

## Race-Conscious Educational Policies Versus a “Color-Blind Constitution”: A Historical Perspective

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This article examines the origins and development of citizenship and equal rights by the Reconstruction Congress (1865–1875) to determine if it created a new constitutional order that is color blind and thus prohibits the use of racial classifications by government to achieve school desegregation and affirmative action programs. The theory of color-blind constitutionalism, although pursued relentlessly by a small cadre of radical Republicans, stood in marked contrast to the views of the moderate-conservative majority, a group virtually obsessed with the ways in which race affected fundamental questions of citizenship, civil equality, and political power. Only through a multiethnic history can we comprehend the variegated and profound ways in which racial ideology shaped the beliefs and behavior of the Reconstruction Congress and the ways in which Congress carefully crafted the meaning and intent of citizenship and equality in the new constitutional order, one that serves as the legal foundation for contemporary debates over race-conscious educational policies.

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This essay has one major theme, to examine a central argument in contemporary desegregation and affirmative action lawsuits, including the Louisville and Seattle school desegregation cases just decided by the U.S. Supreme Court on June 28, 2007 (*Parents Involved*, 2007).<sup>1</sup> The central question is whether the use of racial classifications to achieve school desegregation and diversity violates the Fourteenth Amendment. Along with contemporary constitutional lawyers who argue against race-conscious educational policy, some historians also contend that the Reconstruction Congress created a new order of color-blind constitutionalism that generally forbids the use of racial classifications to implement school desegregation and affirmative action programs.<sup>2</sup> Even as attorneys for the petitioners in the Louisville and Seattle cases concede that school districts have an unquestioned interest in achieving racially diverse schools, they maintain that such objectives, outside of a remedial context, can be pursued only through race-neutral policies and programs. The argument that the U.S. Constitution is color blind has found support among several Supreme Court justices

and also among some historians who contend, as does constitutional historian Paul Moreno, that the Reconstruction Congress “believed there should be one class of American citizenship, without racial classification, whether malignant or benign” (Moreno, 1995, pp. 295–298). Moreno maintains that the 1866 Civil Rights Act and the Fourteenth Amendment “lend no support to the argument that the Reconstruction Congress planned for and implemented race-conscious legislation in order to benefit persons because of their color” (p. 300). Hence, such scholars conclude that attempts to use legislative history to justify race-conscious educational policies run afoul of the color-blind intent of the Fourteenth Amendment. A strict legislative history of the Fourteenth Amendment, according to Moreno, “would have to conclude that racial neutrality was the goal of the Reconstruction congress” (p. 303).

Attorneys and friends of the respondents, as well as other historians of the Reconstruction era, counter this position. A brief filed by historians on behalf of the respondents maintains that the petitioners’ cases for relief rest on a deep misunderstanding of the original intent of the Reconstruction Congress. In their judgment, contemporary race-conscious policies are fully consistent with the original intent of the Fourteenth Amendment. “Indeed,” they contend, “the same Congress that passed the Fourteenth Amendment enacted a wide range of race-conscious programs and funded deliberate efforts to integrate schools.”<sup>3</sup> In support of the race-conscious theory, historians cite the fact that the Reconstruction Congress funded school desegregation efforts, raised no objection when Louisiana and South Carolina wrote school integration clauses into their state constitutions, and expressed no opposition when states and localities took voluntary steps to achieve racially desegregated schools. The historians’ brief also draws upon the fact that some members of the Reconstruction Congress favored and introduced bills demanding racially mixed schooling. Senator Charles Sumner of Massachusetts and other “radical Republicans,” for example, proposed federal legislation designed to establish racially mixed public schools (McPherson, 1965; Trefousse, 1997).

The arguments that the Reconstruction Congress sanctioned some race-conscious programs and funded efforts to achieve racially mixed schooling, however suggestive, remain inconclusive as to whether Reconstruction legislation was designed to permit racial classifications by agencies of the government. The larger academy of historians have emphasized, as Paul Moreno points out, that the Reconstruction Congress was under the control of the moderate-conservative wing of the Republican Party and their

views of race and civil rights framed the form and content of Reconstruction legislation (Moreno, 1995, p. 295). Consequently, despite efforts by abolitionists and radical Republicans to prohibit distinctions of race and color in American law, the moderate-conservative and dominant wing of the Reconstruction Congress consistently defeated color-blind alternatives to the postbellum constitutional order (Gotanda, 1991; Kull, 1992; Lindgren, 1993).<sup>4</sup> There is a similar problem with citing examples of race-conscious efforts to assist refugees and freedmen. Many of these efforts, including the Freedmen's Bureau, were supported as emergency programs. Hence, even the presence of race-conscious policies in such activities does not prove the central question, whether race-conscious policies are consistent with the constitutional order established by the Reconstruction Congress. That order, as defined in the permanent Civil Rights Act of 1866 and the Fourteenth Amendment (as well as the Naturalization Act of 1870 and the Civil Rights Act of 1875), must be examined on its own terms and not implied from the temporary endorsement of race-conscious emergency programs or the refusal by Congress to object to state efforts banning school segregation. After all, education is essentially a state function, and Congress generally refrained from intrusion into matters so clearly reserved to state authority. It is important to field the question directly. In short, did the Reconstruction Congress intend to establish a color-blind constitution that forbids race-conscious educational policy and thus compels our contemporary generation to rely exclusively on race-neutral means to achieve desegregation in public schools and racial diversity in higher education (Linn & Welner, 2007)?<sup>5</sup>

A fresh look at congressional debates from 1865 to 1875 renders the arguments on behalf of color-blind constitutionalism incongruous with the beliefs and behavior of the Reconstruction Congress. The theory of color-blind constitutionalism, although pursued relentlessly by a small cadre of radical Republicans, stood in marked contrast to the views of the moderate-conservative majority, a group virtually obsessed with the ways in which race affected fundamental questions of citizenship, civil equality, and political power. Furthermore, the moderate-conservative majority not only infused race into virtually every debate and resolution pertaining to the new standards of citizenship and equality, but also encoded its feelings and judgments about different racial and ethnic groups into Reconstruction laws and constitutional amendments. Consequently, only through a multiethnic history can we comprehend the variegated and profound ways in which racial ideology shaped the beliefs and behavior of the Reconstruction Congress. Indeed, a major problem contributing to the misunderstanding of Reconstruction legislation as color-blind constitutionalism is the tendency to focus almost exclusively on the response of Congress to the plight of African Americans in the Confederate states. This narrow view of legislative history distorts the wide-ranging discussions of race that characterized the Reconstruction Congress and the ways in which multiracial politics framed the new constitutional order. In other words, the binary framework of Black-White relations conceals the broader concerns about American Indians and Asians that also played a significant role in defining the new standards of citizenship and equal rights. Depending on whether the issue was civil and political equality, birthright citizenship, or naturalized

citizenship, congressional debates and resolutions shifted from Blacks to Indians to Chinese, and in most instances all three groups were considered simultaneously. Hence, the question of whether the new constitutional order was color conscious or color blind, as well as the manner in which either was encoded into law, must be answered by examining the complex and subtle ways in which legislation was designed to address the practical problems of a multiracial nation in the postbellum political economy. Specifically, congressional debates over the civil and political place of Blacks, Whites, Native Americans, and Chinese must be examined together and juxtaposed against each other in order to fully understand and appreciate the role of race in shaping the new constitutional order.<sup>6</sup>

Congress not only reacted to relations between Blacks and Whites in the Confederate states; it also responded to Native Americans on the Plains and Chinese on the Pacific Coast. The 1866 Civil Rights Act and the Fourteenth Amendment, as well as changes in the Naturalization Act, reflected debates and compromises over issues of race and citizenship from 1865 to 1875 that cut across the broad spectrum of American society. In instances where race-conscious legislation seems not to be present when examining Reconstruction plans for African Americans, racial classifications become quite evident in the responses of the Reconstruction Congress to Native Americans and Chinese. Furthermore, even when the language of Reconstruction legislation gives no explicit indication of racial classifications, it is necessary to determine if particular clauses or phrases serve as proxies for underlying race-conscious policies. It is important to remember what one Reconstruction senator from Kansas, Republican Samuel Clarke Pomeroy, said about the incorporation of slavery into the original Constitution by the founding fathers: "Slavery began with a majority of the States in its interests, got a recognition, I am sorry to say, in the Constitution itself. The fathers gave it a place there, but, thank God, they left it without a name" (*Congressional Globe*, 1866, p. 1181; hereafter cited as *CG* 39th).<sup>7</sup> The Constitution never mentions the words *slave* or *slavery*. Whenever the subject arises, other words are used ("such Persons," "other persons," "person held to Service or Labour"). This leads to an obvious question: Were there instances in the Reconstruction Congress when legislators gave race a place in the new constitutional order, but left it without a name?

### Race and Citizenship

The Reconstruction debate over the new standard of American citizenship began with the campaign of abolitionists and radical Republicans to repudiate the Dred Scott decision and guarantee citizenship to former slaves and free persons of color. Initially, some members of the Reconstruction Congress held that the abolition of slavery (i.e., the Thirteenth Amendment) resolved the question of African American citizenship in the sense that all free persons born in the republic were by definition citizens of the United States. Other members of Congress, mainly Democrats, envisioned the newly emancipated persons of color in a status somewhere between alien and citizen. In view of conflicting interpretations as to whether the Thirteenth Amendment also made Blacks citizens, at Senator Lyman Trumbull's insistence, the 1866 Civil Rights Act was amended to include a citizenship clause (Kelly, 1956, pp. 1061-1062). In the opening debate on

the bill, January 29, 1866, Trumbull moved to amend the proposed congressional act to specifically guarantee birthright citizenship to native-born persons of African descent. He proposed, "That all persons of African descent born in the United States are hereby declared to be citizens of the United States" (CG 39th, pp. 474, 497). After some debate and no action taken on Trumbull's motion to amend the Civil Rights Act, he withdrew it, changed the phraseology, and offered another amendment to accomplish the same objective: "All persons born in the United States, and not subject to any foreign Power, are hereby declared to be citizens of the United States, without distinction of color" (CG 39th, p. 498). Had Congress aimed to establish a racially neutral standard of American citizenship, the phrase "without distinction of color" represented the closest approximation of a color-blind concept in the Reconstruction era. The Reconstruction Congress soundly rejected the "without distinction of color" principle. Instead of generating a consensus for color-blind legislation, the concept incited a protracted debate over race and citizenship that ended with a race-conscious citizenship clause in both the 1866 Civil Rights Act and the Fourteenth Amendment. Senator James Guthrie of Kentucky, in direct response to the phrase "without distinction of color," asked Trumbull to respond to the following question: "I will ask the Senator if he intends by that amendment to naturalize all the Indians of the United States?" Trumbull replied, "Our dealings with the Indians are with them as foreigners, as separate nations." "It is not intended to include them," he stated emphatically (CG 39th, p. 498).

Then, Senator Edgar Cowan, a Republican from Pennsylvania, asked if the amendment would "have the effect of naturalizing the children of Chinese and Gypsies born in the country." Trumbull, operating under the assumption that "children born of parents who have not been naturalized are citizens," replied, "Undoubtedly." Furthermore, said Trumbull to Cowan, "Is not the child born in this country of German parents a citizen?" Cowan replied simply, "The children of German parents are citizens; but Germans are not Chinese" (CG 39th, p. 498), alerting Trumbull to the fact that he viewed American citizenship as a racially qualified right that included all native-born Whites but not all native-born persons of color. Senator Cowan worried that extending birthright citizenship to native-born Chinese would ultimately transfer California from "the Indo-European race" to "the Mongolian." He opposed any legislation, particularly a constitutional amendment, that would turn California, Oregon, Colorado, or Nevada "over to an irruption of Chinese" (CG 39th, p. 498). In Cowan's view, the founding fathers opened the door of American citizenship to the Irishman, German, and the Scandinavian races of the North but not to "the barbarian races of Asia or of Africa" (CG 39th, p. 499). He particularly feared the capacity of China to "throw a population upon California and the mining districts that would overwhelm our [White] race and wrest from them the dominion of that country" (CG 39th, p. 498). Ultimately, the majority of congressmen concluded that the small numbers of native-born Chinese (approximately 64,000 out of a total U.S. population of 38.5 million in 1870) rendered the question of their birthright citizenship statistically insignificant. As Senator John Conness, Republican of California, informed his colleagues in late May of 1866, "This portion of our population, namely, the children of Mongolian parentage, born

in California, is very small indeed, and never promises to be larger, notwithstanding our near neighborhood to the Celestial land" (CG 39th, p. 2891). With assurances that the population of native-born Chinese would remain small, the Reconstruction Congress included them along with persons of African descent in the birthright citizenship clauses of the 1866 Civil Rights Act and the Fourteenth Amendment. Such action by the Reconstruction Congress has contributed to the notion that it intended to establish a single class of American citizenship without distinction of race or color. This interpretation, however, rests significantly on a misunderstanding or omission of the manner in which congressional debates about the citizenship of American Indians ultimately framed the citizenship clauses of the 1866 Civil Rights Act and the Fourteenth Amendment.

### **"Subject to the Jurisdiction Thereof": A Race-Conscious Standard of Citizenship**

In contrast to the strong consensus that conferred birthright citizenship on persons of African descent, the Reconstruction Congress stood firmly against extending the right of birthright citizenship to American Indians. Indeed, some of the most heated and protracted debates over the citizenship clauses of the 1866 Civil Rights Act and the Fourteenth Amendment centered on finding the right phraseology to exclude American Indians from birthright citizenship. The original citizenship clause of 1866 Civil Rights Act, borrowing a phrase from the U.S. Constitution that defined how citizens were to be counted for apportionment, declared, "All persons born in the United States and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States" (CG 39th, p. 569). The phrase "Indians not taxed" excluded approximately 90% of American Indians from birthright citizenship, and its race-conscious meaning became increasingly transparent as debates over the new standards of American citizenship extended into the summer of 1866 (Collins, 2006; Seltzer, 1999).<sup>8</sup> Although adopted to restrict American Indian citizenship in the 1866 Civil Rights Act, the phrase "Indians not taxed" was contested from the outset and ultimately proved unacceptable for the citizenship clause of the Fourteenth Amendment. Initially, members of the Reconstruction Congress proposed a citizenship clause saying that "all persons born in the United States and owing allegiance thereto are hereby declared to be citizens." Following extensive debate, that framing was rejected because "a sort of allegiance" was expected from persons in temporary residence. Then, it was suggested that Congress make citizens of all persons born in the United States "not subject to tribal authority" (CG 39th, p. 572). On January 30, 1866, James Henry Lane, Republican Senator from Kansas, moved to amend the citizenship clause of the proposed 1866 Civil Rights Act by striking out the words "Indians not taxed" and inserting the words "not subject to tribal authority" (CG 39th, p. 504). Republican Senator John Brooks Henderson of Missouri proposed the same on February 1, 1866 (CG 39th, p. 574). Senator Lyman Trumbull had no objection to the proposed change, believing that it made the "amendment I offered more specific" (CG 39th, p. 504).

As congressmen from the border states and West Coast reported the existence of large numbers of Indians who acknowledged no tribal government, the phrase "not subject to tribal authority"

seemed too imprecise to exclude from birthright citizenship various populations of nonaligned Indians. Senator Alexander Ramsey, Republican from Minnesota, informed his colleagues in February of 1866: "There are in the border States large bodies of Indians not subject to tribal authority who are wild and untamed as any that roam over the plains." "The large numbers of roaming Indians on our frontier," according to Senator Ramsey, "are the most mischievous of the race, outlaws, refugees from all tribal authority, and recognized no such authority" (CG 39th, p. 574). He worried that the "most obnoxious of all Indians" would qualify for the right of citizenship under the phrase "not subject to tribal authority." Such discussions made it clear to most Reconstruction congressmen that the idiom "not subject to tribal authority" failed to encompass a significant number of Indians who operated under no tribal authority, illuminating the underlying intent of Congress to deny citizenship to Indians in general, including those within and without tribal authority. As Senator Ramsey said, "My object is to exclude all Indians from citizenship except such as the laws of any one of the States elevates to such a *status*" (CG 39th, p. 527).

Ultimately the Reconstruction Congress settled on the phrase "subject to the jurisdiction thereof" as the best means to exclude Indians from the birthright citizenship clause of the Fourteenth Amendment. Although the language sounded more racially neutral than the wording "Indians not taxed," as Senator Lyman Trumbull said in May of 1866, "The object to be arrived at is the same" (CG 39th, p. 2894). Senator Jacob Merritt Howard of Michigan defined the phrase "Indians not taxed" as "embracing all Indians who were uncivilized" and regarded the Fourteenth Amendment phrase "subject to the jurisdiction thereof" as merely "better than the language in the civil rights bill" (CG 39th, pp. 2890–2894). It was clearly understood that the phrase "subject to the jurisdiction thereof" served as a proxy for "uncivilized Indians" or Indians deemed unworthy of American citizenship. Moreover, all similar constructions (e.g., "Indians not taxed" or "not subject to tribal authority") were designed to exclude Native Americans collectively from the right of birthright citizenship (Collins, 2006; Seltzer, 1999). The framers of the Fourteenth Amendment, as the framers of the original Constitution, gave race a place in the new constitutional order, and like the founding fathers the Reconstruction congressmen also encoded race as a proxy without a name. Race was clearly encoded into the new constitutional standard of American citizenship under the phrase that excluded American Indians from birthright citizenship, "subject to the jurisdiction thereof." Thus, the conclusion that the Reconstruction Congress intended to establish a single class of American citizenship without racial classifications cannot be sustained in view of the deliberate and collective exclusion of American Indians from birthright citizenship (see Moreno, 1995, for a contrasting view). Instead of establishing a color-blind or race-neutral standard of citizenship, the Reconstruction Congress enacted a race-conscious amendment that favored native-born persons of African and Chinese descent and worked against American Indians. Indeed, the willingness of Reconstruction congressmen to include native-born persons of African and Chinese descent into the new standard of birthright citizenship was matched only by their determination to exclude Indians.

To their credit, the framers of the Fourteenth Amendment acknowledged the race-conscious character of their beliefs and

behavior. In other words, in 1866, some congressmen understood the race-conscious dimension of the new standard of American citizenship. For example, Senator Willard Saulsbury, a Democrat from Delaware, objected strongly to the exclusion of American Indians from birthright citizenship. While recognizing that the primary purpose of the citizenship clause of the Fourteenth Amendment was to extend birthright citizenship to native-born persons of African descent, he protested the lack of equal treatment for Indians. As he testified before the Senate in late May of 1866, less than two weeks before the passage of the Fourteenth Amendment, "I feel disposed to vote against his amendment, because if these negroes are to be made citizens of the United States, I can see no reason in justice or in right why the Indians should not be made citizens" (CG 39th, pp. 2897). Similarly, Representative James Brooks, a Democrat from New York, challenged the Republican Thaddeus Stevens to include American Indians in the new standards of citizenship and equality. "Why exclude the Indian? Is he not a man and a brother?" asked Brooks. "The Constitution of the United States has always excluded them," replied Stevens (CG 39th, p. 376). Not satisfied with the answer, Brooks countered, "Why not, as we amend the Constitution, embrace the Indian as a man and a brother?" Stevens responded, "Because they are a tribal race, have their separate governments, and, as a general rule, are not citizens." Brooks, still displeased with the evasive answers to his questions, pressed the question one more time: "Why not embrace them all, as we are making a liberal Constitution" (CG 39th, p. 376)? Saulsbury and Brooks understood correctly that the new constitutional standard of birthright citizenship included some groups of color (i.e., native-born persons of African and Chinese descent) while excluding others, namely, American Indians.

### The Naturalization Act of 1870: The Chinese Question Revisited

An exclusive focus on the debates over birthright citizenship can lead to the erroneous conclusion that, except for American Indians, the Reconstruction Congress supported one class of citizenship without racial classifications. The Reconstruction Congress, however, did not limit its discussions of race and citizenship to the issue of birthright citizenship for domestic populations of color. The debates over citizenship also included efforts to amend the Naturalization Act in a manner that would establish a racially neutral standard of naturalized citizenship. In fact, early (January 8, 1866) in the debates over citizenship and equality, Representative Henry Jarvis Raymond, Republican from New York, introduced a bill (H.R. 88) to amend the several acts of Congress relating to naturalize citizenship (Tehrani, 2000, pp. 818–819). Section 1 of his proposed bill stated,

That all acts of Congress relating to naturalization be, and the same are hereby, amended by striking out, wherever they occur, the words "being a free white person," and the words "free white" and the words "a free white person," so that in the matter of naturalization there shall be no distinction as to race or color." (CG 39th, p. 135; H.R. 88, 1866)

Section 2 proposed birthright citizenship for persons born within the limits and under the jurisdiction of the United States. The

final section declared, "That nothing in this act contained shall be construed to naturalize or authorize the naturalization of any members of the Indian tribes" (CG 39th, p. 135; H.R. 88, 1866). Significantly, Raymond's bill joined together the three critical questions of citizenship debated by the Reconstruction Congress: birthright citizenship, naturalization, and American Indian citizenship. As indicated in Raymond's proposed bill to amend the Naturalization Act, the debates over naturalized citizenship also centered on questions of race and ethnicity and provide further evidence as to whether the Reconstruction Congress intended to establish a color-blind or color-conscious standard of American citizenship. Raymond's bill was read a first and second time and then referred to the Committee on the Judiciary, and there it was buried. Nonetheless, as late as May of 1866, some congressmen continued to refer to Raymond's proposal to strike the word *white* from the Naturalization Act (CG 39th, p. 2505). On July 19, 1867, more than one year later, Senator Charles Sumner introduced a similar bill into the Senate, also designed to amend all acts of Congress relating to naturalization by striking the word *white* so that "in naturalization there shall be no distinction of race or color" (*Congressional Globe*, 1867, p. 728). In the summer of 1870, Sumner's proposed amendment, having been buried in committee for approximately three years, emerged for debate and vote on the Senate floor. Prior to the vote, the debate in the Senate revealed strong opposition to a color-blind naturalization act. There were several concerns, but above all else, disdain, suspicion, and fear of Chinese immigration reigned supreme.

The majority of Reconstruction congressmen stood firmly against removing the word *white* from the Naturalization Act. Although the extensive debates included various rationales for denying Chinese the opportunity to become naturalized citizens, the primary opposition reflected an underlying fear that Chinese immigrants would overpopulate the Western states and territories and thus challenge the dominion of Whites on the Pacific coast. Hence, Chinese were constructed in congressional debates as a pagan race incapable of assimilating into American life and culture. Throughout the debates over citizenship, William Morris Stewart, a Republican Senator from Nevada, remained staunchly opposed to "pagan imperialists" being "incorporated into the body politic" (*Congressional Globe*, 1870, pp. 5152, 5155; hereafter cited as CG 41st). In contrast to his description of the Negro as "an American, generally a believer in the Christian religion," he characterized the Chinese as a "pagan-Asiatic, speaking an unknown tongue, and being a stranger, and ever remaining an alien and a stranger, to our language and our institutions" (CG 39th, p. 1104). Similarly, George Henry Williams, Republican Senator from Oregon, resolutely opposed amending the Naturalization Act to include Chinese, fearing the establishment of "an empire of China within the North American Republic" (CG 41st, p. 5156). Such views represented the views of the moderate-conservative Republican majority.

Significantly, while Senator Williams strongly opposed amending the Naturalization Act to permit Chinese to become citizens, he approved amending the act to allow Black aliens to become U.S. citizens. As he put it,

All persons born in Africa, or upon the islands of the sea, to be naturalized if you please; but the practical question before us now

is to deal with this mighty tide of ignorance and pollution that Asia is pouring into the bosom of our country. (CG 41st, p. 5157)

The debates over amending the Naturalization Act underscored the extent to which the Chinese were targeted because of race and color in contradistinction to nationality. Initially, Senator Williams sought to add the following amendment to Sumner's proposal to amend the Naturalization Act: "That nothing in this act shall be construed to authorize the naturalization of persons born in the Chinese empire" (CG 41st, p. 5158). Unwittingly, as pointed out by Senator Carl Schurz, Republican of Missouri, Williams's proposed amendment to the bill "would exclude Germans, Englishmen, Scotchmen, everybody born in the Chinese empire." Senator Williams replied, "I am willing to modify my amendment." In other words, as Senator Oliver Morton of Indiana injected, "He means Chinese" (CG 41st, p. 5158). Did the Senators within the context of the time understand that their actions encoded race-conscious standards of citizenship into law and governmental policies? Senator Lyman Trumbull certainly thought so and protested vehemently against the racially qualified standard of naturalized citizenship held by the majority of his colleagues. As he alerted his fellow senators,

This whole opposition to the naturalization of the Chinese grows out of their race and color. They are Asiatics, and the color of their skin is yellow. It is not long since the color of the skin being black deprived an individual of all his rights. (CG 41st, p. 5164)

Despite strong opposition to amending the Naturalization Act, Sumner called for a vote on his proposal. On July 4, 1870, the Senate voted 30 to 14 against removing the word *white* from the naturalization law (CG 41st, p. 5176). Senator Willard Warner, Republican from Alabama, concluded that the Senate had "wisely voted down the amendment of the senator from Massachusetts" (CG 41st, p. 5177). Then, with no apparent sense of irony or contradiction, Warner moved to amend the Naturalization Act to include aliens of African descent. He offered the following amendment: "And be it further enacted, That the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent" (CG 41st, p. 5177). Senator Warner's amendment was agreed to by a vote of 20 to 17, making persons of African nativity and descent the first "non-Caucasian" race legally eligible for naturalized citizenship in the United States. Senator Lyman Trumbull, recognizing the contradiction of denying naturalized citizenship to Chinese aliens while extending it to African aliens, made a final effort to secure a racially impartial standard of naturalized citizenship. As he asked fellow senators, "Are we now going to place ourselves in the condition of authorizing these Africans to be naturalized and become citizens of the United States, and deny that right to the Chinamen?" The Senate answered with a resounding yes, defeating Trumbull's proposed amendment to include Chinese by a vote of 31 to 9 (CG 41st, p. 5177). Clearly, the Reconstruction Congress also endorsed a race-conscious standard of naturalized citizenship, one that included immigrants of African nativity or descent while excluding immigrants of Chinese descent. This action by the Congress is particularly damaging to notions of color-blind constitutionalism. Even some historians who recognize the failure of the Reconstruction

Congress to eliminate racial distinctions in American law argue, as does Paul Moreno (1995), “There was no benign classification in favor of blacks, only residual racial classifications that worked against them” (p. 303). This conclusion is clearly refuted by the debates and amendment of the Naturalization Act. On the same day and in the same hour that the Senate extended an unprecedented opportunity of naturalized citizenship to aliens of African descent, it also denied the same right to persons of Chinese descent. Hence, when the Senate adjourned at 11:18 p.m. on July 4, 1870, a benign as well as malignant racial classification had been encoded into the Naturalization Act. This was not an emergency or temporary measure but a permanent amendment of the Naturalization Act that would stand as the law of the land until the passage of the McCarran-Walter Act of 1952, and practically until the Hart-Celler Act of 1965, which abolished the national origins quotas that served as proxies for race and color (Zolberg, 2006).<sup>9</sup> Consequently, except for an inadvertent omission of the word *white* from the naturalization statute between June 22, 1874, and February 18, 1875, until 1952, only Blacks and Whites in general could qualify for naturalization (Tehrani, 2000, p. 819).

### Race, Civil Rights, and Equality Before the Law

The Fourteenth Amendment is consistently viewed as the cornerstone of color-blind constitutionalism. It emerged from two different and contradictory streams of constitutional thought. One stream, providing that no state shall make any distinctions among its citizens on account of race or color, represented the proposed solution to racial discrimination that had been developed by abolitionists approximately three decades prior to Reconstruction (Kull, 1992, pp. 22–51). The other stream reflected the position of the moderate-conservative wing of the Republican Congress that controlled the Joint Committee on Reconstruction, a committee whose version of the Fourteenth Amendment permitted the states to retain the constitutional authority to make a broad range of racial distinctions in civil and political rights. The “no race or color distinctions” idea manifested itself in the various versions of the Fourteenth Amendment proposed by radical Republicans. On December 4, 1866, the opening day of the 39th Congress, Senator Charles Sumner submitted for consideration his resolutions for the restoration of the rebel states. Resolution number 2 proposed,

The complete suppression of all oligarchical pretensions, and the complete enfranchisement of all citizens, so that there shall be no denial of rights on account of color or race; but justice shall be impartial and all shall be equal before the law. (*CG*, 39th, p. 2)

The following day, Thaddeus Stevens, majority leader in the House, placed before fellow Representatives a similar proposal to amend the Constitution. His proposed Fourteenth Amendment read, “All national and state laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color” (*CG* 39th, p. 10). Similarly, on December 13, 1866, still five weeks before the Joint Committee proposed its first draft of the Fourteenth Amendment, Representative George Sewel Boutwell, Republican from Massachusetts, introduced his own amendment to guarantee equal political rights without distinction of race or

color. His resolution provided “that no State shall make any distinction in the exercise of the elective franchise on account of race or color” (*CG* 39th, p. 10). Over the next six weeks, Stevens’s and Boutwell’s proposed amendments were followed by a series of similar resolutions from like-minded Republicans, all designed to amend the Constitution in a manner that would preclude the states from making distinctions of race and color in civil and political rights. On January 23, 1866, one day following the Joint Committee’s report to Congress, Senator John B. Henderson of Missouri introduced a fourth version of the Fourteenth Amendment. Henderson’s proposed “Article 14” (S.R. 23) stated simply, “No State, in prescribing the qualifications requisite for electors therein, shall discriminate against any person on account of color or race” (*CG* 39th, p. 362). Six days later, Senator Richard Yates of Illinois offered Senate Bill 106, proposing to amend the constitution as follows:

That no State or Territory of the United States shall, by any constitution, law, or other regulation whatever, heretofore in force or hereafter to be adopted, make or enforce, or in any manner recognize any distinction between citizens of the United States or of any State or Territory on account of race, color, or condition, and that hereafter all citizens without distinction of race, color, or condition, shall be protected in the full and equal enjoyment and exercise of all their civil and political rights, including the right of suffrage. (S. 106, 1866)

On February 2, 1866, Senator Charles Sumner introduced Senate Resolution 28, a sixth version of the Fourteenth Amendment (S.R. 28, 1866). It provided,

That in all States lately declared to be in rebellion there shall be no oligarchy, aristocracy, caste or monopoly invested with the peculiar privileges and powers, and there shall be no denial of rights, civil or political, on account of color or race; but all persons shall be equal before the law, whether in the court-room or at the ballot-box. (*CG* 39th, p. 592)

Finally, on April 12, 1866, Republican Senator William Morris Stewart offered the following amendment to the Constitution: “All discriminations among the people because of race, color, or previous condition of servitude, either in civil rights or the right of suffrage, are prohibited” (*CG* 39th, p. 1906; Kull, 1992, pp. 82, 255). Consequently, during the winter and spring of 1866, the 39th Congress had multiple opportunities to adopt a constitutional amendment designed to end distinctions of race and color in American law. All of the aforementioned proposed amendments, however, were debated, clearly understood, and rejected by the Reconstruction Congress, underscoring its decisive and self-conscious defeat of color-blind constitutionalism.

On January 22, 1866, the Joint Committee on Reconstruction introduced a more conservative and race-conscious version of the Fourteenth Amendment. Proposed in the Senate by William Pitt Fessenden, Republican from Maine and Chairman of the Joint Committee on Reconstruction, and in the House by Thaddeus Stevens, the committee’s proposed Article 14 read,

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers, counting the whole number of persons

in each State, excluding Indians not taxed: Provided, That whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons therein of such race or color shall be excluded from the basis of representation. (*CG* 39th, pp. 337, 351; S.R. 22, 1866)

Stevens explained by example the meaning of the proposed Fourteenth Amendment. According to Stevens, the committee's proposed amendment "says to the State of South Carolina and other slave States" that

we leave where it has been left for eighty years the right [of States] to fix the elective franchise, but you must not abuse it; if you do, the Constitution will impose upon you a penalty, and will continue to inflict it until you shall have corrected your actions. (*CG* 39th, p. 536)

In other words, as Republican Representative Samuel Shellabarger of Ohio pointed out, the Joint Committee's proposed Fourteenth Amendment gave inferential power to any state to exclude people based on race or color, attaching as the only consequence a reduction in its members of the House of Representatives (*CG* 39th, p. 358). Hence, even as it incorporated a penalty for abusing racial distinctions, the Joint Committee's proposed Fourteenth Amendment would not preclude the states from having the constitutional authority to make such distinctions. It is important to underscore the fact that within the Joint Committee three constitutional amendments were proposed for consideration. One of them stipulated that "all provisions in the Constitution or laws of any State, whereby any distinction is made in political or civil rights or privileges, on account of race, creed or color, shall be inoperative and void" (Kendrick, 1914, p. 50). This resolution was rejected in favor of the aforementioned version that explicitly permitted states to discriminate along racial lines. Radical Republicans, particularly in the Senate, were disappointed and strongly opposed to the Joint Committee's proposed Fourteenth Amendment. Sumner regarded it as an amendment that would disgrace a free nation, contradict the Declaration of Independence, and "insert into the Constitution itself a distinction of color" (*CG* 39th, p. 673). Senator Henderson of Missouri denounced the Joint Committee's proposal as "a sham and a delusion" (Henderson, 1866, p. 119), and Senator Yates joined them in a successful campaign to kill the proposal in the Senate (Yates, 1866), although it passed the House with a decisive majority (*CG* 39th, p. 538).

In late April of 1866, after all proposed amendments had been defeated, the Joint Committee completely overhauled its draft of the Fourteenth Amendment. Spearheaded by John Bingham, Republican Representative of Ohio, the Committee evaded "no distinctions of race or color" clauses and replaced such idioms with Bingham's "equal protection" provision that protected undefined rights against state infringement but avoided any principle that would forbid discrimination on account of race or color (*CG* 39th, pp. 2459–2461).

The change that was made allowed states to discriminate by race as deemed appropriate, especially in the arena of "social rights" that included education. The framers of the draft that would become the Fourteenth Amendment to the Constitution understood as much. In the Senate, Fessenden explained why the

Joint Committee on Reconstruction, after much debate and compromise, crafted an amendment that left the states free to impose distinctions of race and color. In his judgment, the committee felt that provisions forbidding distinctions of race and color had to be dropped in order to gain enough support for passage and eventual ratification by the states. As he testified on the floor of the Senate in early February of 1866,

There is a simple way of doing this. I expected that the honorable Senator from Massachusetts [Sumner], who does not like this amendment, would have proposed it. Why not propose a simple amendment precisely in the same terms the honorable Senator from Missouri [Mr. Henderson] has—a proposition doing away at once with all distinctions on account of race or color in all the States of this Union so far as regards civil and political rights, privileges, and immunities? I am free to confess that, could I legislate upon that subject, although I can see difficulties that would arise from it, yet trusting to time to soften them, and being desirous, if I can, to put into the Constitution a principle that commends itself to the consideration of every enlightened mind at once, I would prefer something of that sort, a distinct proposition that all provisions in the constitution or laws of any State making any distinction in civil or political rights, or privileges, or immunities whatever, should be unconstitutional, inoperative, and void to that effect. I would like that much better. (*CG* 39th, p. 703)

Likewise, Stevens became convinced that ratification of the Fourteenth Amendment depended mainly on states retaining the authority to regulate the restrictions and qualification of voters, including race-based restrictions. In his words,

If you should take away the right which now is and always has been exercised by the States, by fixing the qualification of their electors, instead of getting nineteen States, which is necessary to ratify this amendment, you might possibly get five. (*CG* 39th, p. 536)

Stevens, while agreeing to support the Joint Committee's proposed amendment, actually preferred an amendment banning "all national and State laws" from discriminating "on account of race or color." He even hoped that his amendment would eventually be brought to the floor and acted upon, but decided "it would not be wise to entangle the present proposition [proposed Fourteenth Amendment] with that one." "Although I have not obtained what I want," said Stevens, "I am content to take what, after comparing ideas with others, I believe we can carry through the States" (*CG* 39th, p. 537). Hence, for practical political reasons, Stevens embraced a final version of the Fourteenth Amendment that permitted states to make distinctions of race or color in government although it did not compel them to do so.

### Sumner's Last Stand: The 1875 Civil Rights Act

The leading advocates of full equality before the law were keenly aware of their failure to incorporate racial equality into the 1866 Civil Rights Act and the Fourteenth Amendment. Led by Charles Sumner, in 1870, they launched their final campaign to enact a federal law binding the states to equal rights without distinctions of race or color. Sumner introduced his last civil rights bill on May 13, 1870. This bill (S. 916), designed specifically to supplement the 1866 Civil Rights Act, proposed to

secure equal rights in railroads, steamboats, public conveyances, hotels, licensed theaters, houses of public entertainment, common schools, and institutions of learning authorized by law, church institutions, and cemetery associations incorporated by national or State authority; also on juries in courts, national and State. (*CG* 41st, p. 3434)

Neither the Civil Rights Act nor the Fourteenth Amendment precluded racial discrimination in any of these areas (*CG* 39th, pp. 322, 418–420, 500, 505–506, 598, 604, 632, 1115–1121, 1159). Realizing that the 1866 Civil Rights Act and the Fourteenth Amendment failed to uproot racial classifications in important areas of American life, Sumner sought to achieve substantive equality in everyday life by supplementing the 1866 Civil Rights Act with a bill guaranteeing equal rights in a broad range of civil relationships. Sumner died in 1874 before the bill became law. Congress cut out the school desegregation provision and passed an emasculated version of the civil rights bill fundamentally different than the one originally proposed by Sumner (McPherson, 1965, pp. 493–510). Furthermore, signed into law by President Grant on March 1, 1875, the Act was ruled unconstitutional by the U.S. Supreme Court in 1883.

In his classic study, *The Color-Blind Constitution*, legal scholar Andrew Kull (1992) makes the following observation: “The interesting fact that Congress in 1866 considered and rejected a series of proposals that would have made the Constitution explicitly color-blind has been, in consequence, largely forgotten” (p. 69). Many contemporary judges, attorneys, scholars, and pundits not only have forgotten this history of American constitutional law but have created a fictive history, one that assumes the color-blind proposals rejected by the 39th Congress actually define our living constitution. In delivering the opinion of the Supreme Court in the Louisville and Seattle cases, Chief Justice Roberts proclaims, “When it comes to using race to assign children to schools, history will be heard” (*Parents Involved*, 2007, p. 39). He hears a history that proclaims a Constitution that “prevents states from according differential treatment to American children on the basis of their color or race” (*Parents Involved*, 2007, p. 40). Justice Thomas, demonstrating virtually a blind faith in the myth of a color-blind Constitution, rebukes the four dissenting justices for “disfavoring a color-blind interpretation of the Constitution” (*Parents Involved*, 2007, pp. 1, 26). Arguing that the Constitution generally prohibits government race-based decision making, except for remedial purposes, Thomas tells us that he is “quite comfortable in the company I keep.” “My view of the Constitution,” he continues, “is Justice Harlan’s view in *Plessy*: ‘Our Constitution is color-blind, and neither knows nor tolerates classes among citizens’” (*Parents Involved*, 2007, p. 26). Under our Constitution, he concludes, “government may not make distinctions on the basis of race” (*Parents Involved*, 2007, p. 34). Chief Justices Roberts claims to hear the voices of the plaintiffs in *Brown v. Board of Education*, and Justice Thomas hears the voice of Justice Harlan in *Plessy v. Ferguson*, but neither hears the voices of the Reconstruction Congress that framed the Fourteenth Amendment and the 1866 Civil Rights Act.

The moderate-conservative majority that framed the Reconstruction legislation was not a color-blind body bent on establishing racially neutral standards of citizenship and equality.

On the contrary, they were very much a race-conscious generation, one that took race and color into account in all of their debates about citizenship and equal rights and ultimately encoded both benign and malignant racial classifications into Reconstruction legislation. With respect to the Fourteenth Amendment and the 1866 Civil Rights Act, the 39th Congress deliberately deleted the clauses prohibiting states from discriminating on account of race or color (Kull, 1992, pp. 76, 85). Fully aware that the constitutions and laws of virtually every state in the union imposed distinctions on racial lines that would be made illegal by an antidiscrimination amendment, the 39th Congress excluded “no racial distinctions” from the text of the Fourteenth Amendment. Thus, they bequeathed a Constitution to later generations that in general neither denied nor compelled racial distinctions by government. In other words, they left the constitutional question of racial classifications by government unresolved. We may argue for or against the use of racial classifications to pursue issues of school desegregation and affirmative action, but we should not pretend that we are constrained by a color-blind Constitution created by the Reconstruction Congress. In fact, much like the Reconstruction generation, we are constrained primarily by our own sense of social justice and our understanding of the ways in which racial discrimination and subordination have shaped the society in which we live today. If history must be heard, as Chief Roberts contends, then we should take time and effort to understand the historical and sociological context in which school desegregation and affirmative action cases arise and not prejudge them by the mythology of a color-blind Constitution.

## NOTES

This essay is a condensed version of a much longer paper upon which the AERA Distinguished Lecture was based; the longer version, first delivered as a Simmons College/Beacon Press Lecture, is a forthcoming chapter in a book on race, democracy, and education to be published by Beacon Press in 2008.

<sup>1</sup>*Parents Involved in Community Schools v. Seattle School District No. 1, et al.* (*Parents Involved*, 2007; argued December 4, 2006), together with No. 05-915, *Meredith, Custodial Parent and Next Friend of McDonald v. Jefferson County Board of Education et al.*, on certiorari to the United States Court of Appeals for the 6th Cir.

<sup>2</sup>The singular term *Reconstruction Congress* actually refers to the 39th, 40th, 41st, 42nd, and 43rd Congresses, covering the years from 1865 (Thirteenth Amendment) to 1875 (Civil Rights Act of 1875).

<sup>3</sup>Brief of Historians as Amici Curiae in Support of Respondents, *Parents Involved in Community Schools, Petitioner, v. Seattle School District No. 1 et al., Respondents, and Crystal D. Meredith, Custodial Parent and Next Friend of Joshua Ryan McDonald, Petitioner, v. Jefferson County Board of Education et al., Respondents*; Nos. 05-908 and 05-915, in the Supreme Court of the United States. I also cosigned the brief by historians on behalf of respondents (Meredith, 2006).

<sup>4</sup>Kull’s (1992) book refutes the theory of color-blind constitutionalism. The last chapter, however, criticizes current affirmative action advocates for rejecting the color-blind principle.

<sup>5</sup>In comparison to historical perspectives on this question, Linn and Welner (2007) give an excellent report regarding social science perspectives on race-conscious student assignment policies.

<sup>6</sup>Because the Treaty of Guadalupe Hidalgo, the peace treaty that ended the war between the United States and Mexico, guaranteed that Mexicans who remained more than one year in the ceded lands would



automatically become full-fledged American citizens, the Reconstruction Congress regarded the issue of Mexican citizenship as a settled question (Castillo, 1990).

<sup>7</sup>Kull (1992) takes a different view, arguing that “the framers had compromised with slavery but not with racial discrimination: until the ratification of the Fifteenth Amendment, the language of the Constitution did not even acknowledge the existence of racial distinctions” (p. 20). It is extremely doubtful that the founding fathers viewed American slavery as having no necessary racial component. Rather, they recognized that slavery in America meant Black slavery, and thus the sanction and protection of slavery inherently recognized a racial component. Pomeroy has the better of this argument; the framers gave race and slavery a place without a name, reminding us to examine both explicit and coded discourse in order to understand the meaning of constitutional language within its underlying context.

<sup>8</sup>The phrase “Indians not taxed” referred to Indians living on reservations under the care of government agents or roaming individually or in bands over unsettled tracts of country; it is also code speak for “uncivilized Indians” (Seltzer, 1999). Indians not taxed composed 92% of the Native American population in 1870 (Collins, 2006).

<sup>9</sup>The McCarran-Walter Act (1952), states that the right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married. Racial restrictions that previously existed were abolished in the Immigration and Nationality Act (INA), but a quota system was retained and the policy of restricting the numbers of immigrants from certain countries was continued. Eventually, the INA established a preference system that selected which ethnic groups were desirable immigrants. The Immigration and Nationality Act amendments of 1965 (Pub. L. No. 236), also known as the Hart-Celler Act or the INS Act of 1965, abolished the national-origin quotas that had been in place in the United States since the Immigration Act of 1924.

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