

# “No Distinction Would Be Tolerated”: Thaddeus Stevens, Disability, and the Original Intent of the Equal Protection Clause

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## INTRODUCTION

Almost fifty years ago, Thurgood Marshall looked upon the work of his staff with disappointment.<sup>1</sup> He was preparing to argue for a second time before the Supreme Court in *Brown v. Board of Education (Brown I)*,<sup>2</sup> and the brief William Ming, Jr., and Alfred Kelly had prepared was lacking.<sup>3</sup> It argued that the framers of the Fourteenth Amendment were sufficiently idealistic to intend that all racial discrimination on the part of the states, including segregation, would be rendered illegal under the Equal Protection Clause.<sup>4</sup> The problem was that the brief was unpersuasive and vague; “there was nothing concrete in it.”<sup>5</sup>

“I gotta argue these cases,” Marshall explained, “and if I try this approach, these fellows [on the Court] will shoot me down in flames.”<sup>6</sup>

They needed something more. According to Davis and Clark, “[a]fter three days of round-the-clock effort . . . Marshall, Kelly, and company made their hoped-for discovery.”<sup>7</sup> That discovery came in the words of Thaddeus Stevens, a Representative at the time of the framing, where he stated that it was his dream that under the Equal Protection Clause “no distinction would be tolerated in this purified Republic but what arose from merit and conduct.”<sup>8</sup>

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1. See MICHAEL D. DAVIS AND HUNTER R. CLARK, *THURGOOD MARSHALL: WARRIOR AT THE BAR REBEL ON THE BENCH* 22 (updated and rev. ed., 1994).

2. 347 U.S. 483 (1954).

3. DAVIS AND CLARK, *supra* note 1, at 22.

4. *Id.* at 22. U.S. CONST. amend. XIV, § 1, cl. 4.

5. DAVIS AND CLARK, *supra* note 1, at 22.

6. *Id.* at 23.

7. *Id.* at 27.

8. *Id.* at 27 (“The term *purified*, connoting absolution from sin, meant ‘with slavery removed.’”). Brief for Appellants at 94, *Brown v. Board of Education*, 347 U.S. 483 (1954) (No. 1) in 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW

Marshall was elated. “‘Hot damn!’ exclaimed Marshall. ‘Here’s something finally that we can use that isn’t manipulating the facts.’”<sup>9</sup>

Stevens’s words were quoted to the Supreme Court and may have proved pivotal in that landmark case.<sup>10</sup>

On the Supreme Court’s docket this term is the case of *University of Alabama v. Garrett*,<sup>11</sup> which has the potential to be either *Brown v. Board of Education* or *Plessy v. Ferguson*<sup>12</sup> for disabled persons. For nearly a decade now, millions of disabled Americans have “ordered their thinking and living”<sup>13</sup> around a belief that the Americans with Disabilities Act<sup>14</sup> (hereinafter “ADA”) would protect them from state-based discrimination. Disabled law students have spent years in school working exclusively toward the goal of obtaining a Juris Doctorate;<sup>15</sup> without the ADA they would have to wonder if their state would even have to provide a wheelchair ramp when they take the bar exam. Disabled persons have taken out home loans dependent on the retention of state employment; without the ADA, they would have to wonder if they might lose their jobs, not because they are unqualified, but because they are disabled. There are persons with invisible disabilities—such as specific learning disabilities or medical conditions (diabetes or heart murmurs, for example)—who once lived in fear of revealing their disabilities and then chose to live open lives;<sup>16</sup> without the ADA, they will find themselves exposed to the exact dis-

514, 607 (Phillip B. Kurland and Gerhard Casper, eds., 1975) [hereinafter LANDMARK BRIEFS].

9. DAVIS AND CLARK, *supra* note 1, at 28.

10. Taking the Supreme Court’s words at face value, *Brown* did not turn on original intent. The Court determined that the historical evidence was “inconclusive.” 347 U.S. at 489. Having concluded that the historical “battle” had resulted in a draw, the Court proceeded to decide the issue based on their own conception of equal protection. This was precisely the result Marshall had hoped for, in citing figures such as Stevens. As he explained to his staff: “A nothin’ to nothin’ score means we win the ball game.” DAVIS AND CLARK, *supra* note 1, at 28. Cf. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 12 (1921) (explaining that “when reasons are nicely balanced” judges will make their decisions based on their “outlook on life, . . . [and] conception of social needs”).

11. *Cert. granted*, 146 L.Ed. 2d 479 (2000). This is an appeal of *Garrett v. University of Alabama*, 989 F.Supp 1409 (N.D. Ala. 1998); *aff’d in part, rev’d in part, and remanded by* 193 F.3d 1214 (11th Cir. 1999).

12. 163 U.S. 537 (1896).

13. *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992).

14. 42 U.S.C. § 12101-12213 (1990). Title I, 42 U.S.C. § 12111-12117, addresses discrimination against the disabled in employment. Title II, 42 U.S.C. § 12131-12165, addresses discrimination against the disabled in public services. Title III, 42 U.S.C. § 12181-12189, addresses discrimination in public accommodations and services operated by private entities. Title IV, 42 U.S.C. § 12201-12213, includes miscellaneous provisions of the act.

15. Disabled students have similar degree aspirations as non-disabled students. For instance, in 1996, twenty-six percent of college freshmen with disabilities planned to obtain a doctorate or professional degree, compared with twenty-eight percent of non-disabled freshmen. U.S. Dept. of Ed. Office for Civil Rights, *Impact of the Civil Rights Laws* ¶ 45 (1999), at <http://www.ed.gov/offices/OCR/impact.html>, (last visited Nov. 19, 2000).

16. See, e.g., Andrew Weis, *Jumping to Conclusions in “Jumping the Queue”* 51 Stan. L. Rev. 183, 202 (1998) (reviewing MARK KELMAN AND GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* (1997)) (“[A]t Stanford Law School . . . I was not the only student with LD [specific learning disabilities], but I was the *only one*

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crimination they had feared. These same people who have relied on the ADA, to their detriment, now have to wonder if they made an egregious mistake.

The case immediately involves the issue of state sovereignty, but in reality the case will turn on the question of whether Congress, acting on behalf of the people of the whole nation, can eliminate discrimination committed by the states against the disabled, and therefore enforce<sup>17</sup> the Equal Protection Clause.<sup>18</sup> This question involves three subordinate questions. First, what acts of discrimination against the disabled are impermissible under the Equal Protection Clause? Second, what acts of discrimination are made prophylactically illegal under the ADA? Finally, is there congruence and proportionality between the two?<sup>19</sup> Under this framework, the initial question—how much protection the disabled are afforded under the Equal Protection Clause prior to Congressional enforcement—is vital to the outcome of the case.

*Cleburne v. Cleburne Living Center*,<sup>20</sup> which held that discrimination against the mentally retarded would only receive rational basis review, is frequently seen as setting the standard for evaluating all disability discrimination under the Equal Protection Clause.<sup>21</sup> Commentators have ignored the significant, easily distinguishable, differences between those people with a general mental incapacity rendering them incapable or severely impaired in making basic life decisions (such as retarded persons), and persons with disabilities that do not interfere with their ability to make those decisions (such as paraplegics, the Deaf, and those with specific learning disabilities).<sup>22</sup> *Cleburne* has been

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willing to identify myself publicly as LD.”)

17. U.S. CONST. amend. XIV, § 5.

18. The case involves whether the Congress, in passing the ADA, has lawfully abrogated the states' Eleventh Amendment immunity, *id.* amend. XI. In *Kimmel v. Florida Bd. of Regents*, 120 S.Ct. 631 (2000), the Court declared that the relevant inquiry takes two steps. First, the court must determine whether the law “contains a clear statement of Congress’ intent to abrogate the States’ Eleventh Amendment immunity . . . .” 120 S.Ct. at 637. The ADA contains just such a statement. See 42 U.S.C. § 12202 (1990). Then the question becomes whether the ADA “is a proper exercise of Congress’ constitutional authority.” 120 S.Ct. at 637.

19. See generally 120 S.Ct. at 645–47.

20. 473 U.S. 432 (1985).

21. See, e.g., James Leonard, *A Damaged Remedy: Disability Discrimination Claims Against State Entities Under the Americans with Disabilities Act After Seminole Tribe and Flores*, 41 ARIZ. L. REV. 651, 656 (1999) (“[*Cleburne*] decided that equal protection challenges brought by the mentally retarded, and presumably all disabled persons, were to be judged under [the] rational basis standard . . . .”); see also Lisa A. Montanaro, Comment, *The Americans with Disabilities Act: Will the Court Get the Hint? Congress’ Attempt to Raise the Status of Persons with Disabilities in Equal Protection Cases*, 15 PACE L. REV. 621, 622 (1995) (“[T]he [*Cleburne*] Court relegated classifications based on disability to . . . the rational basis test.”) (internal citations and quotation marks omitted).

22. The ability to make basic life decisions was a significant issue to the Court in *Cleburne*. The Court seemed to be concerned, in part, that if it raised the standard of scrutiny for retarded persons then it would be forced to eliminate beneficial legislation designed to address their unique needs. See 473 U.S. at 444 (“It may be, as [the attorneys for the retarded persons] contend . . . that legislation designed to benefit, rather than disadvantage, the retarded would generally withstand examination under a test of heightened scrutiny.”). Since retarded persons have a “reduced ability to cope with and function in the everyday world[,]” 473 U.S. at 442, some “paternalistic” legislation is necessary. However, this logic does not extend to people with disabilities that do not attack the ability to make basic life decisions.

read to apply to all disabilities because the Supreme Court chose to address the issue in dicta and without a full hearing. The Court stated that if they provided protection to retarded persons, they would have to provide protection to all disabled persons, declaring that “[w]e are reluctant to set out on that course, and we decline to do so.”<sup>23</sup>

In *Brown v. Board of Education*, Thaddeus Stevens spoke from beyond the grave and his words helped bring liberation to an oppressed people. If the Supreme Court chose to treat the question of which standard of review applies to the disabled as an open one, then Stevens could also help to bring liberation to the disabled; his life, his experiences, his philosophy of equality of opportunity, if properly recognized, would provide ample justification to uphold the ADA. This note explores an alternative theory of the intent of the framers, and in the process it provides a portrait of a remarkable figure in American history. The first section of this note will establish that Stevens was the primary framer of the Fourteenth Amendment in general and the Equal Protection Clause in particular. The second section will explore Stevens’s experience with—and his awareness of—disability discrimination. The third section will discuss his larger quest for equality of opportunity for all Americans, and how the issue of disability discrimination fits into that quest. Finally, this note will explore Stevens’s conception of equal protection, and demonstrate that the protection afforded by the ADA is congruent and proportional to that original understanding.

#### I. STEVENS’S ROLE AS THE PRIMARY FRAMER OF THE EQUAL PROTECTION CLAUSE.

Accounts of the framing<sup>24</sup> of the Fourteenth Amendment often focus on the work of John Bingham.<sup>25</sup> Justice Hugo Black went as far as to call him the

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23. 473 U.S. at 446. This statement is particularly infuriating to disabled persons because it is a blatant declaration that policy, and not principle, is guiding the Court, and since the case only involved retarded persons, it reached out unnecessarily to parties that were not present to be heard before the Court. Indeed, the opinion reaches much further than was necessary even on the subject of discrimination against the retarded. If the law in question is unconstitutional even under the rational basis test, there is no need to decide whether any higher level of scrutiny would apply. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (striking down an anti-gay law under the rational basis test without addressing whether a higher standard of scrutiny should apply).

24. “Framing,” in this note, is distinct from the act of “writing.” To frame is to control the content. To write is to put that content into words.

25. See Howard Graham, *Our “Declaratory” Fourteenth Amendment*, 7 *Stan. L. Rev.* 3, 18-24 (1954) [hereinafter *Our “Declaratory” Fourteenth Amendment*] (discussing the original intent of the Fourteenth Amendment mainly in terms of Bingham’s words and actions); see also Howard Graham, *The “Conspiracy Theory” of the Fourteenth Amendment*, reprinted in *RECONSTRUCTION: AN ANTHOLOGY OF REVISIONIST WRITINGS*, 107, 108 (Kenneth Stampp and Leon Litwack eds., 1969) [hereinafter *Conspiracy Theory*] (disproving the theory that a corporation is a “person” within the meaning of the Due Process and Equal Protection Clauses, U.S. CONST. amend. XIV, § 1, cl. 3, 4, by examining the words and actions of Bingham); see also ROALD MYKKELTVEDT, *THE NATIONALIZATION OF THE BILL OF RIGHTS: FOURTEENTH AMENDMENT DUE PROCESS AND*

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“Madison of the first section of the Fourteenth Amendment.”<sup>26</sup> The fundamental flaw in these analyses is that they did not examine the power structure that existed at the time of the framing. In other contexts, the power structure has been seen as vital to determine the influence of each participant. For example, Madison’s power when the original Constitution was formed was slight. Because of this, historians have reduced his prominence in their narrative of its framing.<sup>27</sup> Madison had more power when the Bill of Rights was framed and, as a result, he is given more credit for its formation.<sup>28</sup> The underlying power structure should also inform our analysis of the original intent of the Equal Protection Clause. At the time of the framing of the Fourteenth Amendment, Thaddeus Stevens was the most powerful politician in America. His power even eclipsed that of the president,<sup>29</sup> the bigoted Andrew Johnson,<sup>30</sup> as Stevens and his Radical phalanx ran roughshod over the executive until Stevens’s death in 1868.<sup>31</sup> In the words of James Blaine, Stevens was a “natural leader, who assumed his place by common consent, . . . a man of strong peculiarities of character, able, trained and fearless.”<sup>32</sup>

Before the Civil War, Stevens had gained a reputation as an uncompromising, unrelenting abolitionist. After one particularly able attack on the proposed Fugitive Slave Act of 1850, Howell Cobb, the Democratic Speaker of the House, said privately:

Our enemy has a general now. This man is rich, therefore, we cannot buy him. He does not want higher office, therefore we cannot allure him. He is not vicious, therefore, we cannot seduce him. He is in earnest. He means what he says. He is bold. He cannot be flattered or frightened.<sup>33</sup>

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PROCEDURAL RIGHTS 3-11 (1983) (discussing the original intent basis of the incorporation doctrine in terms of Bingham’s words and actions). See generally AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION*, 163-394 (1998) (telling the story of the incorporation of the Bill of Rights mainly in terms of John Bingham’s words and actions).

26. *Adamson v. California*, 332 U.S. 46, 74 (1947) (Black, J., dissenting).

27. Compare MAX FERRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES*, 196 (1913) (arguing that Madison “was the master-builder of the constitution.”) with Forrest McDonald, *The Power of Ideas in the Convention*, reprinted in 1 *MAJOR PROBLEMS IN AMERICAN CONSTITUTIONAL HISTORY* 160, 167-169 (Kermit Hall, ed., 1992) (debunking the “myth” that Madison was the father of the Constitution).

28. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 92 (1992) (Rehnquist, C.J., dissenting) (arguing that James Madison’s intent should be followed in interpreting the First Amendment because “he was a leading Member of the First Congress.”).

29. See, e.g., FAWN BRODIE, *THADDEUS STEVENS: SCOURGE OF THE SOUTH* 18 (1959) (“Stevens . . . held more political power than any man in the nation, more power, in fact, even than Andrew Johnson . . .”).

30. For instance, Andrew Johnson argued that “negroes have shown less capacity for self-government than any other race . . .” DAVID DONALD, *LIBERTY AND UNION* 204 (1978) [hereinafter *LIBERTY AND UNION*].

31. See generally KENNETH STAMPP, *THE ERA OF RECONSTRUCTION: 1865-1877*, 50-154 (Vintage Books, 1965) [hereinafter *ERA OF RECONSTRUCTION*].

32. RALPH KORNGOLD, *THADDEUS STEVENS: A BEING DARKLY WISE AND RUDELy GREAT* 126 (1955).

33. BRODIE, *supra* note 29, at 110.

Stevens became the embodiment of Northern defiance<sup>34</sup> against what was perceived as a dangerous Slave Power Conspiracy against the liberties of all Americans.<sup>35</sup> “It is a vital principle of the constitution, that the will of a majority shall govern[,]” Stevens once declared, “[b]ut terror, treason, [and] threats, are used to compel the majority to yield to a turbulent minority.”<sup>36</sup> The terrorism referred to was the continual threats of secession, and occasional threats to bodily safety.<sup>37</sup>

In Stevens’s eyes, the rise of the Republican Party was a revolution; a victory of the common Northerner over the aristocracy that dominated the South. The North, long cowed by Southern threats of secession, began to assert its own power.<sup>38</sup> Since this was a democracy, it was only appropriate that the North—comprising the majority of the nation’s population<sup>39</sup>—would do so. The 1858 elections, when the Republicans finally outnumbered the Democrats in the House, provided the first major sign of change.<sup>40</sup> The 1860 elections, where for the first time a “Northern man with Northern principles”<sup>41</sup> was placed in the White House, proved that the landscape of American politics had shifted. This tectonic shift was followed by the earthquake known as the Civil War.<sup>42</sup>

One of the by-products of the war was Stevens’s rise to power. He recognized from the beginning that it would be “a protracted and bloody war” with “numerous . . .” “desperate and bloody battles . . .”<sup>43</sup> He understood from the

34. For example, one time Stevens was nearly assaulted by Southern Congressmen on the floor of the House of Representatives. Korngold writes: “Stevens had remained unperturbed and had not moved an inch. When the excitement had subsided he remarked with humorous features: ‘That is the way they used to frighten us.’” KORNGOLD, *supra* note 32, at 103.

35. See generally JEFFREY HUMMEL, *EMANCIPATING SLAVES, ENSLAVING FREE MEN: A HISTORY OF THE CIVIL WAR* 81-82, 113-114 (1996).

36. Thaddeus Stevens, The California Question, June 10, 1850, in 1 *THE SELECTED PAPERS OF THADDEUS STEVENS* 123 (Beverly Palmer & Holly Ochoa eds., 1997) [hereinafter 1 STEVENS PAPERS].

37. Real and threatened violence invaded Congress just before the Civil War. See generally BRODIE, *supra* note 29, at 124-37.

38. For instance, Stevens argued that President Buchanan, a Democrat, believed that “the true way to aid the increase of the Democratic Party North, is for the South to frighten people into the belief that if they venture to elect a Northern man with Northern principles [as Speaker of the House], the Union is to be dissolved . . .” KORNGOLD, *supra* note 32, at 105.

39. The census of 1860 listed about nineteen million whites, two hundred thousand free African Americans and eighteen slaves in the free states, and about eight million whites, three hundred thousand free African Americans and four million slaves in the slave states. See JAMES MCPHERSON, *THE NEGRO’S CIVIL WAR: HOW AMERICAN BLACKS FELT AND ACTED DURING THE WAR FOR THE UNION* 321 app. (Ballantine Books, 1961) [hereinafter *THE NEGRO’S CIVIL WAR*].

40. KORNGOLD, *supra* note 32, at 101.

41. *Id.* at 105.

42. See, e.g., Thaddeus Stevens, State of the Union, January 29, 1863, in 1 STEVENS PAPERS, *supra* note 36, at 180, 189-190 (describing the election of Lincoln as one of the claimed aggressions against the South, and the undemocratic nature of this objection). See also South Carolina Declaration of Causes of Secession of 1860, reprinted in Hall *supra* note 27, at 483, 485 (listing “the election of a man to the high office of President of the United States whose opinions and purposes are hostile to Slavery” as one of the justifications for secession).

43. KORNGOLD, *supra* note 32, at 130-131.

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beginning that “many thousand valuable lives will be lost, and . . . millions of money will be expended.”<sup>44</sup> Under the Constitution, the president cannot spend a dime without it being appropriated to him by Congress,<sup>45</sup> and all measures to raise revenue had to originate in the House of Representatives.<sup>46</sup> Under the rules of Congress at that time, all bills raising revenue or making appropriations had to survive the House Committee on Ways and Means.<sup>47</sup> Whoever held the chair of that committee could close the purse-strings of our nation and therefore would wield incredible power, especially in a time of war. That person was Thaddeus Stevens.<sup>48</sup>

Stevens used that position to help finance the war and help save the American economy;<sup>49</sup> it also allowed him to become extremely powerful. In the hands of this skilled parliamentarian, Stevens quickly became the “dictator” of Congress.<sup>50</sup> There were several factors that led to his remarkable power. First, there was the obvious power of the purse. Second, he was greatly loved, both amongst many politicians<sup>51</sup> and also by the people.<sup>52</sup> This was in part based on his status as an old warrior of the abolitionist movement and also because of his “peculiarly democratic appeal . . .”<sup>53</sup> Finally, he was simply a masterful politician.<sup>54</sup> Korngold gives this account of his control:

When he wished to expedite a measure he would shut off debate by moving the previous question, call for suspension of the rules, or limit discussion to one hour—five minutes—one minute—once even half a minute! In the party caucus his word was law and he brooked no insubordination. When a colleague protested that his conscience would not permit him to vote for a party measure, he banged his fist on the table and shouted: “Conscience, hell! Throw conscience to the devil and stand by the party!”<sup>55</sup>

Ironically, Stevens himself appeared to act principally on his own conscience. To mangle his words, he seemed to throw the party to the devil and stand by his principles.<sup>56</sup> Stevens, however, used his power and the party machinery to mold the other Republicans to fit his will, and to carry out the dictates of Stevens’s conscience, at the price of their own individual scruples.

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44. *Id.* at 131.

45. U.S. CONST. art. I, § 8, para. 1.

46. *Id.* § 7, para. 1.

47. BRODIE, *supra* note 29, at 150.

48. KORNGOLD, *supra* note 32, at 126.

49. *See generally id.* at 130-141.

50. *See, e.g., id.* at 126.

51. *Id.* at 434 (“[Stevens] commanded a phalanx of devoted followers that made it dangerous to break with him.”).

52. *Id.* at 138.

53. THOMAS WOODLEY, GREAT LEVELER: THE LIFE OF THADDEUS STEVENS 151 (1937).

54. BRODIE, *supra* note 29, at 150-51.

55. KORNGOLD, *supra* note 32, at 126.

56. *See infra* notes 184-200 and accompanying text (describing his politically suicidal stand in defense of free education).

Even Lincoln could be bent to Stevens's will. At the beginning of the war, Lincoln attempted to remain "neutral" on the issue of slavery.<sup>57</sup> No slaves would be freed, no black troops would be employed, and Northern armies would expend their valuable resources to capture and return slaves to their masters, even if the master was a Confederate.<sup>58</sup>

Stevens viewed the policy as both immoral and inefficient.<sup>59</sup> Its immorality was demonstrated by sickening reports of slaves attempting to escape, only to be shot by Union soldiers as they fled.<sup>60</sup> The policy's inefficiency was proven by the fact, acknowledged by no less than Jefferson Davis,<sup>61</sup> that slavery was the secret weapon of the Confederacy. First, it freed white manpower, allowing young slaveholders to leave their plantations.<sup>62</sup> Second, as many as one in five slaves worked in direct support of the war effort; some prepared war materials, while others worked as auxiliaries to the Confederate army, performing duties that were performed by soldiers in the Union army, such as fortification, engineering and supply.<sup>63</sup> All of this was only possible because of Lincoln's "neutral" stance on slavery. The slaves had no reason to take any interest in Northern victory, because no matter which side won, their servitude would continue.

Stevens recognized the centrality of slavery to the Southern war effort. "Although the black man never lifts a weapon," Stevens declared, "he is really the mainstay of the war."<sup>64</sup> Stevens, therefore, had a simple prescription: employ the slave in the cause against the Confederacy. "[T]he natural enemies of the slaveholders, must be made our allies."<sup>65</sup> Therefore the slaves must be emancipated. That alone, Stevens understood, would strike a death-blow to the Confederacy. Unlike many Northerners, Stevens understood that the slaves followed Northern policy closely, through the "grapevine telegraph"<sup>66</sup> and, even if they did not actually abandon their plantations, they would bring the Southern economy to its knees by passive resistance.<sup>67</sup> Subsequent events bore him out. As Jeffrey Hummel points out, "[L]iberation, so often presented as something the Union did for blacks, was as much something they did for themselves."<sup>68</sup>

It is uncertain which specific words may have moved the President. We do

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57. See KORNGOLD, *supra* note 32, at 136.

58. See *id.* at 169-70.

59. See, e.g., *id.* at 164-66.

60. *Id.* at 170.

61. *Id.* at 155-56.

62. *Id.* at 155-56.

63. *Id.* at 156.

64. *Id.* at 164-65.

65. *Id.* at 165.

66. *Id.* at 172.

67. *Id.* at 164-66.

68. HUMMEL, *supra* note 35, at 212.

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not know if Stevens ever specifically threatened to obstruct military funding, or if Lincoln simply understood that this was within Stevens’s power and that Stevens was quickly becoming annoyed enough to resort to such tactics. Either way, when Lincoln issued the Emancipation Proclamation, it was probably the result of duress more than anything else. Edward Stanly, military governor of North Carolina, reported that “[t]he President expressed the belief that, without the proclamation for which they were clamoring, the Radicals would take the extreme step in Congress of withholding supplies for carrying on the war . . .”<sup>69</sup> Cuthbert Bullitt, Allen Rice, and George Julian all reported similar statements from the President.<sup>70</sup> This suggests a secret meaning to Lincoln’s words: “I claim not to have controlled events, but confess plainly that events have controlled me.”<sup>71</sup>

As long as Lincoln lived, he could check Stevens’s power to an extent, and rational minds can disagree after the fact about which man had more power. What is important, however, is that the moment Lincoln died, Stevens became the most powerful politician in America, precisely in the time period critical to the framing of the Fourteenth Amendment.<sup>72</sup>

The nature of Stevens’s power was unique and must be properly recognized to understand his role as the primary framer of the Fourteenth Amendment. Stevens was not merely persuasive. Often he could not convince his fellow Republicans of the correctness of his position, but could command solid party votes even when individuals in the party disagreed.<sup>73</sup> Alexander McClure, a contemporary politician, once described how Stevens wielded this power:

I sat by him one morning in the house, . . . before the session had opened when the question of negro suffrage in the District of Columbia was about to be considered, and I heard a leading Pennsylvania Republican approach him to protest against

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69. KORNGOLD, *supra* note 32, at 191.

70. *Id.* at 192.

71. *Id.* at 225.

72. *See id.* at 269. *See also* BRODIE, *supra* note 29, at 128 (“It took him [until 1865] to become the most powerful Republican in the nation. . . . [He] dominate[d] legislation in the political crisis following Lincoln’s murder . . .”). Historians disagree on the exact degree of Stevens power. Some modern historians, such as Hans Trefousse (HANS TREFOUSSE, THADDEUS STEVENS: NINETEENTH CENTURY EGALITARIAN 112 (1997)) and Eric Foner (ERIC FONER, POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR 129 (1980)) argue that Stevens was not very powerful after all. However, Richard Current (RICHARD CURRENT, OLD THAD STEVENS: A STORY OF AMBITION *iii*, 295 (1942)), Fawn Brodie (BRODIE, *supra* note 29, at 18, 128, 261), and others argue he had nearly dictatorial power. The evidence, however, preponderates toward those who assign Stevens heightened power. The most convincing testimony comes from the accounts of contemporary politicians. Politicians are not more honest than historians, but politics is their vocation and there is an ever-present danger that historians simply might not understand politics well enough to report on it accurately. Thus when James Blaine, (KORNGOLD, *supra* note 32, at 126), Alexander McClure (*id.* at 126), Rutherford Hayes (*id.* at 128), James Scovel (TREFOUSSE at 112), and George Boutwell (*id.* at 112) all concur on the claim that Stevens was a “dictator,” while on the other hand neither Trefousse nor Foner can summon a single politician to counter their testimony, this would appear to settle the issue.

73. KORNGOLD, *supra* note 32, at 126-27.

committing the party to that policy. Stevens' grim face and cold eye gave answer to the man before his bitter words were uttered. He waved his hand to the trembling suppliant and bade him to go to his seat and vote for the measure or confess himself a coward before the world. The Commoner [Stevens] was obeyed, for had disobedience followed, the offender would have been proclaimed to his constituents, over the name of Stevens, as a coward, and that would have doomed him to defeat.<sup>74</sup>

Stevens also used the power of the purse to ensure that defeat would come to any who opposed him. Thus, the individual members of his party often followed him because they were too afraid to challenge his power. In this context, one wonders if those congressmen who followed him truly had any intent, except to follow Stevens's orders.

This places John Bingham's role in the framing of the Fourteenth Amendment into proper perspective. Bingham did much of the writing,<sup>75</sup> and arguably Stevens allowed Bingham to write most of Section One in order to solidify his support and the support of like-minded Conservative Republicans. Still, Bingham's power was limited to the ability to make suggestions, and at all times, Stevens retained the power to accept or reject those suggestions.

Once Bingham challenged Stevens's power. When Conservative Republicans balked at portions of the Reconstruction Act of 1867, Bingham and Blaine introduced amendments to the law that would have made it more palatable. Brodie states that "[f]or a time it seemed that Bingham would win the issue and take over Stevens' leadership in the House."<sup>76</sup> However Stevens employed all of his parliamentary skill to crush this insurrection. Recounting this episode, Fawn Brodie concluded that "Bingham was no real match for Stevens."<sup>77</sup>

Having written the first draft of the Equal Protection Clause,<sup>78</sup> possessing a veto on its language, and commanding solid party obedience to his command to vote for the entire Fourteenth Amendment, Stevens is properly characterized as the primary framer of the Equal Protection Clause.<sup>79</sup> He was the primary force moving the clause from inception to ratification. Further, this note will show that the Equal Protection Clause was the culmination of a life's quest for equality of opportunity for all persons.<sup>80</sup> All of his power surely would have focused on bringing that dream to life. In that context, Stevens's philosophy of equality of opportunity and its contours and its origins, are vital to a proper

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74. *Id.* at 127.

75. *See e.g.*, *Adamson v. California*, 332 U.S. 46, 111-13 (1947) (Black, J., dissenting).

76. BRODIE, *supra* note 29, at 303.

77. *Id.* at 303.

78. KORNGOLD, *supra* note 32, at 331; *see also* Graham, *Our "Declaratory" Fourteenth Amendment*, *supra* note 25, at 20 n.81 & 21 n.86.

79. Two historians concur that Stevens is the primary framer of the Fourteenth Amendment. *See* KORNGOLD, *supra* note 32, at 342 ("Such then was the Fourteenth Amendment forged under the leadership of Stevens . . ."); *see also* BRODIE, *supra* note 29, at 10 (describing him as "father of the Fourteenth Amendment"); *but see infra* notes 92, 99, 177 (critiquing Brodie's analysis on other topics).

80. *See infra* notes 154-207 and accompanying text.

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originalist interpretation of the clause.

### II. STEVENS’S EXPERIENCE WITH DISABILITY DISCRIMINATION.

In *Ex Parte Bain* the Supreme Court declared that “[i]t is never to be forgotten that in the construction of the language of the constitution . . . we are to place ourselves as nearly as possible in the condition of the men who framed that instrument.”<sup>81</sup> At least one Supreme Court Justice has recognized that in the case of the religion clauses,<sup>82</sup> the courts should place themselves in the condition of being a religious dissenter in the eighteenth century,<sup>83</sup> based on the fact that James Madison was a deist.<sup>84</sup> In the case of the Equal Protection Clause, the courts should place themselves in the condition of being a disabled man in the nineteenth century.

Thaddeus Stevens was disabled. He was born with a clubbed foot.<sup>85</sup> In purely functional terms it meant that he had a severe limp when he walked.<sup>86</sup> Indeed, an observer watching him walk would not realize he was unusually tall for his day—about six feet—until he halted and straightened himself.<sup>87</sup> Because of this disability, he was never able to work on a farm or perform a number of jobs that required strength in the legs.<sup>88</sup>

These physical limitations are irrelevant, however, to this analysis of intent. The relevant fact is that Stevens faced prejudice as a result of his disability.<sup>89</sup> First, the clubbed foot was seen as grotesque.<sup>90</sup> More significant, however, is the fact that at the time there was a superstition that a clubbed foot was a sign that a person was a child of the Devil.<sup>91</sup> This fits into the larger context of dis-

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81. 121 U.S. 1, 12 (1887).

82. U.S. CONST. amend. I, cls. 1, 2.

83. *Lee v. Weisman*, 505 U.S. 577, 617 (1992) (Souter, J., concurring) (“some [modern Americans], like several of the Framers, are deists”).

84. JON BUTLER, *AWASH IN A SEA OF FAITH* 218 (1990). James Madison is considered important in the framing of the First Amendment, *see supra* note 28, and accompanying text.

85. *See, e.g.*, BRODIE, *supra* note 29, at 23.

86. *Id.* at 17.

87. *Id.* at 17.

88. CURRENT, *supra* note 72, at 4.

89. *See e.g.*, Paula Berg, *Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law*, 18 YALE L. & POL’Y REV. 1 (1999) (arguing in part that discrimination is the largest difficulty that disabled persons face and criticizing the courts’ focus on the definition of disability in Americans with Disabilities Act cases).

90. William Hall described Stevens’s foot as “distorted.” BRODIE, *supra* note 29, at 25.

91. *Id.* at 19 (describing “the old superstition that cripples are really demons in mortal form.”). There is some evidence that clubbed feet were uniquely associated with satanic parentage. *See* JAMES MCGREGOR BURNS, *THE VINYARD OF LIBERTY* 121 (1982) (citing another famous clubfooted politician being referred to as a “cloven footed Devil”). *See also* CURRENT, *supra* note 72, at 20 (“[I]n the minds of many his clubfoot assumed the sinister significance of a cloven hoof.”). *See infra* text accompanying note 126. *Cf.* FRED PELKA, *THE ABC-CLIO COMPANION TO THE DISABILITY RIGHTS MOVEMENT* 264 (1997) (describing the “persistent thread within the Christian tradition . . . that the person with disabilities is either divinely blessed or damned: the defiled evildoer or the spiritual superhero”) (internal citations omitted).

abilities generally being seen as an “an outward sign of inner deformity.”<sup>92</sup>

This superstition amounted to a stereotype that he was incapable of good deeds and good intent. As the result of this, Stevens faced discrimination. Like many disabled persons, he was a pariah growing up—in part because he could not engage in many schoolyard games—and he was the target of ridicule, other children making fun of his handicap.<sup>93</sup> In addition to social rejection, there are several events that appear to be the result of discrimination. For instance, at Dartmouth College Stevens was excluded from the Phi Beta Kappa fraternity,<sup>94</sup> and Stevens’s later comments indicate that he believed it was motivated by some form of prejudice.<sup>95</sup> More disturbingly, when he became eligible to enter the York County Bar to practice as an attorney, the bar suddenly changed its rules so that he was no longer eligible and would be unlikely ever to become eligible.<sup>96</sup> According to his biographers, this change in policy was designed specifically to exclude him and no one else.<sup>97</sup> Stevens eventually became an attorney and hung his shingle in Gettysburg where other attorneys openly referred to him as the “lame young lawyer.”<sup>98</sup>

Other examples of probable bigotry abound.<sup>99</sup> At one point, he was falsely

92. KORNGOLD, *supra* note 32, at 34. *See also* Berg, *supra* note 89, at 5-6 (discussing superstitious attitudes toward disabled persons in history). Brodie’s own approach to Stevens reflects a curious phenomenon. Brodie does not seem to believe that Stevens actually was the Devil’s child. Instead the thesis of her book seems to be that knowledge of his disability and the superstitions surrounding it unbalanced his mind and led to “vindictive” policies toward the South. *See, e.g.*, BRODIE, *supra* note 29, at 21 (“Since he, being crippled, could never be perfect, he would not be deluded by the pleasant fantasy that the world was moving ineluctably toward sweetness and light.”). By contrast, this note argues that Stevens’s experiences with prejudice awakened him to the injustices that others faced. Therefore this discrimination was, in a way, an enriching factor, deepening his soul. *See infra* text accompanying notes 267-270. This possibility never occurs to Brodie.

93. KORNGOLD, *supra* note 32, at 5.

94. BRODIE, *supra* note 29, at 28-29.

95. *See infra* notes 112-114 and accompanying text.

96. *See* KORNGOLD, *supra* note 32, at 12-13.

97. All of his biographers listed in this note but Current concur in this assessment of their motives. *See id.* at 12-13 (“[T]he York County Bar had adopted a rule (apparently for his especial benefit) that no one could be admitted who had not devoted at least one year wholly to the study of law.”); *see also* WOODLEY, *supra* note 53, at 24 (“It soon became known that the lame school teacher had ambitions to enter the County Bar, and that association, for some reason, immediately took steps to block him.”); *see also* BRODIE, *supra* note 29, at 32 (“[T]he County Bar Association passed a resolution, apparently aimed at Stevens, forbidding anyone to take the bar examination who was not studying law full time.”); *see also* TREFOUSSE, *supra* note 72, at 11 (“According to Edward Callender, one of the earliest of Stevens’s biographers, the regulation required an applicant not to have engaged in any other profession while studying for the bar, a rule allegedly directed against Stevens . . .”). Professor Current does not contradict this account, CURRENT *supra* note 72, at 9, consistent with a general pattern of omitting but not contradicting any evidence that might generate sympathy for his subject, *see infra* notes 184-200 and accompanying text, especially note 200.

98. KORNGOLD, *supra* note 32, at 15.

99. Other explanations exist for many of these incidents, but what is disturbing is that most of his biographers do not even ask the question. This is similar to the phenomenon observed in race relations where white persons have great difficulty recognizing unconscious racism. *See, e.g.*, Peggy Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1560 (1989) (“The claim of pervasive, unconscious racism is easily devalued.”). Being “invisible” in the Ellisonian sense to contemporaries and to historians, *see infra* notes 271-273 and accompanying text, his problems being alien to them, they did not think to ask

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accused of fathering a child with a young woman.<sup>100</sup> At another point, there were rumors that he had committed murder.<sup>101</sup> This particular claim was so irrational that when Jacob Lefever published it, he was convicted of criminal libel.<sup>102</sup> Since truth was allowed as a defense,<sup>103</sup> the conviction represents a determination that Stevens was innocent to a moral certainty and that it was *unreasonable* to believe otherwise.<sup>104</sup> Once it is established that there is no reasonable explanation for his accusers' belief that Stevens was a murderer, then one is left with only unreasonable and irrational explanations for this belief. Considering that his accusers also demonstrated a sickening racial bigotry,<sup>105</sup> it seems all the more likely that they based their accusations on stereotypes or superstitions about Stevens, rather than empirical facts. Finally, in addition to those acts of bigotry, Stevens's opponents repeatedly made reference to his disability.<sup>106</sup> For instance, when he became known affectionately as “The Old Commoner,” his opponents referred to him as “The Old Clubfoot.”<sup>107</sup>

Even more important to this discussion of intent, Stevens seems to have recognized that he was the target of disability discrimination. His terminology was arcane but, understood in his historical milieu and in his own use of certain concepts, he unmistakably makes the claim that he had faced prejudice. For instance, both he and his compatriots referred to him as being “persecuted.”<sup>108</sup> Indeed, Professor Current insinuates that Stevens had a persecution complex.<sup>109</sup>

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the question. Professor Woodley appears to be the only exception. See *infra* notes 118, 207.

100. KORNGOLD, *supra* note 32, at 62-63.

101. *Id.* at 27.

102. *Id.* at 27.

103. BRODIE, *supra* note 29, at 43.

104. Cf. TREFOUSSE, *supra* note 72, at 22 (“So unsubstantiated an accusation would ordinarily be inconsequential, if Fawn Brodie . . . had not devoted a whole chapter to it.”).

105. See BRODIE, *supra* note 29, at 37 (detailing an accusation where children claim to see “black wool” caught between his fingers, a bigoted term for African American hair).

106. See, e.g., *id.* at 18 (quoting a newspaper article claiming that “upon [Stevens’s] body . . . was fixed hell’s seal of deformity . . .”). It seems safe to assume that they would not use such bigoted language, unless they believed (rightly or wrongly) that other people would be convinced by invoking these prejudices; therefore, by invoking these prejudices, they are demonstrating a belief that these prejudices are common.

107. *Id.* at 19.

108. CURRENT, *supra* note 72, at 72 (quoting William McPherson describing Stevens as “a most unrighteously persecuted man.”); see also *id.* at 70 (quoting Stevens’s claim of “persecution” when he is charged with fathering a child with a young woman).

109. For instance, Current quotes a former roommate at Dartmouth, writing that Stevens was “a poor sport and deeply envious of the scholars who made better marks.” CURRENT, *supra* note 72, at 6. But see WOODLEY, *supra* note 53, at 25 (“[The roommate’s] poor opinion of Stevens might have been inspired by personal animus more than fair judgment . . .”). When Stevens is snubbed by the Phi Beta Kappas, Current claims that Stevens “assuaged his sense of persecution by imagining” the Betans as “patricians” of ancient Rome, while he saw himself as a “poor plebeian[.]” CURRENT, *supra* note 72, at 7. Current dismisses Stevens’s class-based view of his exclusion as a product of Stevens’s “dream world,” *id.* at 7, and then goes on to complain that Stevens is no friend of the common people because he spoke in favor of the right to property and because he believed that equality of outcome was only achievable “in the poverty of barbarism,” *id.* at 7. What Current could not or would not recognize is that a genuine friend of the poor could advocate for equality of *opportunity*, but not equality of *outcome*.

In the context of his times, Stevens most likely used the word “persecution” to describe what we would call “discrimination.” At that time, Americans simply did not have the same vocabulary of equal protection that we have today; we have long since attached words to concepts that people living in the nineteenth century conspicuously struggled to articulate.<sup>110</sup> However, Stevens’s mother had taught him to read using the Bible and by adulthood he knew it well.<sup>111</sup> If one examines the Bible to obtain a definition of the term “persecution” one sees that it is not limited to crucifixion, throwing Christians to the lions, and the like, but also includes milder acts of repression, which we would term ordinary “discrimination.” Thus, a complaint that one is “persecuted” can be read as a complaint that one is facing discrimination.

Stevens also looked to another “Holy Scripture,” the Declaration of Independence, to find ways to describe discrimination. Stevens read the Declaration of Independence as a polemic against all forms of caste and privilege.<sup>112</sup> Terms such as “nobility” and “aristocracy” were often used by Stevens to describe the ultimate result of discrimination: the creation of a favored class that received benefits or immunities denied to another class, and unrelated to merit. Thus, when Stevens describes induction into the Phi Beta Kappas as “enter[ing] into the service of the aristocracy” and “grasping at unmerited honors,”<sup>113</sup> this can be read fairly as an indicator that Stevens believed that prejudice had infected their admissions criteria.<sup>114</sup>

Further, his behavior when faced with exclusion by the York County Bar demonstrates a belief that he had been treated unjustly. Stevens had read law for a year in Peacham, Vermont and then for another year in York, Pennsylvania—while working part time as a teacher in each town.<sup>115</sup> After reading law for a year in York, Stevens would have ordinarily been eligible to enter the lo-

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*See infra* notes 184-200 (discussing Stevens’s politically suicidal defense of free education and demonstrating that this fight was actually about eliminating a discrimination against the poor).

110. A few examples from Stevens’s life would prove instructive. For instance, when a Democrat mentioned a New Hampshire law that excluded African Americans from their militia, Stevens interjected this joke: “Let me say that I understand these laws to be made in favor of the colored race, giving them advantages over white people.” CONG. GLOBE, 39TH CONG., 1st Sess., 202 (1866). In modern language, this would be called “affirmative-action.” In his speech defending free education, he said that a return to the old system would “brand” poor students, *see infra* text accompanying note 194; a modern speaker would say that it would discriminate against those students, or stigmatize them.

111. KORNGOLD, *supra* note 32, at 4.

112. *See, e.g.*, KORNGOLD, *supra* note 32, at 302 (quoting Stevens’s declaration that the claim that “[t]his is a white man’s government. . . . contradict[ed] all the distinctive principles of the Declaration of Independence . . . . Our fathers repudiated the whole doctrine of the legal superiority of families or races, and proclaimed the equality of men before the law.”) (internal quotation marks omitted).

113. Letter from Thaddeus Stevens to Samuel Merrill (Jan. 5, 1814), in 1 STEVENS PAPERS, *supra* note 36, at 4.

114. *See* BRODIE, *supra* note 29, at 32 (“[H]e had been shut out of [the] fraternity for no cause he could recognize as just.”).

115. CURRENT, *supra* note 72, at 7; WOODLEY, *supra* note 53, at 24.

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cal bar.<sup>116</sup> In Stevens’s case, however, the York County Bar changed its rules so that a person could only become a lawyer if he or she did not have any other employment while reading the law.<sup>117</sup> Authoritative accounts agree that this was done specifically to exclude him.<sup>118</sup> Thus Stevens would not be eligible that year, and since he could not afford to spend a year without gainful employment,<sup>119</sup> he probably would have never become eligible under their rules. It was at that time that Stevens rode to Maryland and essentially bribed his way onto the bar in Bel Air;<sup>120</sup> by reciprocity, this rendered him eligible to practice in Pennsylvania, too.<sup>121</sup>

Stevens was not simply seeking an easy route into the legal profession. If that had been his motivation, he would have gone to Bel Air when he first arrived in Pennsylvania a year earlier, or sooner. By reading law for a year in York, Stevens demonstrated an initial willingness to conform to the rules of the local bar. Yet when those rules changed specifically to exclude him, he suddenly rejected their rules and made use of this corrupt method. Following the principle of Occam’s Razor, the plainest explanation is that he perceived an injustice in the process and thereby rejected their determination of ineligibility. It is only a small step from there to recognize that he could have easily believed that disability animus was the motivation for this injustice.

The final example of perceived, potential discrimination is the cruelest of all. When he was young, his father abandoned his family. The stories of his departure vary from his father being absent for long periods of time until he simply never came back,<sup>122</sup> to a feminist encounter where Stevens’s mother actually banished his father, apparently deciding that her children would be

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116. KORNGOLD, *supra* note 32, at 12.

117. *Id.* at 13.

118. See *supra* sources at note 97. Professor Woodley also appears to attribute this exclusion to disability prejudice. Woodley explains that “[s]ome antigregarious trait in the young clubfoot now made him unattractive to those about him in York County just as it had in Stevens’s childhood contracts with life.” WOODLEY, *supra* note 53, at 24. Although the Oxford English Dictionary does not contain a definition for “antigregarious” it does define “gregarious” in relation to humans as being “inclined to associate with others . . .” 6 Oxford English Dictionary 822 (2d, 1989). This is apparently closely related to its definition in natural history where the term describes any species of animals that lives in flocks or herds. *Id.* Thus an “antigregarious trait” is presumably a trait that prevents a person from being part of a group. Further, in Woodley’s view the same “antigregarious trait” that caused the bar association to exclude Stevens also caused him to be ostracized as a child. When one examines Woodley’s account of Stevens’s youth, one sees that Woodley primarily blames the clubfoot for the social rejection Stevens faced as a child. See WOODLEY, *supra* note 53, at 17 (describing how other boys would “laugh at [Stevens], boy-like, and mimic his limping walk.”). Therefore Woodley’s claim that the same “antigregarious trait” that rendered Stevens an outcast as a child also motivated the York County Bar, appears to be a subtle accusation that the bar acted out of prejudice toward Stevens.

119. KORNGOLD, *supra* note 32, at 13-15 (discussing how poor Stevens was during this period).

120. See *id.* at 13.

121. BRODIE, *supra* note 29, at 32.

122. KORNGOLD, *supra* note 32, at 4; see also BRODIE, *supra* note 29, at 24; see also TREFOUSSE, *supra* note 72, at 2; see also CURRENT, *supra* note 72, at 4.

better off without him.<sup>123</sup> In his speech defending free education, Stevens may have revealed his view of the abandonment. Stevens declares that “there are some men, whose whole souls are completely absorbed in the accumulation of wealth, . . . that they look upon their very children in no other light than as instruments of gain . . .”<sup>124</sup> These words take on a chilling meaning when one remembers that Stevens was incapable of helping his father on the farm.<sup>125</sup> It might only be a coincidence, but it holds open the possibility that Stevens perceived himself to have been the victim of a very personal and devastating form of discrimination.

Stevens was fully aware of his status as a disabled person and the superstition attached to his disability. Once he said to two youths, “You have heard that I am one of the devil’s children, and that this club foot of mine is proof of my parentage.”<sup>126</sup> Moreover, Stevens appeared to develop a sense of group identity as a disabled person. One of Stevens’s favorite poems was *Essay on Man*, by Alexander Pope<sup>127</sup>—a “celebrated cripple[.]” in Fawn Brodie’s words.<sup>128</sup> Stevens also bragged that he could replicate Lord Byron’s feat of swimming the Hellespont;<sup>129</sup> Byron was also clubfooted.<sup>130</sup>

Stevens would make reference to disability in the most diverse contexts, further demonstrating his group awareness. When he hired another disabled man as an assistant, his joke was that “[h]e’s crippled, but smart”<sup>131</sup>—probably a thinly veiled reference to how he believed he was perceived. When attacking Virginia’s slave code, he singled out a statute that declared that when a slave ran away too frequently, that slave would be dismembered to reduce mobility.<sup>132</sup> When the Civil War began and the Union began to see a large influx of disabled veterans,<sup>133</sup> Stevens began to make reference to them. When discussing the value of a particular measure, he accused opponents of having “no pity for the poor widow, the suffering soldier, the wounded martyr to his country’s good . . .”<sup>134</sup> When he and other Radicals believed that Andrew Johnson, Lincoln’s pro-Southern successor,<sup>135</sup> might actually attempt a military coup,

123. See WOODLEY, *supra* note 53, at 15.

124. Thaddeus Stevens, On the School Law (April 11, 1835), in 1 STEVENS PAPERS, *supra* note 36, at 23.

125. CURRENT, *supra* note 72, at 14.

126. BRODIE, *supra* note 29, at 25.

127. *Id.* at 9.

128. *Id.* at 29.

129. KORNGOLD, *supra* note 32, at 6.

130. BRODIE, *supra* note 29, at 26.

131. KORNGOLD, *supra* note 32, at 20.

132. Thaddeus Stevens, The California Question, (June 10, 1850), in 1 STEVENS PAPERS, *supra* note 36, at 121.

133. *Infra* text accompanying note 245.

134. Thaddeus Stevens, The Treasury Note Bill (February 6, 1862), in 1 STEVENS PAPERS, *supra* note 36, at 261.

135. For a discussion of how Johnson transformed from a promising populist radical to a defender

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Stevens proclaimed that Civil War veterans would stand in the way of any approaching army and “shake their mutilated limbs in the traitors’ faces.”<sup>136</sup>

He even demonstrated his group awareness in one of his most famous proposals. It is rarely known that Stevens was one of the earliest and strongest advocates of reparations.<sup>137</sup> Lincoln blocked this proposal,<sup>138</sup> but if Stevens had gotten his way, the large plantations would have been seized and redistributed to the freedmen as forty acres and a homestead.<sup>139</sup> Even fewer people realize that Stevens’s proposal would not have been confined to former slaves, but would have also benefited war widows and disabled veterans.<sup>140</sup>

At first blush, the inclusion of disabled veterans among the beneficiaries of this proposal might appear to be a coincidence. To understand why this is unlikely to be a coincidence, one must know two facts about his life. The first is that Stevens may have believed that his father died in the War of 1812. After his father abandoned his family, he was never heard from again.<sup>141</sup> One rumor was that he was killed by a British bayonet at Oswego.<sup>142</sup> Although Stevens did not appear to make any direct comment on the subject, he did refer to his mother as a widow,<sup>143</sup> indicating that he believed his father was dead. Stevens had unusually tender feelings for his mother. Whenever he spoke of her, “all the harsh lines of his countenance appeared to give place to the tenderness of a child.”<sup>144</sup> Therefore she probably exerted a powerful influence, even after she died.

The second fact one must know is that Stevens probably had an affair with his black housekeeper, Lydia Smith. Historians know little about their relationship; indeed there is substantial disagreement among his biographers about whether there was a relationship at all. The evidence is frequently ambiguous and not one of the biographers I have examined has explained how much proof would be required to establish its existence in his or her mind.<sup>145</sup> However, if one requires only a preponderance of the evidence, as I do,<sup>146</sup> there is suffi-

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of the slaveholding class, see generally STAMPP, *ERA OF RECONSTRUCTION*, *supra* note 31, at 50-82.

136. Thaddeus Stevens, Speech to Soldiers and Citizens of Washington (Dec. 2, 1866), in 2 *THE SELECTED PAPERS OF THADDEUS STEVENS* 209 (Beverly Palmer & Holly Ochoa eds., 1998) (emphasis added) [hereinafter 2 *STEVENS PAPERS*].

137. See KORNGOLD, *supra* note 32, at 176.

138. *Id.* at 175.

139. *Id.* at 176.

140. *Id.* at 176.

141. *Id.* at 4.

142. TREFOUSSE, *supra* note 72, at 2; see also KORNGOLD, *supra* note 32, at 4. Fawn Brodie treats his father’s death as a soldier as a fact and not a rumor. BRODIE, *supra* note 29, at 24.

143. CURRENT, *supra* note 72, at 67 (referring to himself as a “widow’s son.”).

144. KORNGOLD, *supra* note 32, at 6.

145. See generally *id.* at 72-76; see also WOODLEY, *supra* note 53, at 149, 417; see also CURRENT, *supra* note 72, at 116; see also TREFOUSSE, *supra* note 72, at 70. For the most searching analysis on the subject, however, see generally BRODIE, *supra* note 29, at 86-93.

146. See, e.g., Gary Lawson and Christopher Moore, *The Executive Power of Constitutional Inter-*

cient evidence to establish its existence.<sup>147</sup> It would be unfair to characterize this as an adulterous affair. Since adultery is sex outside of the context of marriage, and the laws of the day forbade interracial marriage, Stevens and Smith could not have a sexual relationship without technically committing adultery. Since the same evidence that establishes the existence of the relationship also tends to show that the affair was long in duration, and deeply loving,<sup>148</sup> it is more equitable to refer to their relationship as a virtual marriage, or a marriage of the heart.<sup>149</sup> Since this appeared to be Stevens's first healthy relationship with a woman,<sup>150</sup> and he represented Smith's second chance at love,<sup>151</sup> I sus-

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*pretation* 81 IOWA L. REV. 1267, 1296-97, 1297 n.137 (1996) (discussing the level of certainty needed to determine the original intent of the framers). I used the preponderance of the evidence test to determine all facts relevant to this note. See also *United States v. Balsys*, 524 U.S. 666, 689 (1998) (arguing that the court had found "the most probable reading" of the Fifth Amendment privilege against self-incrimination).

147. Stevens's exchange with Jonathan Blanchard, where he actually cries over her, is sufficient to tip the balance, in this author's mind. See *infra* note 148.

148. A modern reader might wonder if Stevens used his position as an employer to coerce Lydia Smith into entering a relationship with him: a quid pro quo. Since this was a secret relationship, very little can be known about its contours. However, the evidence that exists is only consistent with a relationship based on respect and mutual affection.

Beginning with Stevens's side of the relationship, he demonstrates his affection for her most clearly when contemplating his own mortality. He went through great pains to ensure that he was buried in a desegregated cemetery. See BRODIE, *supra* note 29, at 91-92. Some commentators believed that he had done so in order to allow Smith to be buried next to him. See *id.* at 91-92. Stevens's own statements are contradictory on this point. While he declared on his tombstone that he did so to make a statement in favor of racial equality, see *infra* text accompanying note 175, his friend Blanchard writes

I saw [Stevens] cry till the big tears ran heavily down his sunken cheeks, . . . while relating his efforts to get his bones where a devilish spirit of caste and proscription could not cast out as a dead brute the corpse of the woman who had taken care of him for more than twenty-five years with the ability and fidelity of a wife . . . .

BRODIE, *supra* note 29, at 92. Whatever motivation he had for purchasing the new plot, the mere fact that Stevens broke down into tears over Smith provides a glimpse into the affection he had for her. One can only guess if that affection was deep enough to call "love." Stevens demonstrated respect for her, both by contributing to her education, see *id.* at 88 ("That she profited under the stimulation of Stevens' tutelage is clear."), and by demanding from his friends and family a level of "deferential treatment [toward Smith] almost unheard-of in his day[.]" *id.* at 88. Indeed, the unusual level of respect he showed her fueled the scandal. See, e.g., TREFOUSSE, *supra* note 72, at 69.

While even less information exists about Lydia Smith, there is some evidence that she returned his affection. Although she was not buried near him, see BRODIE, *supra* note 29, at 92, her tombstone pointedly mentions that she was "for many years the trusted housekeeper of Honorable Thaddeus Stevens." WOODLEY, *supra* note 53, at 418. However, there might be a plausible alternative explanation for this inscription; for instance, this might reflect a custom rather than a choice. Clearer evidence can be found in Smith's will, where she left \$500 for the upkeep of his grave. See BRODIE, *supra* note 29, at 92. This is consistent with affection.

149. Blanchard writes, summarizing a conversation with Stevens, that Smith was "not permitted by a law, mightier far than the statute, to become his wife." BRODIE, *supra* note 29, at 92. If Stevens had said this, this would indicate an aversion to interracial marriage. However, by the way Blanchard writes this account, one cannot tell if he is merely trying to paraphrase Stevens's words, or interjecting his own opinion. Therefore, we cannot be sure to whom the thought can be attributed.

150. See *id.* at 30-31. His difficulties with romance might be traced to prejudicial attitudes about his disability. Fred Pelka discusses the closely related topic of the sexuality of physically disabled persons explaining that "[m]any nondisabled people (and some people with disabilities) see disability as sexually repulsive . . ." PELKA, *supra* note 91, at 281.

151. Lydia Smith was a widow when she met Stevens. BRODIE, *supra* note 29, at 87.

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pect that what they shared was beautiful.

With these two facts known, his “forty acres” proposal takes on new meaning. By advocating the distribution of the large plantations to former slaves, war widows and disabled veterans, he would have protected people like his “wife” (former slaves), people like his mother (war widows) and people like himself (disabled veterans). Such a coinciding is unlikely to be just a coincidence. Instead, it appears to be an example of how his personal experiences guided the intellectual component of his philosophy.<sup>152</sup> It is also further evidence of Stevens’s awareness of his status as a member of a larger group.

In summary, Thaddeus Stevens, the primary framer of the Equal Protection Clause, was disabled. He faced prejudice and discrimination as the result of that disability, and he was fully aware of that prejudice and that discrimination. Further, he was aware of his membership in a unique group, what we would term an “insular minority.”<sup>153</sup> The next section will demonstrate the causal link between his status as a disabled person and his larger quest for equality of opportunity.

### III. STEVENS’S CRUSADE FOR EQUAL OPPORTUNITY

Throughout his long political career, Stevens engaged in a number of political battles. He was the leader of the Anti-Masonic movement in Pennsylvania,<sup>154</sup> he was the savior of Pennsylvania’s free school system,<sup>155</sup> and he fought for religious liberty.<sup>156</sup> He also supported equality of opportunity for women, late in life.<sup>157</sup>

The central crusade in his life, however, was against racial discrimination, first struggling to end slavery and then later attempting to secure full equality of opportunity for African Americans in the aftermath of the Civil War. Indeed, he did not confine his vision to black and white alone.<sup>158</sup> He was the leading abolitionist lawyer in Pennsylvania.<sup>159</sup> In 1837 he declared that the races were equal and the present “degraded condition” of the black race was

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152. This will be a significant issue in the next section. See *infra* notes 154-207 and accompanying text.

153. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(7); see also *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938).

154. TREFOUSSE, *supra* note 72, at 37.

155. *Infra* notes 184-200 and accompanying text.

156. WOODLEY, *supra* note 53, at 187.

157. *Infra* notes 217-226 and accompanying text.

158. Thaddeus Stevens, Remarks on Chinese Immigrants in California (June 25, 1862), in 1 STEVENS PAPERS, *supra* note 36, at 305 (“California . . . has constantly discriminated against” Chinese Americans); see also KORNGOLD, *supra* note 32, at 109 (“[T]here would be less danger [in the West] . . . if the white men were watched [by the army] and the Indians protected; instead of the Indians being watched and the whites protected.”); see also Thaddeus Stevens, Speech on Congressional Sovereignty (Sept. 27, 1866), in 2 STEVENS PAPERS, *supra* note 136, at 198-99 (explaining that the Equal Protection Clause would protect African Americans, Irish and Dutch equally from discrimination).

159. BRODIE, *supra* note 29, at 63-65 (discussing his role as an abolitionist lawyer).

purely the result of white oppression;<sup>160</sup> he echoed that sentiment in 1850 by declaring that the differences between white and black were traceable to “climate, habits, food, and education.”<sup>161</sup> He fought unsuccessfully against an effort to exclude African Americans from the franchise in Pennsylvania<sup>162</sup> and another losing battle in Congress against the Fugitive Slave Act of 1850.<sup>163</sup> Later, as an attorney, he was integral to rendering the Fugitive Slave Act a dead letter in Pennsylvania by jury nullification<sup>164</sup> and when the Civil War began, he forced Lincoln to turn the war into a crusade against slavery.<sup>165</sup>

Furthermore, Stevens appeared to believe in self-help and self-determination. With his “Forty Acres” proposal, Stevens hoped to make African Americans the masters of their own destiny. “Make them independent of their old masters,” Stevens pleaded, “so that they may not be compelled to work for them upon unfair terms.”<sup>166</sup> Recognizing how important it was for African Americans to be seen participating in their own liberation, he also forced Lincoln to employ black troops.<sup>167</sup> He also pushed through legislation giving African Americans the right to vote.<sup>168</sup> Providing the right of suffrage

160. Thaddeus Stevens, Speech on Equal Rights at the Pennsylvania Convention, (July 8, 1837), in 1 STEVENS PAPERS, *supra* note 36, at 57-58.

161. Thaddeus Stevens, The California Question, (June 10, 1850) in 1 STEVENS PAPERS, *supra* note 36, at 118. It is not necessary to my disability rights argument to prove that Stevens had a “complete lack of racial prejudice . . .” FONER, *supra* note 72, at 134. Indeed, it would strengthen my argument if Stevens was proven a bigot. See *infra* notes 213-228 and accompanying text. However, fairness requires me to point out that Stevens was a true racial egalitarian both expressly, in his speeches, and implicitly, when his policies depended on the equality of the races for their success. See *infra* notes 167-171 and accompanying text. The only comment that I know of that Stevens ever made that was even arguably racist came when he was in the midst of an intricate satire on the myth of the happy slave. At one point he seems to state a belief that slaves are “ugly.” Thaddeus Stevens, The California Question (June 10, 1850), in 1 STEVENS PAPERS, *supra* note 36, at 119. However, this comment was made in a satiric crescendo in a highly satiric speech. Citing this speech for the proposition that Stevens thought African Americans were ugly might be as ridiculous as citing “A Modest Proposal” for the proposition that Jonathan Swift thought human flesh was delicious. See generally JONATHAN SWIFT, A MODEST PROPOSAL FOR PREVENTING THE CHILDREN OF POOR PEOPLE FROM BEING A BURTHEN TO THEIR PARENTS OR THE COUNTRY: AND FOR MAKING THEM BENEFICIAL TO THE PUBLICK (1730).

In context one can quickly recognize that he was not serious. He painted a portrait of how easy it would be to turn a white man into a slave, how their wills could be broken and how they would literally change color until they could “pass muster in the most . . . pious slave-market in Christendom.” Thaddeus Stevens, The California Question, (June 10, 1850), in 1 STEVENS PAPERS, *supra* note 36, at 119. He deliberately invoked the worst fear of most white persons living at the time—that they could somehow become black—and turned that bigoted fear against slavery. In that context, one cannot be sure what he actually felt. He was clearly putting on an act. One can only cite the speech for the proposition that he believed that the races were equal, because he had made a similar statement before then *sans* satire. See *supra* note 160 and accompanying text.

162. KORNGOLD, *supra* note 32, at 52.

163. *Id.* at 83-92; see also HUMMEL, *supra* note 35 at 94 (describing the provisions of the Fugitive Slave Act of 1850).

164. KORNGOLD, *supra* note 32, at 93-95.

165. See generally *supra* notes 57-71 and accompanying text.

166. KORNGOLD, *supra* note 32, at 287.

167. *Id.* at 204, 207-208; see also BRODIE, *supra* note 29, at 161 (“Stevens also led the fight to equalize the pay between white and colored soldiers . . .”).

168. KORNGOLD, *supra* note 32, at 380.

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was a meaningful demonstration of Stevens’s confidence in the capacities of African Americans. Under these laws, African Americans became a significant force in many Southern states, enjoying real power in American politics, before a “counterrevolution overthrew [this] fledgling experiment in racial equality.”<sup>169</sup> In South Carolina, for example, almost two thirds of the voters were black, while in Mississippi over fifty percent of the voters were black, following the Reconstruction Act of 1867.<sup>170</sup> Stevens also wrote the original draft of the Fifteenth Amendment, demonstrating a desire to render the right of suffrage irrevocable.<sup>171</sup>

Even in his preparations for death, he demonstrated both his radical tendencies and his surprising consistency.<sup>172</sup> In his will he created an orphanage that was desegregated along the lines of race and religion.<sup>173</sup> Further, when Stevens had learned that he had chosen a plot in a segregated cemetery, he sold the plot and purchased a new one in a desegregated cemetery.<sup>174</sup> On his tombstone he explained that he had done so because he wished to demonstrate in death “the principles I have advocated through a long life: EQUALITY OF MAN BEFORE HIS CREATOR.”<sup>175</sup>

Historians have long debated the source of his radical tendencies. Professor Current claimed he was simply ambitious.<sup>176</sup> Meanwhile, Fawn Brodie believed he was irrational.<sup>177</sup> Other historians could only scratch their heads and

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169. JAMES MCPHERSON, *ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION* 22 (Ballantine Books 1991). McPherson reports that “three or four years [after the Reconstruction Act of 1867], about 15 percent of the office holders in the South were black—a larger proportion than in 1990.” *id.* at 19. McPherson concludes that the civil rights struggle of the 1860’s was revolutionary, and that this fact has been obscured from many historians because a counter-revolutionary “redemption” movement erased much of the progress the Radical Republicans had made.

170. *Compare* 2 EDITORS OF EBONY MAGAZINE, *EBONY PICTORIAL HISTORY OF BLACK AMERICA: RECONSTRUCTION TO SUPREME COURT DECISION 1954*, 15 (1974) (explaining that following the Reconstruction Act of 1867, in South Carolina there were 78,982 black and 46,346 white voters; meanwhile in Mississippi there were 60,167 black and 46,636 white voters), *with* MCPHERSON, *THE NEGRO’S CIVIL WAR*, *supra* note 39, at 321 app. (giving the census figures from 1860, listing 402,406 slaves, 9,914 free African Americans, and 291,300 whites in South Carolina; and 436,631 slaves, 773 free African Americans, and 353,899 whites in Mississippi).

171. *See* KORNGOLD, *supra* note 32, at 411.

172. Stevens is accused of being inconsistent in his support of various nativist factions, such as the “Know-Nothings.” *See* CURRENT, *supra* note 72, at 97-99. However, as Hans Trefousse points out, the effect of his alliance with these factions was to advance the cause of anti-slavery. *See* TREFOUSSE, *supra* note 72, at 89 (“It was not his most praise-worthy action, but it worked . . .”).

173. BRODIE, *supra* note 29, at 365.

174. *Id.* at 92.

175. TREFOUSSE, *supra* note 72, at xi. *But see supra* note 148 (offering an alternative explanation for his choice of gravesite).

176. *See* CURRENT, *supra* note 72, at iii (“[Stevens] was, above everything else, a man of politics seeking always to get and exercise the powers of public office.”). *But see infra* notes 185-201 and accompanying text (discussing his politically suicidal defense of free education).

177. Brodie’s account appears to be marred by bias against Stevens. In her acknowledgements for example, she thanks various persons for helping her to understand Stevens “as a cripple.” BRODIE, *supra* note 29, at 14. This epithet is not per se proof that Brodie viewed her subject with bigoted eyes, but it raises suspicions.

wonder.<sup>178</sup> The fact that Stevens was correct when it came to race does not explain how he found his way to that position. After all, only a miniscule number of white Americans were able to find their way to the same position.<sup>179</sup> Nor is there any readily apparent link between his crusade against racial discrimination and other causes, such as Anti-Masonry, free education, religious freedom and equality of opportunity for women. In order to find the connection between each of these crusades, it is useful to examine two individually.

The first cause to draw Stevens into the political arena was Anti-Masonry. Briefly, the Anti-Masonic party rose in response to the disappearance of William Morgan. A disgruntled Mason, Morgan had announced that he would publish all the secrets of the society in an upcoming book. Shortly thereafter he disappeared, under circumstances that suggested Masonic involvement, and he was never heard from again. In the subsequent trials, the men accused of murdering him were acquitted, but under circumstances that suggested that they were freed because they were Masons and not because they were innocent. This led to the formation of an Anti-Masonic Party, which included in its ranks such luminaries as William Seward, Amasa Walker, Richard Rush, John Quincy Adams and John Marshall.<sup>180</sup>

The reasons for each Anti-Mason's opposition to the Lodge vary considerably. For Stevens, however, the true evil was contained in their promise to give advantages to fellow Masons in all areas of life. Stevens believed that Masons would "extricate each other from every difficulty, whether right or wrong" even if it meant violating judicial oaths.<sup>181</sup> In short, Stevens believed the Masons *discriminated* against non-Masons. Since no disabled person could be inducted into the Lodge,<sup>182</sup> this "grandfathered" that discrimination into a

Brodie attempts to play psychiatrist to Stevens, diagnosing him as a fanatic, *id.* at 10 (describing "Stevens' extraordinary capacity for hatred"), irrationally incapable of forgiving the sins of the Confederacy against our nation, *id.* at 307 ("To treat an enemy with compassion meant a blunting of his hatred. And for Thaddeus Stevens hatred was an energizing force with the passionate quality of love."). This smacks of stereotype. *Cf.* PELKA, *supra* note 91, at 200 ("[In movies] disabled characters [are often] portrayed as embittered by their disability, even setting out to wreak vengeance on the nondisabled world . . ."). Further, her analysis is bizarre at times. For instance, in discussing Stevens's relationship with Lydia Smith (she also believed that Stevens and Smith were lovers), Brodie seems to expect that there should have been "a mellowing in the man or . . . tempering of the violence of his hatreds." BRODIE, *supra* note 29, at 92. It is hard to believe that falling in love with a black woman would soften his hatred for slavery. The opposite was probably more likely to occur.

178. FONER, *supra* note 72, at 128 ("Historians have found Stevens a baffling figure . . ."); *see also* WOODLEY, *supra* note 53, at 8 (describing his "almost enigmatic character"); *see also* STAMP, ERA OF RECONSTRUCTION, *supra* note 31, at 103 (describing his "complicated personality").

179. *See* DONALD, LIBERTY AND UNION, *supra* note 30, at 202 ("[A] majority of even philanthropic Northerners accepted" racial inferiority).

180. *See generally* KORNGOLD, *supra* note 32, at 23-25, for a description of the rise of the Anti-Masonic movement.

181. WOODLEY, *supra* note 53, at 41.

182. BRODIE, *supra* note 29, at 376 n.27 ("Erik M. Erikson . . . has stated that his disability in the form of a club foot would have prevented him from becoming a Mason.") (citations and internal quotation marks removed). Mysteriously, Brodie buries this significant fact in an endnote, where most read-

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discrimination against disabled persons. At least one historian concurs that this was probably the real reason why Stevens opposed the Masons.<sup>183</sup>

The second major crusade he embarked on was the fight to save the free school system that existed in Pennsylvania. In the year preceeding this battle, the Pennsylvania legislature passed a law that created a free school system.<sup>184</sup> Prior to this legislation, public schools charged tuition. This system was theoretically available to all citizens, since those who were too poor to afford the tuition could declare their poverty with the county and receive assistance.<sup>185</sup> Under the new system, schools were funded from a common pool. Thus no child was charged tuition, making the system “free.”

As ordinary as this system might seem to the modern reader, it was highly controversial to the citizens of Pennsylvania and a massive, grass-roots repeal movement swept the state.<sup>186</sup> The legislators who voted for the measure either promised to vote for its repeal or they lost the next election; there were few exceptions to that rule.<sup>187</sup> Stevens, however, was one of the few legislators who won re-election without promising to vote for repeal; even then, this re-election was a sign of support for the man rather than the cause of free education since “more than three-fourths of his constituents signed a petition . . . for the repeal of the Free Public School Act.”<sup>188</sup> The repeal measure won quick, nearly unanimous approval in the Pennsylvania Senate and was destined for the same overwhelming approval in the House of Representatives. Stevens’s friend and political advisor, McSherry, warned him that he had pushed his constituents and his party too far: If he could not stand to vote for repeal, then he should abstain from voting.<sup>189</sup> To actually vote against the bill, or speak out against it, was tantamount to political self-immolation.

In a previous effort in the cause of education, Stevens enunciated his view of the proper balance a politician should strike between representing the will of the people and insulating the process from their ill-advised urges. “In matters of doubtful propriety or of mere local concern the will of the constituents should be obeyed,” he explained, “but not in matters of interest to the entire state, the rightfulness of which could not be doubted.”<sup>190</sup> If their positions could not be reconciled, it was always the people’s right to remove him.<sup>191</sup> Stevens was so convinced of the correctness of his position in support of free

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ers are unlikely to look.

183. TREFOUSSE, *supra* note 72, at 25 (“[Stevens] must have been furious at the Masons’ exclusion of ‘cripples.’”); *Cf. infra* note 207 (discussing Woodley’s theory of why Stevens opposed the Masons).

184. KORNGOLD, *supra* note 32, at 33.

185. *Id.* at 33 (“As few self-respecting people cared to [declare their poverty], thousands of children received no schooling” under this arrangement).

186. *Id.* at 33. *See also id.* at 33 for a description of the interests opposed to free education.

187. *Id.* at 33.

188. *Id.* at 34.

189. *Id.* at 34.

190. *Id.* at 32.

191. *Id.* at 32.

vens was so convinced of the correctness of his position in support of free education, that he was willing to take the step that seemed the most politically suicidal. On the day of the House vote, when victory for the repealers was certain, he took the floor and made a speech in opposition to the repealer.<sup>192</sup> As word of the speech spread, Senators filled the gallery to hear what he had to say.<sup>193</sup> The reason why he was so passionate in this cause is revealed in this key passage of his speech:

[The repealing act] is, in my opinion, of a most hateful and degrading character. . . . It proposes that the assessors shall take a census and make a record of the *poor*. This shall be revised, and a new record made by the county commissioners, so that the names of those who have the misfortune to be poor men's children, shall be forever preserved, as a distinct class, in the archives of the county! The teacher, too, is to keep in his school a *pauper* book, and register the names and attendance of poor scholars; thus pointing out and recording their poverty in the midst of their companions. Sir, hereditary distinctions of ranks are sufficiently odious; but that which is founded on poverty is infinitely more so. Such a law should be entitled "An act for branding and marking the poor, so that they may be known from the rich and proud."<sup>194</sup>

In other words, Stevens saw this as a discrimination between rich and poor. Like his quest against the Masons, he had personal reasons to be concerned by this discrimination. When his father abandoned Stevens's family, they were left in poverty. Four children were supported on the wages his mother could earn in the male-dominated world of the nineteenth century.<sup>195</sup> In this case, however, Stevens made the personal connection explicit: "I am induced to thank my Creator for having, from early life, bestowed upon me the blessing of poverty. . . ." he said at one point during the speech, "[I]t is a blessing—for if there be any human sensation more ethereal and divine than all others, it is that which feelingly sympathizes with misfortune."<sup>196</sup>

Perhaps if Stevens had lost this fight, he would have returned to the law and occupied himself with his cases full time. Perhaps he would have decided that idealism did not pay and would have returned to political life as a hardened cynic, unwilling to stand for principle again. However, something remarkable occurred in the chambers of the Pennsylvania House that day. Historians have never been able to account for it, but something in the logic of his argument or the passion of his words brought the repeal movement to a halt.<sup>197</sup> At the close of his speech, the hall erupted in cheers and applause, and a cry

192. *Id.* at 34.

193. *Id.* at 35.

194. Thaddeus Stevens, On the School Law (April 11, 1835), in 1 STEVENS PAPERS, *supra* note 36, at 22.

195. BRODIE, *supra* note 29, at 24.

196. Thaddeus Stevens, On the School Law, (April 11, 1835), in 1 STEVENS PAPERS, *supra* note 36, at 24.

197. See, e.g., KORNGOLD, *supra* note 32, at 37 (describing the victory); see also *id.* at 34-35 (struggling to explain how Stevens produced this effect).

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arose to vote on a substitute measure Stevens had offered, to retain and expand the free school system. The measure passed quickly, and shortly after, the Senate rescinded the repealer and passed Stevens’s proposal as well.<sup>198</sup> Thus the free school system was created and stood in Pennsylvania “at least a generation before it could otherwise have been expected.”<sup>199</sup>

This episode can be fairly considered one of the defining moments of Stevens’s life. It also demonstrated beyond any reasonable doubt that Stevens was willing to sacrifice political power for his principles; and more importantly, he was rewarded for taking that risk. This refutes any claim that Stevens was merely an ambitious politician.<sup>200</sup>

The remaining issues—religious liberty, feminism and especially the long crusade against racism—all follow the same theme. Every political fight Stevens undertook, every skirmish historians found to be notable, were in the end all about discrimination.<sup>201</sup> Stevens said as much when he said in 1866 that he had been in a thirty-year “war for liberty.”<sup>202</sup> Modern Americans often see freedom as conflicting with equality of opportunity because our dialogue is oriented toward the person who wishes to discriminate.<sup>203</sup> However, if we orient ourselves toward the person who faces discrimination—the woman who wishes enter the legal profession, the African American who wishes to sit wherever she or he chooses on a bus, or the paraplegic who wishes to live independently—for those people *freedom* and *equality* are the same term.<sup>204</sup> Thus Stevens’s “war for liberty” can be read fairly as crusade against all forms of discrimination.<sup>205</sup>

In this context the source of his philosophy of equality of opportunity can finally be understood. Once one recognizes that each of his struggles were against *discrimination*, the motivation behind each of them becomes plain and

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198. *Id.* at 37.

199. BRODIE, *supra* note 29, at 61.

200. Even Richard Current, who “meticulously assembled and copiously documented . . . whatever there was in Stevens’ life that could be called tricky, unscrupulous, and demagogic[.]” *id.* at 9, could not help but admit that Stevens had acquitted himself well in this episode. A full account, like Korngold’s, would have cast doubt on Current’s portrayal of an ambitious enemy of the common people. So Current buries the episode; he gives the entire speech a lone paragraph buried in a chapter on Anti-Masonry. See CURRENT, *supra* note 72, at 23; see also *supra* note 97 and accompanying text. Given this apparently deceptive omission, Current’s account should be treated carefully.

201. Brodie argues that “[a] lame man is a minority wherever he walks. And there was . . . no persecuted minority in America for whom Stevens did not at one time speak out.” BRODIE, *supra* note 29, at 26. She is exaggerating, but only slightly.

202. Thaddeus Stevens, Reconstruction (March 10, 1866), in 2 STEVENS PAPERS, *supra* note 136, at 102.

203. Cf. GRANT GILMORE, THE AGES OF AMERICAN LAW 111 (1977) (“In Hell there will be nothing but law, and due process will be meticulously observed.”).

204. See THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR. 8 (Clayborne Carson, ed., 1998) (describing Dr. King’s experience with racial discrimination largely in terms of restrictions on his freedom).

205. If we assume that Stevens was not attempting to be mathematically precise, it would contain each of the causes outlined in this note. See *supra* text accompanying notes 154-201.

the principle of Occam's Razor attaches. From an early age, Stevens realized that the discrimination he faced was unjust. From that realization he developed a philosophy of equal opportunity, always centered on the belief that people like himself should no longer face discrimination and applied this philosophy to each of these other forms of discrimination.<sup>206</sup> Therefore, equal opportunity for the disabled was the foundation upon which his entire philosophy of equality of opportunity was built.<sup>207</sup>

#### IV. STEVENS'S UNDERSTANDING OF EQUAL PROTECTION

With these facts in mind, we can "place ourselves . . . in the condition"<sup>208</sup> of the person who framed the Equal Protection Clause, and finally evaluate the constitutionality of the ADA. A comparison between Stevens's enunciated principles—combined with the reality of Stevens's life—and the proscriptions of the ADA reveals a reasonably close fit between the statute and the original understanding of the Equal Protection Clause.

First, the Equal Protection Clause was designed to reach beyond racial discrimination.<sup>209</sup> The original draft of the clause was actually two clauses: one specifically prohibiting racial discrimination and the other assuring that the laws would be "equally applicable."<sup>210</sup> Equal *application* became equal *pro-*

206. Indeed, Stevens did not view the injustices others faced as mere abstractions. As a fellow Representative explained, Stevens "seemed to feel . . . that every wrong inflicted upon the human race was a blow struck at himself." BRODIE, *supra* note 29, at 26. The plainest explanation for such empathy—that most "ethereal and divine" of "human sensation[s] . . . which feelingly sympathizes with misfortune[.]" Stevens, *supra* note 196—is that Stevens viewed these abstractions through the prism of his own experiences.

207. Thomas Woodley makes nearly the same assertion, only in more arcane language. "[T]hat clubfoot . . . supplied the most profoundly moving forces of his being[.]" Woodley argues, "[i]t created the strongest sympathy with all human beings who found themselves under disadvantage or *declassified* for any cause." WOODLEY, *supra* note 53, at 11 (emphasis added). Later he described Stevens's reasons for joining the Anti-Masonic cause:

[Anti-Masonry's] stated purpose was an *inherent* part of [Stevens's] being. . . . His entire life up to that time was a preface to a creed that hated all class distinction and special interest. Children, schoolmates, professional men had all banded together against him at various stages of his career. When he could oppose private fraternities or favored, vested interests it was inevitable that he would do so.

*Id.* at 37 (emphasis added). Thus Woodley argues first that somehow Stevens's clubfoot led him to sympathize with the *declassified* and disadvantaged, and second that Anti-Masonry touched on some inherent trait that "hated all class distinction." The similarity to my thesis is close. See also *supra*, note 118 (detailing a specific instance where Woodley appears to believe that Stevens faced disability discrimination).

208. *Ex Parte Bain*, 121 U.S. 1, 12 (1887).

209. Cf. Graham, "Conspiracy Theory" *supra* note 25, at 108 (arguing that *Santa Clara Co. v. S. Pacific R.R.*, 118 U.S. 394 (1886) "sounded the death knell of the narrow 'Negro-race theory' of the Fourteenth Amendment").

210. Thaddeus Stevens, Basis of Representation, (Jan. 31, 1866), in 2 STEVENS PAPERS, *supra* note 136, at 74. The original draft of the Equal Protection Clause read as follows: "All national and State laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race

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tection and the clause expressly prohibiting racial discrimination was cut, leaving it implicit in the larger concept of equal protection.<sup>211</sup> Stevens reinforced that impression explicitly. Stevens declared that under the Equal Protection Clause, “no distinction would be tolerated in this purified Republic but what arose from merit and conduct.”<sup>212</sup>

Further, Stevens’s theory of equality of opportunity did not require actual equality as a prerequisite for protection from discrimination. To understand any theory of equal opportunity, one must first understand how discrimination is justified. Logically, in order to discriminate between two groups, one must make two determinations, one factual and one philosophical. First, one must determine that there is a significant difference between the groups in question. It is not enough that there is a difference; the color of a person’s skin is technically a difference, but it is not a *significant* difference. Second, one must determine that this difference justifies unequal treatment. It is one thing to believe, as Justice Bradley did in *Bradwell v. Illinois*,<sup>213</sup> that women are not suited for the practice of the law; it is another matter to believe that one is justified in acting upon that belief.

Therefore a person could justify equal opportunity either by arguing that the groups in question are equal, or by arguing that even if the two groups are not equal, this does not justify the discrimination contemplated. Thus Kenneth Stampf began his examination of slavery by saying that “innately Negroes *are*, after all, only white men with black skins,” (and “Caucasians [are] black men with white skins”)<sup>214</sup> indicating that it was important to Professor Stampf to believe that the races were equal. By contrast, Owen Lovejoy, an abolitionist, justified his position as follows: “[w]e may concede . . . that [the black race] is infirm; but does it follow, therefore, that it is right to enslave a man because he is infirm?”<sup>215</sup> To Lovejoy, the question of equality was beside the point. On the issue of race, Stevens seemed to proceed at all times on a presumption of equality.<sup>216</sup> For instance, in his searing attack on the myth of the happy slave, he offered no facts. He assumed it was untrue—that the slaves could not possibly be happy—apparently based on a belief in equality.<sup>217</sup> In other cases,

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or color.” *Id.* at 74.

211. In allowing the clause explicitly outlawing racial discrimination to be cut, Stevens apparently adopted Bingham’s view that it would be undesirable to have “any implied recognition or tedious taxonomy of discriminations.” Graham, *Our “Declaratory” Fourteenth Amendment*, *supra* note 25, at 20.

212. LANDMARK BRIEFS, *supra* note 8, at 514, 607.

213. 83 U.S. 130, 142 (1873) (Bradley, J., concurring).

214. KENNETH STAMPF, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH*, vii, viii (Vintage Books, 1956).

215. EMERSON FITE, *THE PRESIDENTIAL CAMPAIGN OF 1860*, 48 (1911).

216. *See supra* notes 160, 161 and accompanying text.

217. *See generally* Thaddeus Stevens, *The California Question*, (June 10, 1850), in 1 STEVENS PAPERS, *supra* note 36, at 117-119 (attacking the claim that the slaves were happy). *See also supra* note 161 (discussing how to interpret this satiric passage).

however, he advocated for equal opportunity even when he believed that the group facing discrimination was inferior.

This can be proven by examining the evidence that Stevens was a feminist. Stevens did not begin with the assumption that women were equal to men. For much of his life he actively resented women. When a woman he was courting tried to get him to buy her a diamond ring, he decided she was a “mercenary” and ceased all attention.<sup>218</sup> Once, he declared to a crowd of men that all women were “unchaste.”<sup>219</sup> When a heckler asked if that applied to Stevens’s mother, Stevens walked out of the room and never spoke of women in that fashion again.<sup>220</sup> Perhaps the influence of Stevens’s mother—a strong female role model—or the love of Lydia Smith cooled his animosity toward their gender. Either way, by the time of the framing, Stevens had transformed into a feminist, in that he believed that there should be equal opportunity between the sexes.

For instance, when he introduced his original draft of what became Section Two of the Fourteenth Amendment,<sup>221</sup> it made no reference to gender.<sup>222</sup> Stevens highlighted this fact. Criticizing efforts to insert the word “male” into this proposal, he asked, “[w]hy make a crusade against women in the Constitution. . . ?”<sup>223</sup> He went on to ask if the Republican who advocated the change feared the “rivalry” of women the way the Democrats feared the “rivalry of the negro?”<sup>224</sup> In the same speech, he introduced the original draft of the Equal Protection Clause, which employed equally gender-neutral language.<sup>225</sup>

218. BRODIE, *supra* note 29, at 31.

219. *Id.* at 25.

220. *Id.* at 25.

221. U.S. CONST. amend. XIV § 2.

222. Thaddeus Stevens, Basis of Representation (Jan. 31, 1866), in 2 STEVENS PAPERS, *supra* note 136, at 69.

223. *Id.* at 73.

224. *Id.* at 73.

225. *Id.* at 74. It is well known that women’s rights advocates living at the time of the framing of the Fourteenth Amendment fought to remove the word “male” from Section Two, and their failure has been lamented ever since. *See, e.g.,* Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1282 n.12 (1991). However, the insertion of the word “male” into Section Two is not necessarily a defeat for women. There is some evidence from the operation of Section Two that the framers were secretly promoting women’s rights, a benevolent “conspiracy” in the Fourteenth Amendment. This “conspiracy” becomes plain by considering how racists might have exploited a loophole, before the ratification of the Fifteenth Amendment.

Consider South Carolina, where roughly two-thirds of the population and two-thirds of the voters were African American after the Civil War. *See supra* note 170 and accompanying text. For simplicity’s sake, imagine there were 120,000 people in that state, divided into 80,000 black people and 40,000 white people, each group divided evenly between the sexes. Suppose a law was passed extending the vote to all men regardless of color, but to *white* women only? This would have excluded 40,000 black women from the franchise. Thus the 40,000 white men and women would equal the 40,000 black men still eligible to vote, a change from African Americans having two-thirds of the vote to only half the vote. Meanwhile, Section Two only penalizes a state for the exclusion of *men*, and thus the state would have received the same number of congressional seats; they would not have been penalized for this exclusion.

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This implicit coverage of gender issues in Stevens’s Equal Protection Clause is verified in one exchange on the floor of the House. Representative Eldridge asked Stevens whether the Equal Protection Clause would eliminate the discrimination between married women and men, or between married women and unmarried women, in the rights of property. Stevens explained that “[w]hen a distinction is made between two married people or two *femmes sole* [single women], then it is unequal legislation; but where all of the same class are dealt with in the same way then there is no pretense of inequality.”<sup>226</sup> This statement suggests that discrimination between married men and married women would no longer be tolerated under the Equal Protection Clause.<sup>227</sup>

There are no logical barriers, then, between Stevens’s enunciated views and the inference, based on his life experience, that he intended to prohibit discrimination against the disabled. Nothing in the text of the clause, or his pronouncement on its meaning that “no distinction would be tolerated in this purified Republic but what arose from merit and conduct[,]”<sup>228</sup> would place disabled persons outside of its protection. The objection that disabled persons are not equal to so-called “normal” persons is met by the fact that Stevens believed that gender discrimination would also be prohibited under the Equal Protection Clause. There is no logical reason, therefore, to believe that when he framed the Equal Protection Clause he intended to exclude himself from its protection from discrimination.

Indeed a conclusion that disability discrimination would be tolerated under the Equal Protection Clause would conflict with the standards the courts had applied previously, to determine the scope of constitutional protections. For example, when weighing the claim that a corporation was a “person” in the Fourteenth Amendment’s Due Process<sup>229</sup> and Equal Protection Clauses, the Circuit Court of the United States for the District of California borrowed this

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Since Section Two concerns the apportionment of Representatives and Congress rarely makes mistakes in apportionment, it is safe to assume that Section Two was intentionally designed to operate in this manner. Still, it is not clear whether this was done to dilute the power of African Americans or to aid women. In this author’s opinion, it seems reasonable to believe that the framers were idealistic enough to expect a sufficient number of white women to ally with enough black men to extend the franchise to all women, creating an even greater majority in support of equal opportunity. This would fit with the framers’ modus operandi of using bigotry against itself to promote justice.

226. Congress Debates the Fourteenth Amendment, 1866, in 1 Hall, *supra* note 27, at 536.

227. Indeed, in an account of the contributions of women during the Civil War written only a year before the Fourteenth Amendment was ratified, the authors reported that the “rights, duties and capacities [of women] are now under serious discussion.” L.P. BROCKET AND MARY C. VAUGHAN, *WOMEN AT WAR: A RECORD OF THEIR PATRIOTIC CONTRIBUTIONS, HEROISM, TOILS AND SACRIFICE DURING THE CIVIL WAR* 29 (Longmeadow Press 1993) (1867). Brocket’s and Vaughan’s contribution to this discussion is intriguing: they argued that the “gifts and sacrifices,” *id.* at 65, of Northern women—and the lack of similar effort by Southern women—gave Northern troops an advantage over the Confederates, suggesting that the efforts of Northern women might have been decisive in the war effort. *Id.* at 64-65.

228. LANDMARK BRIEFS, *supra* note 8, at 514, 607.

229. U.S. CONST. amend. XIV, § 1, cl. 3.

passage from *Dartmouth College v. Woodward*:

It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go further and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.<sup>230</sup>

Thus the *Dartmouth College* case was seen as creating a test for constitutional inclusion. It states that the only way the court will exclude a group from the protection of a constitutional provision is if (1) it was not in the mind of the framers, (2) it was not in the mind of the people, and, further, (3) if it can be shown that if it had occurred to anyone that it might apply to the present case, that the language would have been changed to prevent that result. Or failing that, an exception can be made if there is something (4) "so obviously absurd or mischievous, or repugnant to the general spirit of the instrument" in inclusion, justifying a judicially-created exception.

The same test that gave relief to corporations and colleges should apply to human beings. There is evidence that Stevens knew of the *Dartmouth College* case, and its "test" for inclusion. By the time of the framing, the case had gained so much notoriety that Thomas Cooley reported that the definition of due process provided in Daniel Webster's oral argument was probably more often quoted than any other definition of due process.<sup>231</sup> Further, this case represented a life and death struggle for Stevens's alma mater,<sup>232</sup> and therefore he is very likely to have known of the case. Just as there is a dialogue between the legislative and judicial departments in interpreting statutes,<sup>233</sup> there is a similar dialogue between the judicial department and the framers of future amendments in the interpretation of the Constitution.<sup>234</sup> Each constitutional decision is, in part, the Supreme Court's way of telling future framers how they

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230. 4 Wheat. (17 U.S.) 518, 644-45 (1819); this passage was quoted in *Santa Clara v. Southern Pacific R. Co.*, 18 F. 385, 397 (1883); *aff'd* 118 U.S. 394 (1886). The Supreme Court affirmed the lower court's reasoning without comment. For a discussion of the argument before the Supreme Court in that case, see generally Graham, "Conspiracy Theory," *supra* note 25.

231. AMAR, *supra* note 25, at 282.

232. KORNGOLD, *supra* note 32, at 7.

233. See e.g. *Johnson v. Transportation Agency*, 480 U.S. 616, 629-630 n.7 (1987)

234. For instance, the citizenship clause, U.S. CONST. amend. XIV, § 1, cl. 1, is considered to be a repudiation of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1957). See, e.g., Graham, *Our "Declaratory" Fourteenth Amendment*, *supra* note 25, at 23-24. The incorporation of the Bill of Rights is considered to be a reaction to *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). See, e.g., AMAR, *supra* note 25, at 140-160. Finally, Section Five is believed to be a canonization of John Marshall's reading of the Necessary And Proper Clause, U.S. CONST. art. I, § 8, para. 18, in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). See, e.g., Steven A. Engel, Note, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115 (1999).

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will interpret future amendments. Stevens and the American people had every reason to expect that the same standard would be applied to the Fourteenth Amendment.

This note has attempted to show that a hatred of disability discrimination was the foundation upon which Stevens, the primary framer of the Equal Protection Clause,<sup>235</sup> built his entire philosophy of equal opportunity.<sup>236</sup> When he declared that “no distinction would be tolerated”<sup>237</sup> he meant exactly that: no distinction. No *discrimination*. None. That should be enough. Further, even assuming for the sake of argument that it was not on the mind of the people—and this note takes no position on this question<sup>238</sup>—it is unlikely that, if someone had raised the issue at the time of the framing, the language would have been changed to remove the disabled from coverage under the Equal Protection Clause.

Who would lead this movement to exclude the disabled? Certainly Stevens would not have exerted any effort to remove the disabled from its protection, and it is unlikely that opposition would have come from any other quarter. Charles Sumner, another important Radical,<sup>239</sup> probably would not have opposed this. Sumner was a disciple of Samuel Howe,<sup>240</sup> an advocate of the disabled who had argued that education should be given to disabled children “not as a charity but as a right . . .”<sup>241</sup> Several times Sumner accompanied Howe when he worked to educate the disabled, and once even observed his mentor’s progress with Laura Bridgman, who was deaf and blind.<sup>242</sup>

Indeed it is hard to believe that any person in the Senate would have led the movement to exclude the disabled from the Equal Protection Clause considering that they had confirmed General Oliver Howard to head the Freedmen’s Bureau.<sup>243</sup> Howard lost his arm at the battle of Seven Pines. In that day the army did not consider two working arms a bona fide occupational qualification for military generals, so after his recovery leave he went on to fight in Antietam, Fredericksburg, Chancellorsville, Gettysburg, Missionary Ridge and At-

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235. See generally *supra* notes 24-80 and accompanying text.

236. See generally *supra* notes 154-207 and accompanying text.

237. LANDMARK BRIEFS, *supra* note 8, at 514, 607.

238. I have not been able to find any evidence, one way or the other, on this question.

239. DONALD, LIBERTY AND UNION, *supra* note 30, at 158 (“The Radicals . . . [were] represented by . . . Sumner and Thaddeus Stevens in the Congress . . .”).

240. DAVID DONALD, CHARLES SUMNER AND THE COMING OF THE CIVIL WAR 85-87 (1960) [hereinafter SUMNER].

241. ROBERT BREMNER, THE PUBLIC GOOD: PHILANTHROPY AND WELFARE IN THE CIVIL WAR ERA 169 (1980).

242. DONALD, SUMNER, *supra* note 240, at 87. Howe and Bridgman’s success brought the pair fame and proved that people who were both deaf and blind could be educated. See PELKA, *supra* note 91, at 164.

243. WILLIAM McFEELY, YANKEE STEPFATHER: GENERAL O.O. HOWARD AND THE FREEDMAN 23, 61-63 (1968).

lanta.<sup>244</sup> The fact that the Senate confirmed him for the difficult task of helping the former slaves become independent demonstrates that the Senate was at least as open-minded about his capacities as the army had been.

It would also be unlikely that there would be any insurgency in the House against protection for the disabled with two hundred thousand wounded veterans from the Civil War, including nearly thirty thousand amputees.<sup>245</sup> Would the Representatives have dared to lead the charge, walking past the doors that Private S. H. Decker opened for them with two artificial arms,<sup>246</sup> and risk alienating the families and friends of every disabled veteran, and every person who had served in the military? It seems hard to believe, especially when one remembers that only a few years before all of Congress had founded the first national university for the Deaf, later known as Galludet.<sup>247</sup> If we operate on a presumption of coverage, as Marshall did in the *Dartmouth College* case, there does not appear to be anything so "absurd or mischievous"<sup>248</sup> in extending the Equal Protection Clause to the disabled.

Thus I have attempted to prove that discrimination against the disabled is prohibited by the Equal Protection Clause, and therefore Congress can certainly attack laws that formally exclude the disabled. This does not explain, however, whether the reasonable modification/accommodation requirement<sup>249</sup> is congruent and proportional with Stevens's original understanding of equal protection. As a preliminary matter, discrimination against the disabled is frequently accomplished without direct reference to disability. Instead physical and societal barriers exclude and discriminate by reference to some trait a disabled person possesses. Thus a state university that refuses to build wheelchair ramps excludes paraplegics by reference to their inability to climb stairs, as surely as if the state had passed a law proscribing their attendance. Meanwhile, a state bar association that establishes testing procedures that require applicants to read by sight and to write by hand in order to pass the bar exam excludes the

244. *Id.* at 40.

245. PHILLIP PALUDAN, "A PEOPLE'S CONTEST:" THE UNION AND CIVIL WAR 1861-1865, 324, 325 (1988).

246. *Id.* at 325-26.

247. PELKA, note 91, at 134.

248. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 645 (1819).

249. The ADA requires reasonable modifications and accommodations indirectly by defining discrimination as a failure to provide reasonable accommodations or modifications as a form of discrimination. Title I, dealing with employment, makes this obvious by stating that the term "discriminate" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless . . . the accommodation would impose an undue hardship . . ." Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5)(A). Meanwhile, Title II declares that "no qualified individual with a disability shall, by reason of such disability, be excluded from . . . the services, programs, or activities of a [state] or be subjected to discrimination by such entity." 42 U.S.C. § 12132. The term "qualified individual with a disability" is defined in the same title as a person with a disability "who, with or without reasonable modifications . . . meets the essential eligibility requirements for the . . . public entity." 42 U.S.C. § 12131(2). This implies that one cannot avoid being found to discriminate without providing such modifications.

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blind as surely as if the state had passed a law declaring that no blind person shall be a lawyer. By such “grandfathering,” states can effectively exclude the disabled from any “services, programs or activities”<sup>250</sup> they choose.<sup>251</sup> The reasonable modification/accommodation requirement is Congress’ way of addressing this problem.

Equal protection, as Stevens conceived it, guarded against “sophisticated as well as simpleminded modes of discrimination.”<sup>252</sup> In his speeches, he demonstrated that his philosophy of equal opportunity included protection against both formal, direct discrimination, and discrimination by “grandfathering.” For instance, when Representative Aaron Sargent of California proposed a tariff on cleaned rice, Stevens recognized it for what it was: discriminatory legislation aimed at Chinese Americans. Furious, Stevens denounced California’s treatment of Chinese Americans and helped defeat the measure.<sup>253</sup>

Another example comes from when Stevens first introduced Section Two of the Fourteenth Amendment. Under Stevens’s original proposal a state would only be penalized for racial discrimination in the franchise.<sup>254</sup> When introducing this draft, Stevens addressed the argument that Southern states could avoid its penalty by basing the discrimination on “previous condition of slavery.”<sup>255</sup> Since only African Americans had been enslaved, Stevens reasoned, such discrimination would truly be “on account of race or color[.]”<sup>256</sup> and would trigger the penalty.

This is consistent with the approach to constitutional interpretation enunciated in *McCulloch v. Maryland*.<sup>257</sup> In *McCulloch*, John Marshall declared that the Constitution is not a technical legal code, but instead it is an outline that sets out certain goals that the government could and could not pursue. If the goal is allowed, then the government has broad powers in choosing the means to accomplish that goal. Conversely, if the goal is prohibited by the Constitution, then the government cannot pursue that goal by any means.

Stevens knew of the decision in *McCulloch*, and even applied its principles

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250. 42 U.S.C. § 12132 (2000).

251. See, e.g., *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996) (challenging a Hawaiian quarantine law that makes it impossible for persons using assistance animals to enjoy a vacation in that state); see also *Lightbourn v. Garza*, 928 F.Supp. 711 (W.D. Tex. 1996) (finding that disabled citizens were effectively denied the right to vote by failure to accommodate), *rev’d* *Lightbourn v. El Paso*, 118 F.3d 421 (5th Cir. 1997), *cert. den.* *Lightbourn v. Garza*, 522 U.S. 1052 (1998), *vacated without opinion* *Lightbourn v. Garza*, 127 F.3d 33 (5th Cir. 1997).

252. *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

253. Thaddeus Stevens, Remarks on Chinese Immigrants in California (June 25, 1862), in 1 STEVENS PAPERS, *supra* note 36, at 304-06.

254. Thaddeus Stevens, Basis of Representation (Jan. 31, 1866), in 2 STEVENS PAPERS, *supra* note 136, at 69.

255. *Id.* at 75.

256. *Id.* at 75.

257. 17 U.S. (4 Wheat.) 316 (1819).

on one occasion.<sup>258</sup> Since there is a dialogue between the judicial department and the framers of future amendments,<sup>259</sup> he had every reason to believe that the Fourteenth Amendment would be interpreted following the same principles. The Equal Protection Clause sets out a goal that the state governments cannot pursue; by the *McCulloch* approach the states cannot pursue that goal *by any means*, whether formal or informal. Thus, just as discrimination against former slaves would be impermissible as discrimination against African Americans, and discrimination against those who eat rice would be impermissible as discrimination against Chinese Americans, discrimination against persons incapable of climbing stairs or reading by sight would be impermissible disability discrimination, unless those abilities were truly relevant to the activity at issue.<sup>260</sup>

In this light, the ADA is “appropriate legislation,”<sup>261</sup> because the Equal Protection Clause demands a similar form of protection. The ADA’s requirement that the state provide “reasonable modifications” or “reasonable accommodations” is tailored to eliminate the use of “grandfathering” to exclude the disabled. One might object, however, that the ADA’s reasonable modification/accommodation standard reaches even accidental discrimination. Stevens is not clear if he intended to eliminate intentional discrimination only, or would see the end of even accidental discrimination.<sup>262</sup> Still, even though much of the discrimination that disabled persons face begins unintentionally, its continuance is rarely accidental.

Consider the example of a blind woman seeking to become an attorney. Suppose she showed up to take the bar exam without making any request for accommodations, only to discover that the test requires the ability to read by sight and to write by hand. This test would tend to exclude her and all other

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258. Thaddeus Stevens, The Treasury Note Bill (Feb. 6, 1862), in 1 STEVENS PAPERS, *supra* note 36, at 257. Stevens analyzes the legal tender issue as follows:

The Constitution nowhere gives Congress power to create corporations or to establish a bank of the United States. But as Congress had power to regulate commerce, and to regulate the value of coin, and it deemed the establishment of a bank necessary to effectuate those powers, the Supreme Court pronounced it constitutional.

*Id.* at 257.

259. See *supra* notes 233-234 and accompanying text.

260. Indeed, when Stevens was excluded from the York County Bar, this was also accomplished by “grandfathering,” by reference to a trait unique to him: the fact he worked part time. See *supra*, notes 115-121 and accompanying text; see also *supra*, text accompanying note 182.

261. U.S. CONST. amend. XIV, § 5.

262. Aaron Sargeant openly declared that the purpose of the rice tariff was to harm Chinese Americans. Thaddeus Stevens, Remarks on Chinese Immigrants in California, (June 25, 1862), in 1 STEVENS PAPERS, *supra* note 36, at 306 n.3. Meanwhile, Stevens’s comment that Section Two would embrace discrimination based on “previous condition of slavery” is ambiguous on whether the discrimination contemplated would be intentional or not. See Thaddeus Stevens, Basis of Representation (Jan. 31, 1866), in 2 STEVENS PAPERS, *supra* note 136, at 75.

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blind persons; yet this discrimination is arguably accidental. However, suppose instead that she had learned of the format of the test ahead of time and requested that her exam be modified by converting it into Braille and allowing her to use a Braille typewriter to write her answers. If the bar association refused, that refusal would transform the accidental discrimination of the exam format into intentional discrimination. From then on the bar association would be knowingly employing a testing format that excluded blind persons from the legal profession. There is no question that from that moment forward, her exclusion would be intentional; the only question is whether that discrimination is justified.

Under the ADA discrimination against the disabled can be justified in at least two ways. The first is by proving that the discrimination is based on genuine qualification;<sup>263</sup> this is analogous to Stevens’s statement that only distinctions based on merit or conduct would be permissible. The second is by demonstrating that the modifications or accommodations requested are unreasonable because they place an “undue hardship”<sup>264</sup> on the covered entity. There is no analogue to this concept in Stevens’s Equal Protection Clause. Thus with arguably less reach than the original Equal Protection Clause, the ADA is congruent and proportional to the protections that would be offered under the Constitution.<sup>265</sup>

In summary, Thaddeus Stevens, the primary framer of the Equal Protection Clause, was disabled and faced discrimination as a result. This injustice motivated a life-long crusade against all discrimination, culminating in the framing of the Equal Protection Clause. Finally, the principles he enunciated were broad enough to include the discrimination that he himself faced, and is congruent with the discrimination that the ADA prohibits. Hugo Black once declared that “[t]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.”<sup>266</sup> If the Supreme Court chose to follow the Constitution, it could find ample justification to uphold the Americans with Disabilities Act.

## CONCLUSION: THE “INVISIBLE” POLITICIAN?

Sarah Stevens, Thaddeus Stevens’s mother, once wrote to him that “[o]ur help is in God . . . Sickness and [disease] are at His command . . . [L]et us put our trust in Him.”<sup>267</sup> Implicitly, she was arguing that suffering serves a divine

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263. The ADA only prohibits discrimination against *qualified* individuals with disabilities. Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5)(A), § 12132 (2000).

264. 42 U.S.C. § 12112(b)(5)(A) (2000).

265. *Supra* notes 18-19 and accompanying text

266. *Feldman v. United States*, 322 U.S. 487, 499 (1943) (Black, J., dissenting).

267. CURRENT, *supra* note 72, at 118.

purpose.<sup>268</sup>

Thaddeus Stevens began life disabled by a clubbed foot and crippled by the prejudice he faced as a result. He decided early on that he would not be a victim. He would survive and, by sheer will power, he would overcome.<sup>269</sup> His suffering served a purpose. His experience with discrimination forged a philosophy of equality of opportunity that guided him for the rest of his life, and even found expression in death. He became “the natural enem[y]”<sup>270</sup> of all forms of discrimination.

Ralph Ellison once described racial prejudice in terms of invisibility. Ellison explained that because of his skin color, others “see only my surroundings, themselves, or figments of their imagination—indeed everything and anything except me.”<sup>271</sup> Stevens was rendered equally “invisible” by his disability. His enemies saw Satan’s child, while his friends and allies seemed to have utterly failed to understand his unique and personal struggle.<sup>272</sup> Ellison explains, however, that “[i]t is sometimes advantageous to be unseen . . .”<sup>273</sup> Because his friends and allies failed to understand him, Stevens was a “stealth” weapon in the crusade against discrimination: a white male who knew how it felt to face prejudice.

When the moment came to remold our Constitution, Stevens was in the right place at the right time to make the best use of this opportunity.<sup>274</sup> The Equal Protection Clause could have been framed by persons who never had the slightest taste of discrimination and for whom prejudice was an academic issue. In Stevens’s knowing hands, however, the Equal Protection Clause represented the culmination of an entire life’s work. When he introduced his original proposal, Stevens declared, “[t]here is the genuine proposition; that is the one I love . . .”<sup>275</sup> When he framed the Equal Protection Clause, he poured everything he had learned throughout his life into those words. Decades of

268. Cf. KING, *supra* note 204, at 231 (“History has proven over and over again that unmerited suffering is redemptive.”).

269. This differentiation is between being a *victim* and being a *survivor* was first suggested to me by Dr. Constance Hilliard, Professor of History, at the University of North Texas.

270. KORNGOLD, *supra* note 32, at 165.

271. RALPH ELLISON, *INVISIBLE MAN 3* (Vintage, 1952).

272. This is closely mimicked by his biographers. Current appears to believe in all of the stereotypes surrounding Stevens’s disability. *Supra* note 176 and accompanying text. Brodie, meanwhile, does not believe that his clubfoot automatically rendered Stevens vindictive, but apparently she believed that he was so mentally affected by these stereotypes that it became a self-fulfilling prophesy. *Supra* note 177. Meanwhile, his positive biographers, such as Korngold, and Trefousse, do not appear to understand him. See generally KORNGOLD, *supra* note 32 and TREFOUSSE, *supra* note 72. Only Woodley’s account contains any hint that the author understood Stevens’s unique motives. See *supra* notes 118, 207.

273. ELLISON, *supra* note 271, at 3.

274. FONER, *supra* note 72, at 130 (“Stevens . . . was a man absolutely convinced, and in a sense rightly, that he and history were for the moment in perfect step.”).

275. Thaddeus Stevens, Basis of Representation (Jan. 31, 1866), in 2 STEVENS PAPERS, *supra* note 136, at 74.

“No Distinction Would Be Tolerated”

meaning were expressed in a single turn-of-phrase: “no distinction would be tolerated in this purified Republic but what arose from merit and conduct.”<sup>276</sup>

At the root of his philosophy of equality of opportunity was his own experiences with discrimination. When he framed the Equal Protection Clause, he was thinking of himself. He remembered the abuses he had faced through the long struggle of his life, and he thought, “never again.” It would be a cruel irony if the clause he loved was interpreted so that the very discrimination that motivated it would continue to be tolerated.

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276. LANDMARK BRIEFS, *supra* note 8, at 514, 607.

