very little right to choose on his own criteria.

Eisenstadt v. Baird extended the doctrine of "reasonable classification" one step further. A Massachusetts statute prohibited the distribution of contraceptives except in the cases of physicians and pharmacists furnishing them to married persons. The Court held this to be a violation of the Equal Protection Clause.

A classification just be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that persons similarly circumstanced shall be treated alike...

The statute was held to be unconstitutional because it discriminated between married and unmarried persons in similar situations.

An overlap in social and economic rights was evidenced in Allston v. School Board. The Circuit Court of
Appeals had held that Negro teachers must be paid equal salaries as white teachers doing the same work. The Supreme Court in effect affirmed the lower court decision by refusing to grant certiorari.

Welfare residency requirements have also been subject to review by the Court. In Shapiro v. Thompson, Washington v. Legrant, and Reynolds v. Smith, the Court held that state and District of Columbia residency requirements of one year prior to the receipt of welfare assistance were in violation of the Equal Protection Clause. Likewise, in Graham v. Richardson the Court held that a state may not deny welfare benefits to aliens who have not resided in the United States for a stated period of years. The Court stated that the Equal Protection Clause precludes any denial of such benefits either on the grounds that the recipient is an alien or that the person has not resided in this country for a specified number of years.

Other Recent Cases. In Palmer v. Thompson the Court faced a rather ticklish situation. Ordered to desegregate their public swimming pools or close them altogether, the city of Jackson, Mississippi elected the latter. The city officials considered operation of the pools on a desegregated basis as unwise. A suit was brought to enjoin the officials to open the public pools, there being only one other pool at which Negroes could swim. But the court held that the
closing of the pools did not constitute a denial of equal protection to Negroes, because the closing deprived whites and blacks alike.

In Weber v. Aetna Casualty & Surety Co. the Court held that discrimination against illegitimate children in the state's Workmen's Compensation laws denied to them equal protection of the laws. Louisiana law placed illegitimate children in a category other than that of legitimate children and made it possible for the former to obtain benefits only if there were not enough legitimate children to exhaust the maximum benefits. The classification of illegitimate children as "other dependents" did not meet the test of being based on a valid legislative purpose.

Perhaps the most recent landmark case to deal with the Equal Protection Clause was Roe v. Wade, the now-famous abortion decision. In that case the Court held that the shelter of the clause for a "person" did not extend to the unborn.
CONCLUSION

The role of a constitution in an ongoing governmental system is subject to many kinds of analysis. In this work I have put forward a rather conservative argument; that being that a constitution should be a clearly-stated and widely-understood embodiment of the principles and of the government which will operate under it. A constitution should remain the work of its authors, rather than its interpreters. It should retain the meaning originally given to it, rather than have it twisted and distorted by those who follow in later years.

All of which is not to say that a constitution should not change. Indeed, it should and it must. But the change should come in the form of amendment - reform of the document itself - rather than through redefinitions of the words of the document to make it fit particular modern needs. To this end, the process of amendment need be simple, because all too often our Constitution is viewed with such awe that to alter it seems to some people an act of defilement. All law, constitutions included, is made by men, we should remember, not dieties; and the purpose of law is to meet men's needs, not to wax eternal. Those who would prefer a more sanctified document, a "living" Constitution, I commend to Roscoe Pound. For myself, however, I would prefer a document considerably more reliable.
This work has focused on a mere clause of our Constitution and yet the enormous breadth of the words "equal protection of the laws" has been demonstrated. Should it have retained the comparatively narrow construction of its framers, or should it have been used by the Supreme Court to bring about the civil, social, political, and economic changes which it saw as necessary? My own opinion is rather definite, and I feel sure that it is evidenced throughout the work.

The objective of the 39th Congress was to protect the newly freed Negro, and the objectives of John Bingham were to provide federal protection of "civil" rights and to rectify the flaw which he saw had existed in the Constitution since 1789. But to these objectives must be added those of the Supreme Court, because they determine how the clause will be applied. Among the Court's objectives must be listed: to bring an end to alien discrimination, to desegregate and integrate the public schools, to end discrimination in the use of public facilities, to insure fair methods of jury selection, to end discriminatory housing codes, to protect the rights of those accused of a crime, to order reapportionment and change the structure of state governments, to protect the rights of voters and candidates, and to end all racial discrimination in state laws along with discrimination against other classes of people. For some of these objectives, I must truly admire the Court; but for some of the others, I
have nothing but contempt.

The Warren Court, which brought about so many distortions of the Equal Protection Clause, will in later years, I feel certain, mark the high point of judicial ascendancy. It will be many years before the judiciary as a whole will be able to chew what the Warren Court bit off.

In closing, it remains only to be added the the future of the Equal Protection Clause is far from certain, or even predictable. In McLaughlin v. Florida, the Court appears to have found an approach that it likes, but how long it will last is anyone's guess. It is probably an approach of which John A. Bingham would approve, if we could only ask him.
NOTES

3. Ibid.
4. Ibid.
8. Kendrick, Joint Committee of Fifteen, p. 46.
9. Ibid.
11. Ibid., pp. 57-59.
12. Ibid., p. 13.
13. Ibid., p. 20.
15. 15 L. Ed. 691 (1857).
16. Both Flack, The Fourteenth Amendment, p. 20, and Kelly,
The American Constitution, p. 460, allude to this. A partial explanation might be that this was the first time that Congress had sought to overturn a Supreme Court decision holding one of its acts to be unconstitutional.


20. Kendrick, Joint Committee of Fifteen, p. 87.


23. Ibid., p. 2459. A divergence from the main subject should be made here to point out that historical evidence lends credence to the argument that the Fourteenth Amendment "nationalized" the Bill of Rights. It is evident that the intention of many of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments was, in effect, to write a new Constitution. The radicals as a whole, and Stevens' comment here is only one example, intended not only to free and protect the lack man in the South, but to alter the course of American government as a whole. However, this was not widely realized at the time and it was not until expediency called for a nationalization of the
Bill of Rights that it was begun in the 1930s under the initiative of Justice Hugo Black and continues today.

24. Ibid.
25. Ibid., p. 2461.
26. Ibid., p. 2462.
27. Ibid., p. 2467.
28. Ibid., p. 2500.
29. Ibid., p. 2538.
30. Ibid., pp. 2542-3.
31. Ibid.
34. This phrase was a part of both the Freedmen's Bureau Bill and the Civil Rights Bill, the emphasis being on the right of all citizens to seek recourse to the courts for their own protection and that of their property.
36. Ibid.
37. Ibid.
38. Ibid.
39. For a very thorough analysis of the Equal Protection Clause from the point of view of this argument, see the article by Alfred Avins, previously cited.
40. 21 L. Ed. 394 (1873).
41. 109 U. S. 3 (1883).
42. 163 U. S. 537 (1896).
43. 54 U. S. 391 (1877).
44. 118 U. S. 356 (1886).
45. 232 U. S. 138 (1914).
46. 239 U. S. 175 (1915).
47. 274 U. S. 392 (1927).
48. 263 U. S. 197 (1923).
49. 332 U. S. 633 (1948).
50. 334 U. S. 410 (1948).
52. 175 U. S. 528 (1899).
53. 275 U. S. 78 (1927).
57. 382 U. S. 905 (1965).
58. 211 U. S. 45 (1908).
59. 305 U. S. 337 (1938).
60. 332 U. S. 631 (1948).
63. 235 U. S. 151 (1914).
64. 339 U. S. 816 (1950).
68. 373 U. S. 244 (1963).
70. 100 U. S. 303 (1880).
71. 100 U. S. 313 (1880).
72. 100 U. S. 339 (1880).
73. 294 U. S. 587 (1935).
74. 316 U. S. 400 (1942).
75. 325 U. S. 398 (1944).
77. 344 U. S. 443 (1953).
78. 345 U. S. 559 (1953).
81. 245 U. S. 60 (1917).
82. 271 U. S. 323 (1926).
83. 334 U. S. 1 (1948).
84. 334 U. S. 24 (1948).
86. 351 U. S. 12 (1956).
87. 89 S. Ct. 1818 (1968).
89. 91 S. Ct. 668 (1970).
90. 92 S. Ct. 1845 (1971).
91. 369 U. S. 186 (1962).
95. 387 U. S. 105 (1967).
97. 89 S. Ct. 1225 (1968).
98. 89 S. Ct. 1234 (1968).
100. 377 U. S. 533 (1964).
112. 89 S. Ct. 1944 (1968).
113. No other paragraph than Paragraph 2 could possibly apply, which amounts to nothing more than a statement of the age and citizenship requirements for being a
member of the House of Representatives.


115. 106 U. S. 583 (1883).


117. 92 S. Ct. 1029 (1971).

118. 112 Fed. 2d 992 (1940).

119. All three cases are listed as 89 S. Ct. 1322 (1968).

120. 91 S. Ct. 1848 (1970).

121. 91 S. Ct. 1940 (1970).

122. 92 S. Ct. 1400 (1971).

123. 93 S. Ct. 705 (1973).
SELECTED BIBLIOGRAPHY


Beth, Loren P. The Development of the American Constitution, 1877-1917.


Dunning, William Archibald. Essays on the Civil War and


Flack, Horace E. The Adoption of the Fourteenth Amendment. Baltimore: Johns Hopkins Press, 1908.


