THE KLAN, THE CONGRESS, AND THE COURT: CONGRESSIONAL ENFORCEMENT OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS & THE STATE ACTION SYLLOGISM, A BRIEF HISTORICAL OVERVIEW

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INTRODUCTION

Early congressional attempts to enforce the Fourteenth and Fifteenth Amendments were frustrated far too often by the U.S. Supreme Court.[1] Supreme Court opinions then and since have ignored too much historical context.[2] The missing context includes the his-

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1 *E.g.*, United States v. Cruikshank, 92 U.S. 542, 554 (1875) ("The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another."); United States v. Reese, 92 U.S. 214, 217 (1875) ("The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude."); *cf.* United States v. Harris, 106 U.S. 629, 644 (1882) (holding that the Fourteenth Amendment did not support a federal statute punishing individuals in a lynch mob for depriving the victim (a prisoner in a state jail) of equal protection of the law); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 83 (1872) (holding that an act of the state legislature granting a corporation the exclusive right to maintain slaughterhouses, among other provisions, did not deprive plaintiffs of due process, equal protection or privileges and immunities and eviscerating the Privileges or Immunities Clause).

2 *See, e.g.*, United States v. Morrison, 529 U.S. 598, 620–21 (2000) (discussing early Supreme Court cases interpreting the Fourteenth Amendment); City of Boerne v. Flores, 521 U.S. 507, 520–24 (1997) (discussing the historical background of the Fourteenth Amendment). This article continues and develops earlier work on this subject. *See generally* MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000) [hereinafter CURTIS, FREE SPEECH] (giving a history of free speech between the colonial era and the Civil War); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986) [hereinafter CURTIS, NO STATE SHALL ABRIDGE]; WILLIAM W. FREEHLING, 2 THE ROAD TO DISUNION: SECESSIONISTS TRIUMPHANT 1854–1861 (2007); LEONARD L. RICHARDS, "GENTLEMEN OF PROPERTY AND STANDING": ANTI-ABOLITION MOBS IN JACKSONIAN AMERICA (1970); WILLIAM SHERMAN SAVAGE, THE CONTROVERSY OVER THE

torical background of the Fourteenth Amendment and the terrorism that provoked efforts to enforce the Fourteenth and the Fifteenth Amendments. By leaving out context, the Court has obscured what was at stake.

A broader context includes slavery and civil liberties, the suppression of free speech and effective democracy in the South before and after the Civil War, and the appeal to democratic values and to national Bill of Rights liberties before and after the Civil War. A broader Reconstruction context includes the attack by political terrorists on majority rule, speech, press and political association, and the right to vote.

Simply reading Supreme Court opinions (then and later), one would not understand that political terror during Reconstruction was a key weapon used to undermine biracial democracy in the South. One would certainly not understand the extent to which the United States Supreme Court facilitated the result.[3] Though race was a crucial factor, any account of the attack on Reconstruction is grossly misleading to the extent that it emphasizes race to the exclusion of majority rule, democracy, and political freedom. These values were at

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DISTRIBUTION OF ABOLITION LITERATURE, 1830–1860 (photo. reprint 1968) (1938); Michael Kent Curtis, *The Fourteenth Amendment: Recalling What the Court Forgot*, 56 DRAKE L. REV. 911, 941–55 (2008) (discussing, as a contribution to the Drake Symposium on Forgotten Constitutional Provisions, how various government officials and judges thought the Fourteenth Amendment should be applied); Michael Kent Curtis, *John A. Bingham and the Story of American Liberty: The Lost Cause Meets the "Lost Clause,"* 36 AKRON L. REV. 617 (2003) [hereinafter Curtis, *Bingham*] (discussing, as a contribution to the symposium on John A. Bingham, different interpretations of the Fourteenth Amendment around the time of the Civil War); Clement Eaton, *The Freedom of Thought Struggle in the Old South, cited in* RUSSELL BLAINE NYE, FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY, 1830–1860 (1972). For additional scholarship on application of the Bill of Rights to the States, see AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993); George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 OHIO ST. L.J. 1627 (2007) (arguing for a negative to agnostic view of application); Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L.J. 1509 (2007) (citing sources on both sides of the debate but supporting application). For an outstanding article dealing with the attack on democracy during Reconstruction, see Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65 (2008) (focusing on the victory of "Redemption" and disfranchisement ending Reconstruction as replacing majority with minority rule).

3 The opinions themselves of course do not mention such facilitation. *See, e.g.*, *Harris*, 106 U.S. 629; *Cruikshank*, 92 U.S. 542; *Reese*, 92 U.S. 214; *The Slaughter-House Cases*, 83 U.S. 36. For an account of the facts surrounding *Cruikshank*, see CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008) [hereinafter LANE].

stake both for Americans of African descent and for their white allies. By undermining protections for both white and black Republicans in the South, the Court wounded democratic values and severely wounded protection for fundamental rights of all American citizens. The Court's decisions helped a minority that used terrorist tactics, force, and fraud displace democracy and majority rule.[4] The results were especially awful for Americans of African descent.[5]

I. BACKGROUND

As the title of this conference recognizes, the Thirteenth, Fourteenth, and Fifteenth Amendments were a second founding. In the second founding, a second group of framers sought to give the nation a new birth of freedom and to bring it closer to the ideals of the Declaration of Independence and the Constitution's preamble. The nation sorely needed a second founding. The slave system had systematically undermined liberty and equality. Slavery had done this not only for slaves and free blacks, but for whites as well.[6]

Under the original Constitution, states and individuals could and did deny slaves virtually all liberties, and if the hapless slave escaped to a free state, the Constitution (as interpreted in *Prigg v. Pennsylvania*[7]) broadly protected the right of the slave owner to get him back. In *Dred Scott*,[8] the Supreme Court had held that free Americans of African descent could never be citizens of the United States. Only

4 *See, e.g.*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 279, 342–44, 425–44 (1988) (describing the violent tactics that some whites used to intimidate blacks and Republicans); VERNON LANE WHARTON, THE NEGRO IN MISSISSIPPI 1865–1890, at 181–206 (1984) (explaining the use of political violence and fraud, followed by disfranchisement, in the South in 1875); LANE, *supra* note 3. *See also* cases cited in *supra* note 3.

5 For some of the consequences, see, for example, DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008) (describing abuse of the criminal justice system and other abuses in Southern states that reduced Americans of African descent to virtual slavery); Chin & Wagner, *supra* note 2, at 110–22 (setting out consequences from the racial caste system to disfranchisement and criminal justice).

6 *See, e.g.*, CURTIS, FREE SPEECH, *supra* note 2, at 216–70 (describing the killing of Elijah Lovejoy, who was defending his anti-slavery press from a mob, and the suppression of anti-slavery speech in the North by mob action and in the South by laws and mobs); *id.* at 271–99 (detailing the suppression of Republican meetings, supporters, and campaign literature, etc. in the South); Curtis, *Bingham*, *supra* note 2, at 640–41 (noting the same denial of free speech in the South).

7 41 U.S. (16 Pet.) 539, 613–14 (1842) ("[W]e have not the slightest hesitation in holding, that, under and in virtue of the Constitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave . . . .").

8 Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

United States citizens were entitled to the rights, privileges, and immunities set out in the Constitution; Americans descended from slaves were excluded. By the *Dred Scott* decision, free blacks had no federal constitutional rights.

Earlier, in *Prigg v. Pennsylvania*,[9] the Court struck down a Pennsylvania law that guaranteed a due process hearing to Americans of African descent captured in Pennsylvania as supposed "slaves." Pennsylvania had freed all slaves in the state around 1800, and it passed a series of laws that sought to protect its black citizens from reenslavement. The centerpiece of that protection was a law requiring a due process hearing before blacks found in the state were taken from the state and consigned to slavery for life.[10]

In Pennsylvania, all persons were presumed to be free. In slave states, blacks were presumed to be slaves.[11] The *Prigg* decision upheld the right of the supposed slave owner to capture her supposed slave in Pennsylvania and return the slave and her children to slavery without any legal process whatsoever.

A due process hearing before removal was crucial. Once a black person was removed from Pennsylvania to a slave state, she would be stripped of the presumption of freedom and be presumed to be a slave. However, the Supreme Court held the slave owner had an immediate right to possession of the slave and any delay at all, such as that required for a hearing, would interfere with the slave owner's constitutional right to immediate possession.[12]

The pre-Civil War federal system allowed states to deprive free Americans of African descent of all sorts of rights, including the right to contract, to inherit, to own real property, to testify against whites, to preach, to bear arms, to assemble, and to enjoy freedom of speech.[13]

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9 *Prigg*, 41 U.S. (16 Pet.) 539.

10 *See id.* at 602 (setting out Pennsylvania statute). For an early complaint to Congress from Pennsylvania about the kidnapping of free blacks, see 10 ANNALS OF CONG. 229–30 (1800); CURTIS, FREE SPEECH, *supra* note 2, at 108–09.

11 *See Prigg*, 41 U.S. at 576 (noting Hambly's brief for Pennsylvania on the conflicting presumptions).

12 *See id.* at 612 ("Now, certainly . . . it may fairly and reasonably be said, that any state law or state regulation, which interrupts, limits, delays, or postpones the right of the owner to the immediate possession of the slave, and the immediate command of his service and labour, operates, pro tanto, a discharge of the slave therefrom.").

13 *See, e.g.*, Aldridge v. Commonwealth, 2 Va. Cas. 447 (Va. Gen. Ct. 1824) (stating that slaves and free blacks are not generally protected by the Virginia Bill of Rights: "[t]he numerous restrictions imposed on [free blacks and mulattoes] in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States, as respects the free whites, demonstrate, that, here, those instru-

Slavery not only undermined liberty for Americans of African descent, but also undermined liberty for whites. In the South, state laws banned expression that would tend to make free blacks or slaves "discontent."[14] The ban applied to virtually all anti-slavery expression addressed to white voters. It was enforced by searches and seizures for anti-slavery books and pamphlets and cruel punishments.[15] So, as both Lincoln and Douglas recognized in their famous debates, Republicans could not campaign in the South or organize a Republican party there.[16] Mob violence against Republicans was common and effective.

By the late 1850s, most Republicans in the House of Representatives had endorsed a project to abridge (as a campaign document) Hinton Helper's anti-slavery book *The Impending Crisis of the South.* The book highlighted the negative effect of the slave system on non-slave owning whites and advocated state by state elimination of slavery by democratic action.[17]

In North Carolina, an elderly minister circulated Helper's book as a Republican campaign document. He was convicted and sentenced to prison under the state's bad tendency statute. In 1860, the state legislature changed the statute against incendiary documents to provide the death penalty for the first offense.[18]

Mobs made frequent resort to such laws unnecessary. For example, when a chemistry professor at the University of North Carolina was outed by a Raleigh paper as a supporter of Republican John C. Fremont in the 1854 presidential election, he was fired from his job at the University, and a mob drove him from the state.[19] Southern

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ments have not been considered to extend equally to both classes of our population.") The Black Codes, passed after the Civil War, which abridged for Americans of African descent the rights of speech, assembly, religion, to bear arms, and to be free from cruel punishments, would have been constitutional but for the Thirteenth and Fourteenth Amendments. *See infra* text accompanying note 30 (setting out these restrictions on free Americans of African descent).

14 *See, e.g.*, Act to Prevent Circulation of Seditious Publications, N.C. Rev. Code ch. 34, sec. 16 (1854) (revising 1830 N.C. Sess. Laws ch. 5, at 10–11).

15 *See* CURTIS, FREE SPEECH, *supra* note 2, at 260–63 (discussing Southern suppression of anti-slavery documents); *id.* at 290 (describing how the North Carolina Council of State warned postmasters to ban incendiary books or newspapers and to strictly scrutinize out of state merchants, tract distributors and book dealers).

16 CREATED EQUAL?: THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858, at 290–91 (Paul M. Angle ed., 1958); CURTIS, FREE SPEECH, *supra* note 2, at 282.

17 HINTON ROWAN HELPER, THE IMPENDING CRISIS OF THE SOUTH: HOW TO MEET IT (1857).

18 *See* CURTIS, FREE SPEECH, *supra* note 2, at 271–72, (describing Helper's book); *id.* at 271–96 (discussing Worth's case and the change in the statute).

19 CURTIS, FREE SPEECH, *supra* note 2, at 290.

mobs punished those who attended Republican national conventions and dispersed a Republican meeting in Virginia.[20]

Nor had these outrages been limited to the South. Mobs in the North attacked abolitionists[21]: in 1838 a mob burned a hall abolitionists built in Philadelphia devoted to free discussion,[22] and mobs destroyed anti-slavery newspaper presses.[23] In the most dramatic case, a member of the mob killed Elijah Lovejoy, a minister and editor in Illinois, who was defending one of his printing presses from a mob. Mobs had destroyed the previous three.[24] The city government of Alton, Illinois had refused Lovejoy's request for protection from the mob. Responding to the killing of Elijah Lovejoy defending his press from an anti-abolition mob, critics frequently insisted that the mob had denied Lovejoy the national constitutional privilege of freedom of the press.[25]

With the end of the Civil War, the nation abolished slavery with the reluctant assent of the former Confederate states. For most Republicans this converted former slaves into American citizens, and for many leading Republicans, American citizens were entitled to fundamental rights that included those in the Bill of Rights, as well as to equality of rights under state law.[26] But, as the 39th Congress convened in 1865–1866, Republicans saw not a new birth of freedom, but a rebirth of slavery, including private violence of the sort aimed at opponents of slavery before the Civil War.[27]

After the Thirteenth Amendment was ratified, Southern states and localities passed Black Codes. These Codes discriminated against

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20 CONG. GLOBE, 36th Cong., 1st Sess. 1860–61 (1860).

21 *See* CURTIS, FREE SPEECH, *supra* note 2, at 129 (describing a mob attack on William Lloyd Garrison).

22 *See id.* at 248–50 (depicting Pennsylvania Hall as a place for free discussion and its destruction by a mob).

23 *See id.* at 140–41 (describing an 1835 attack on an abolitionist meeting and newspaper in New York state); *id.* at 149 (depicting the destruction of James G. Birney's press in Ohio).

24 *Id.* at 216.

25 *See id.* at 230–31 (discussing free speech and press in connection with the Lovejoy killing).

26 *See, e.g.*, CURTIS, NO STATE SHALL ABRIDGE, *supra* note 2, at 48–54 (noting the Thirteenth Amendment as making blacks citizens and discussing the rights of citizens), 60–61 (Congressman Bingham); *cf. id.* at 62 (Congressman Donnelly), 74–76 (Congressman Wilson in the Civil Rights bill debate), 79–80 (Congressman Thayer), 139–40 (Judge Davis). *But cf. id.* 78–79 (Rep. Shellabarger, Civil Rights Bill merely secures equality except to the extent that citizenship is involved in it).

27 *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 783 (1866) (statement of Rep. Ward); *id.* at 911 (Rep. Cullom rejecting "the ancient order of things, when liberty of speech was abridged, and the bludgeon used to silence the voice eloquently pleading for the oppressed of the land"); *id.* at 1013 (Rep. Plants noting the pre-War suppression of speech: "no man could utter the simplest truths but at the risk of his life"); *id.* at 586 (Rep. Donnelly referring to "the old reign of terror" in the South).

the newly freed slaves and returned them to a state of semi-slavery. For example, a local code in Louisiana prohibited a "negro" from passing within the limits of the parish without written permission from his employer; prohibited absence from the employer's premises after 10 p.m. without written permission; prohibited "negroes" from renting or keeping a house within the parish; required them to be in "regular service of some white person," and banned them from bartering or exchanging merchandise without written permission of their employers.[28] Provisions such as these have been widely noted, even in decisions of the U.S. Supreme Court.[29]

But the Codes often went beyond racial discrimination. They also abridged, for Americans of African descent, fundamental rights in the Bill of Rights—if one assumes, as leading Republicans often did, that these rights limited state and local governments. For example, local codes banned "public meetings or congregations of negroes . . . after sunset"; and special permission of the captain of the (former slave) patrol was required for *any* meeting. "No negro shall be permitted to preach, exhort, or otherwise declaim to congregations of colored people, without a special permission from the president of the police jury . . . . No negro who is not in the military service shall be allowed to carry fire-arms, or any kind of weapons, within the parish, without the special written permission of his employers . . . indorsed by the nearest . . . chief of patrol."[30] These provisions violated the right to assemble, to freedom of speech, to bear arms (as it was then widely understood), and to free exercise of religion—assuming again (as many leading Republicans did) that these provisions established personal, nationwide rights of American citizens that all states should respect.

Republicans in Congress who framed the Fourteenth Amendment in 1866 saw another equally troubling aspect of the rebirth of slavery. They saw a rebirth of "private" violence in the South aimed at suppressing political opinion. "Freedom of speech," lamented one con-

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28 *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 516–17 (1866) (setting forth an ordinance of Opelousas, Louisiana); WALTER L. FLEMING, 1 DOCUMENTARY HISTORY OF RECONSTRUCTION: POLITICAL, MILITARY, SOCIAL, RELIGIOUS, EDUCATIONAL, & INDUSTRIAL, 1865 TO THE PRESENT TIME 279–81 (1906) (setting forth an ordinance of St. Landry Parish, Louisiana).

29 *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70 (1873) (describing Black Codes, but omitting provisions that would violate the Bill of Rights if binding on state and local governments).

30 *See* FLEMING, *supra* note 28, at 279–81 (setting forth an ordinance of St. Landry Parish, Louisiana); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 516–17 (1866) (setting forth an ordinance of Opelousas, Louisiana).

gressman, "as of old, is a mockery."[31] Others made similar observations.

II. ENFORCING THE THIRTEENTH AMENDMENT: THE CIVIL RIGHTS ACT OF 1866

In response to the Black Codes, Republicans in Congress passed the Civil Rights Act of 1866. The Act provided that all persons born in the United States were citizens of the United States and of the state in which they resided.

> [S]uch citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and *to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens* . . . .[32]

Democrats immediately attacked the Civil Rights Act as unconstitutional. Republican supporters cited the Thirteenth Amendment and its Enforcement Clause. As many Republicans saw it, by abolishing slavery, the Amendment had conferred liberty on the slave. Slaves were now citizens, entitled to all the rights of American citizens.[33] The Black Codes were attempting to deprive the newly freed slaves of liberty. By this view, the Thirteenth Amendment not only ended slavery in name, it also empowered Congress to stamp out the badges and incidents of slavery. Because the Black Codes imposed badges and incidents of slavery on the newly freed slaves, Congress could nullify them. Republicans faced a counter-argument: Northern states that did not have slavery had sometimes imposed these disabilities on free Americans of African descent.[34]

Leading Republicans cited other constitutional justifications as well. James Wilson, Chairman of the Judiciary Committee in the House, said the Act was supported by the power of Congress to enforce the guarantees of liberty and property in the Fifth Amendment.[35] Finally, some leading Republicans cited the interstate Privileges and Immunities Clause—reading it expansively to protect both

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31 CONG. GLOBE, 39TH Cong., 1st Sess. 783 (1866) (statement of Rep. Ward).

32 The Civil Rights Act of 1866, ch. 31, 14 STAT. 27 (emphasis added).

33 *See generally* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 2, at 71–83 (detailing the debate on the Civil Rights Act).

34 *Id.*

35 *Id.* at 79–80 (Rep. Wilson and Rep. Thayer).

fundamental national rights including those in the Bill of Rights and equality to state-created rights.[36]

III. THE FOURTEENTH AMENDMENT

Section 1 of the Fourteenth Amendment (minus the Citizenship Clause which was added in the Senate) was drafted by Congressman John A. Bingham, a centrist anti-slavery congressman from Ohio. The Amendment made all persons born or naturalized in the United States citizens of the United States and of the state in which they resided. The Amendment continued: "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[37]

The Bill of Rights question discussed below is central to congressional power to enforce the Fourteenth Amendment. The rights Congress can enforce under Section 5 of the Amendment depend in part of what guarantees of liberty the Amendment contains.

An earlier version of the Bingham amendment was in a different form. It provided, "[t]he Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states; and to all persons in the several states equal protection in the rights of life, liberty, and property."[38] Bingham, like a number of his colleagues, had read the Article IV Privileges and Immunities Clause as containing an ellipsis. As he read the Clause, it provided that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens [of the United States] in the several States."[39] For him and others, the privileges and immunities of citizens of the United States were all rights shared by all citizens of the United States; these included, but were not limited to, the rights in the Bill of Rights.[40]

Bingham explained that his first version of the Fourteenth Amendment gave Congress the power to enforce the Bill of Rights. Enforcement was required because "this immortal bill of rights em-

36 *See id.* at 73–78 (Rep. Lawrence and Sen. Trumbull).

37 U.S. CONST. amend. XIV.

38 CURTIS, NO STATE SHALL ABRIDGE, *supra* note 2, at 57.

39 U.S. CONST. art. IV, § 2.

40 CURTIS, NO STATE SHALL ABRIDGE, *supra* note 2, at 62 (describing Bingham's ellipsis reading and his discussion of the constitutionality of Oregon's proposed constitution).

bodied in the Constitution, rested for its execution and enforcement hitherto on the fidelity of the States."[41]

The early version of Bingham's amendment received substantial support from Republicans, but it also encountered significant opposition. One leading critic, Congressman Hale, a New York Republican, focused on the equal protection provision. Hale thought states were already required to obey the Bill of Rights. However, he believed that the equal protection provision would allow the federal government to legislate on virtually all subjects previously reserved to the states—such as, for example, the rights of married women. This he found too great an incursion of principles of federalism.[42]

Bingham defended his original proposal as needed to enforce the guarantees of the Bill of Rights. He explained that in *Barron v. Baltimore* the Supreme Court had held that the guarantees of the Bill of Rights did not limit the states. That showed the necessity of his amendment.[43] In another speech Bingham doubted that Congress had the constitutional power to pass the Civil Rights Bill. He agreed with those like James Wilson that the guarantees of the Bill of Rights should be enforced and that the Civil Rights Bill was an effort to enforce the Bill of Rights; but, unlike Wilson who supported the Civil Rights Bill partly on that ground, Bingham insisted a constitutional amendment was necessary to make that possible.[44]

Congressman Giles Hotchkiss made a particularly influential speech criticizing Bingham's first version. He raised two objections to Bingham's early version. Like Congressman Hale, his federalism concerns focused on the equal protection language, which he understood to allow Congress to pass uniform and preempting laws throughout the United States on the protection of life, liberty, and property.[45] Hotchkiss had no objection to the privileges or immunities section; it was, he said, like the existing Constitution. But Hotchkiss understood the amendment to allow Congress to "establish uniform laws throughout the United States upon the subject named, the protection of life, liberty, and property. I am unwilling that Congress shall have any such power."[46]

Hotchkiss also had a second objection. The laws passed under the proposed amendment could simply be wiped out by the next Con-

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41 CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866) (statement of Rep. Bingham).

42 *Id.* at 1063–65 (statement of Rep. Hale).

43 *Id.* at 1089 (statement of Rep. Bingham).

44 *Id.* at 1291 (statement of Rep. Bingham); *id.* at 1294 (statement of Rep. Wilson).

45 *Id.* at 1095 (statement of Rep. Hotchkiss).

46 *Id.*

gress. "Now, I desire that the very privileges for which the gentleman is contending shall be secured to the citizens; but I want *them* secured by a constitutional amendment that legislation cannot override. Then if the gentleman wishes to go further, and provide by laws of Congress for the enforcement of these rights, I will go with him."[47] Apparently returning to his focus on the equal protection provision, Hotchkiss suggested, "[w]hy not provide by an amendment to the Constitution that no State shall discriminate against any class of its citizens; and let that amendment stand as part of the organic law of the land, subject only to be defeated by another constitutional amendment."[48] Bingham's first version was postponed and replaced by the current version of Section 1.

When the (nearly) final version reached the Senate floor, Senator Howard spoke on behalf of the Joint Committee in favor. He explained that he considered the Privileges or Immunities Clause very important.[49]

Howard said the privileges or immunities of citizens of the United States would include those in the Article IV Privileges and Immunities Clause[50] plus

> the personal rights *guarantied and secured* by the first eight amendments to the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances . . . ; the right to keep and bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures . . . ; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right . . . against cruel and unusual punishments.[51]

Howard continued:

> [T]here is no power given in the Constitution to enforce and to carry out any of these guarantees. They are not powers granted by the Constitution to Congress, and of course do not come within the sweeping [necessary and proper] clause of the Constitution . . . , they stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions . . . . The great object of the first section of this

47 *Id.* (emphasis added).

48 *Id.*

49 *Id.* at 2765 (statement of Sen. Howard).

50 *Id.*

51 *Id.*

> amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.[52]

Senator Howard, like House Judiciary Chairman Wilson,[53] described rights in the Bill of Rights as fundamental rights (and as privileges). He said that the lack of power to enforce was corrected by Section 5. It provided "a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees."[54]

In discussing the need for the amendment, Howard alluded to the *Barron* decision without naming it. He noted that the "restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress."[55]

In his speech on the amendment, Bingham explained that it would allow the Congress "to protect by national law all the privileges and immunities of all citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State."[56] As an example of the need for the provision, he cited past instances of state injustice and oppression such as imposition of cruel and unusual punishments.[57]

Much of the discussion of Section 1 was cryptic. Congressman Farnsworth said the section changed things by only adding equal protection.[58] He must have assumed that states were already prohibited from abridging rights in the Bill of Rights such as due process. A few *seem* to have read the Privileges or Immunities Clause or the entire first section as an anti-discrimination provision.[59]

Some equated Section 1 with the Civil Rights Act, apparently also assuming that the Act encompassed a federal standard of due process.[60] The Civil Rights Act had guaranteed to all citizens the full and

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52 *Id.* at 2765–66.

53 *Id.* at 1294 (statement of Rep. Wilson).

54 CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard).

55 *Id.* at 2765.

56 *Id.* at 2542 (statement of Rep. Bingham).

57 *Id.*

58 *Id.* at 2539 (statement of Rep. Farnsworth).

59 *Id.* at 2511 (statement of Rep. Eliot); *id.* at 2883 (statement of Rep. Latham stating: "the 'civil rights bill' . . . covers exactly the same ground as this amendment," which could only be true if the Civil Rights Act contained the Due Process Clause, in which it would not be merely an anti-discrimination provision).

60 *Cf.* CONG. GLOBE, 39th Cong., 1st Sess. 2498 (1866) (statement of Rep. Bromall); *id.* at 1263 (statement of Rep. Bromall); *id.* at 2459 (statement of Rep. Stevens saying that it is partly true that the Amendment secures the same things as the Civil Rights Bill, but a law is repealable by a majority).

equal benefit of all laws and provisions for the security of person and property as enjoyed by white citizens. The phrase, laws for the security of person and property, had long been used to describe rights such as those in the federal Bill of Rights. Some contemporaries read the Civil Rights Act to protect Bill of Rights liberties. Senator Dixon, for example, said the Civil Rights Act protected free speech throughout the United States;[61] a Republican newspaper made a similar assertion.[62]

For historical questions, often the best we can achieve is a hypothesis that fits the facts better than competing ones. A number of methods of legal and historical interpretation support the hypothesis that the privileges or immunities of citizens of the United States included rights in the Bill of Rights. Again, the meaning of the Privileges or Immunities Clause matters for congressional enforcement of the Fourteenth Amendment because the Clause is part of what Congress will be enforcing.

IV. INTERPRETING PRIVILEGES OR IMMUNITIES

A. Textual Analysis

1. Contemporary Usage: Original Meaning

From the American Revolution through the framing of the Fourteenth Amendment, fundamental rights such as those in the Bill of Rights were repeatedly described as "privileges" and "immunities." There are hundreds of examples, including from the Zenger trial, and from controversies over ratification of the Constitution, over the Sedition Act, and over the free speech and press right to criticize slavery.[63] For present purposes one example will need to suffice. In

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61 CONG. GLOBE, 39th Cong., 1st Sess. 2332 (1866) (statement of Sen. Dixon); Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the* Slaughter-House Cases *Without Exhuming* Lochner*: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 52 (1996). *See generally id.* at 51–65 (responding to "nothing but equality" readings of Section 1).

62 STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876, at 31 (1998) (quoting Editorial, NEW YORK EVENING POST, Apr. 7, 1866, at 2, col. 1: Civil Rights Act "seeks to provide a remedy . . . that there will be no . . . attempts to prevent ['colored men'] holding public assemblies, freely discussing the question of their own disabilities, keeping fire-arms").

63 *See, e.g.*, CURTIS, NO STATE SHALL ABRIDGE, *supra* note 2, at 64–65 (pointing to the use of the words privileges or immunities by William Penn, William Blackstone, and American Revolutionaries); *id.* at 43 (pointing to usage by abolitionist legal theorist Joel Tiffany); *id.* at 37–38 (describing usage by James Wilson, chairman of the Judiciary Committee in the 39th Congress). *See generally* Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life*

proposing the Bill of Rights to the first Congress, James Madison had included guarantees of rights aimed against the states—for free press, jury trial, and rights of conscience. Madison explained that states were as likely to attack the "invaluable privileges" as the federal government was.[64]

2. *Technical Legal Meaning*

In contrast to the way the Framers of the Bill of Rights, newspaper commentators, framers of the Fourteenth Amendment, many congressmen, and many others used the words "privileges" and "immunities," one might insist on a technical legal meaning. The phrase "privileges or immunities *of citizens of the United States*" does not appear elsewhere in the Constitution. *Dred Scott* however described each and every constitutional right collectively as rights, privileges, and immunities belonging to citizens of the United States.[65] *Dred Scott* used the word "right" and the word "privilege" interchangeably, noting that one "right" of citizens of the United States was the "privilege" of suing in federal court.[66] *Dred Scott* also treated every constitutional right, privilege, or immunity as belonging only to citizens of the United States, a category that excluded all descendants of slaves.[67] Republicans rejected that and the Fourteenth Amendment corrected that holding. The word privilege was also a common way lawyers described Bill of Rights liberties such a free speech and press. Under

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After Death: The Privileges or Immunities of Citizens of the United States, 78 N.C. L. REV. 1071 (2000). *Cf.* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 2 at 199–200 (pointing to the usage of the words "privileges or immunities" by the Court in *Palko v. Connecticut*, 302 U.S 319, 325–26 (1937), to describe all the rights in the Bill of Rights, while holding that not all limited the states).

64 BERNARD SCHWARTZ, 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1033 (Leon Friedman et al. eds., 1971).

65 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 403 (1856) ("The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, [become part of the political community created by the Constitution], and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States . . . .").

66 *Id.* For additional uses of the phrase, sometimes referring to national constitutional rights, *see id.* at 403–06, 411–13, 415–16, 425–26, 449.

67 *Id.* at 411 (stating that the blessings of liberty and the powers granted and the privileges secured to the citizen were reserved to citizens of the United States, a class that excluded Americans of African descent—free or slave—who were descended from slaves). On the meaning of the Fourteenth Amendment in light of prior law, see William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 4–7 (1954). The path of better understanding the application of the Bill of Rights to the states was blazed by Professor Crosskey.

Barron v. Baltimore[68] states had been free to abridge these privileges and immunities. "No state shall" were the words *Barron* said should be used to change that. So the argument for the legal meaning of the Fourteenth Amendment is also strong—no State shall abridge the privileges or immunities [rights] of [shared by all] citizens of the United States [all their constitutional rights].

B. Context or Inter-textual Analysis

When the Framers of the original Constitution put limits on the states in the interest of liberty in Article I, Section 10, they used the "no State shall" language.[69] When they wanted to strongly protect a liberty from being denied in the First Amendment, they prohibited abridging it.[70]

C. Precedent

Barron v. Baltimore[71] held the Bill of Rights did not limit the states. Had the framers intended the rights to limit the states, Chief Justice Marshall said they would have used the "no State shall" language. The Amendment did use exactly that language. John Bingham explained in 1871 that he used the words "no State shall" to comply with *Barron*'s formula.[72]

D. Historic Grievances

Discrimination against Americans of African descent was a substantial part of the history leading up to the Fourteenth Amendment, but only one part. So were denials of free speech, press, and free exercise of religion (to critics of slavery), and searches and cruel punishments to enforce suppression of speech. One of the nation's two major political parties was unable to campaign or even exist in the South. Having been targeted, Republicans were keenly aware of the denials of speech and other liberties in the interest of slavery. These grievances were repeatedly discussed in the 38th Congress that abolished slavery and in the 39th Congress that framed the Fourteenth

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68 Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833).

69 U.S. CONST. art. I, § 10.

70 U.S. CONST. amend. I.

71 *Barron*, 32 U.S. at 250.

72 CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871) (statement of Rep. Bingham explaining that he re-read *Barron* and followed its suggestion to use the same—"no State shall"—form used by the Framers of the original Constitution when they set limits on the states).

Amendment.[73] The need to protect free speech and constitutional rights of American citizens was commonly mentioned in the election campaign of 1866.[74] The 1866 congressional election was a referendum on the Fourteenth Amendment as a basis for reconstruction.

E. Original Understandings

Many Congressmen and other opinion leaders in 1866 described the Fourteenth Amendment as protecting Americans in all their constitutional rights or in all the rights of American citizens.[75] As noted above, some instead described the Amendment as equivalent to the Civil Rights Act, a claim that assumes that at least one Bill of Rights liberty (due process) was subsumed in the Civil Rights Act's protections. No one explicitly contradicted Congressman Bingham's or Senator Howard's statements indicating that the Amendment would protect Bill of Rights liberties from the states. In the 1871 speech where he explained why he changed the form of the Amendment to comply with *Barron*, Bingham also explained that the privileges or immunities were chiefly contained in the first eight Amendments, which he proceeded to read word for word.[76]

Of course, that leaves open the question of what the guarantees included in privileges or immunities, such as free speech and free press, meant to Bingham, other framers, and people in 1866–1868. History sheds some light on that subject. As to free speech and press, for example, the rich history of free speech controversies from 1798 through to Civil War (a history often alluded to in the 38th and 39th Congresses) negates the idea that the guarantees were thought merely to protect against prior restraint. The idea that supporters of the Amendment would agree that one could not be restrained from publishing an anti-slavery book or newspaper but could be imprisoned, whipped, or hung after publication is belied by this history.[77]

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73 *E.g.*, CURTIS, NO STATE SHALL ABRIDGE, *supra* note 2, at 36–56; CURTIS, FREE SPEECH, *supra* note 2, at 271–99, 357–72.

74 CURTIS, NO STATE SHALL ABRIDGE, *supra* note 2, at 131–53.

75 *Id.* at 89–90 (including some descriptions of Section 1); 131–33 (including somewhat divergent ones); 140–45 (including discussion in the 1866 campaign).

76 CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871) (statement of Rep. Bingham).

77 *See, e.g.*, CURTIS, FREE SPEECH, *supra* note 2 at 271–299, 357–383 (showing that Republican concerns about suppression of free speech in the South by law were focused on subsequent punishment, not prior restraint).

F. Structure

Representative government requires free speech, free press, and the right to assemble and associate for political purposes, as well as, of course, a meaningful and protected right to vote. The other guarantees of the Bill of Rights also reinforce personal liberty and political freedom. As Professor Calabresi has wisely noted,[78] a racial caste system is essentially totalitarian. Robust protection of the rights in the Bill of Rights is incompatible with a totalitarian system. Both slavery and a racial caste system are severely threatened by the freedoms in the Bill of Rights.

Popular sovereignty is a basic structural principle of American constitutional government.[79] The Constitution should be interpreted to support its basic structure and to provide basic guarantees in order for representative government to work. In the years leading up to the Civil War, the South became a closed society. Southern states (and the Kansas territory) and mobs suppressed speech, press, assembly, religious expression, and political association and expression on the central issue facing the United States in the years leading up to the Civil War. That history shows how important these guarantees are for a healthy democracy. A healthy democracy is crucial so disputes can be settled by peaceful means, not by civil war. Rights of speech, press, assembly, political association, and voting were attacked again by terrorism during Reconstruction.

V. RECONSTRUCTION AND POLITICAL TERROR

Except for Tennessee, which was readmitted to Congress, the Southern states at first rejected the Fourteenth Amendment. Congress established military Reconstruction. Before readmission to Congress the states were required to ratify the Fourteenth Amendment and to establish constitutions acceptable to Congress. Congress required the former Confederate States to elect state constitutional conventions by manhood suffrage—so it required enfranchisement of recently freed slaves.[80] Former rebels who had taken an oath to sup-

78 Steven G. Calabresi, oral presentation at the National Constitution Center evening program, Nov. 14, 2008.

79 *See, e.g.*, U.S. CONST. pmbl. ("We the People of the United States . . . do ordain and establish this Constitution for the United States of America."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.").

80 *See, e.g.*, Act of Apr. 10, 1870, ch. 17, 16 Stat. 40.

port the Constitution and who had supported the Confederacy were not allowed to vote for the Constitutional Conventions. The new state constitutions enfranchised the newly freed slaves. Most of the new state constitutions also enfranchised all former rebels.[81] Under Section 3 of the Fourteenth Amendment, former rebels who had taken and broken an oath of allegiance to the United States (most of the pre-civil War political elite) were disqualified to hold state or federal office until Congress removed the disability. Congress removed the disability in 1872.[82]

A. The Fifteenth Amendment

The Fifteenth Amendment was proposed by the Congress in 1868 and ratified in 1870. It provided that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."[83]

Republican critics of the Amendment favored broader guarantees of the right to vote, something approaching universal male suffrage. They presciently warned that the Fifteenth Amendment could be evaded by all sorts of methods that disfranchised people on a *basis* other than race (literacy tests for example)—but that had the *effect* of disfranchising blacks.[84]

B. Terror as a Political Weapon

For a time, multi-racial democracy worked. A white-black Republican political coalition controlled Southern states.[85] But, the Ku Klux Klan ("KKK") and similar organizations soon undertook a campaign of political terror against white and black Republicans. Congress responded with acts designed to enforce the Fourteenth and Fifteenth Amendments.[86]

One stark fact emerges from a study of Reconstruction and the debates on the Ku Klux Klan Enforcement Act of 1871. The Klan was targeting Republicans, black *and* white. The victims of its political

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81 FONER, *supra* note 4, at 276–80; RICHARD B. MORRIS, ENCYCLOPEDIA OF AMERICAN HISTORY 246–49 (1953); Chin & Wagner, *supra* note 2, at 80, 82.

82 FONER, *supra* note 4, at 504.

83 U.S. Const. amend. XV.

84 *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 94–102 (2000) (describing framing debates and the failure to include a broader guarantee of the right to vote in the Fifteenth Amendment).

85 FONER, *supra* note 4, at 587; Chin & Wagner, *supra* note 2, at 82–83.

86 Act of May 31, 1870, ch. 114 16 Stat. 140; Act of Apr. 20, 1871, ch. 22, 17 Stat. 13.

terrorism were people who led or supported the Republican Party in the South. As a result, simple protection against racially motivated violence would have been inadequate—important, but not sufficient. Requiring racial motivation was problematic because blacks were often targeted *because of their political activity*. In addition, Americans of African descent would become far more vulnerable without their white allies and without a bi-racial Republican party. Once their opponents captured state government, they became extremely vulnerable.

In the debates on the 1871 KKK act, Senator Ames of Mississippi recounted attacks on Republican speakers and meetings in Mississippi. It was, he said, impossible to advocate Republicans' principles in some counties.[87] Ames recounted a politically inspired riot in Meridian, Mississippi. The murder victims included a white Republican judge who supported black rights.[88] In Louisiana, Ames noted, there had been 859 political murders of Republicans. No murders were prosecuted. "[W]hat political party at the North can retain its vigor and lose yearly in each State by murder eight hundred of its best and most reliable workers?"[89] He warned that "[f]uture contests for party supremacy will be but repetitions of the past; and unless the Government interferes hundreds and hundreds of men are yet to be made martyrs for opinion's sake."[90]

Ames recognized that while whites were also victims, Americans of African descent had the most to lose. "And when this 'white man's party' shall dominate, should it ever, you will see class legislation so harsh and so cruel as . . . to force the colored people into a serfdom worse than slavery . . . ."[91] Witness after witness in Congressional hearings described shootings and beatings designed to "run . . . off [those who] voted the Radical ticket."[92] Senator Hoar described "large numbers of our fellow-citizens . . . deprived of the enjoyment of the fundamental rights of citizens." The deprivations occurred because of loyalty to the country and "because [of] their opinions on questions of public interest."[93] Violence was intensely political.

Representative Perry described attacks against politically active blacks and their white allies:

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87 CONG. GLOBE, 42d Cong., 1st Sess. 196 (1871).

88 *Id.*

89 *Id.* at 197.

90 *Id.*

91 *Id.*

92 *Id.* at 321 (statement of Rep. Stoughton, recounting testimony before Congress; question by Senator Nye).

93 *Id.* at 332 (statement of Sen. Hoar).

> The aim appears to be to put them under fear, so they will be silent when freemen should speak, and will stay at home when freemen should be at the polls; or, failing in that, to compel them to abandon citizenship in that part of the country; or, failing in that, to murder and mutilate them, disperse their families, burn their houses, and steal or destroy their property.[94]

Speaker after speaker, quoting witness after witness, told the same story: violence was aimed at whites and blacks as a means to regain political dominance.

Representative Rainey of South Carolina, the first American of African descent elected to the House of Representatives, said that if "the negroes . . . would only cast their votes in the interest of the Democratic party, all open measures against them would be immediately suspended, and their rights, as American citizens, recognized."[95] But he said, "we love freedom more, vastly more, than slavery."[96]

C. Enforcement Acts

The Enforcement Act of 1870[97] focused mainly on attempting to protect Fifteenth Amendment rights. It reached both state actors and private persons who interfered with the right to vote of those protected by the Fifteenth Amendment.[98] Section 5 punished any person who

> shall prevent, hinder, control, or intimidate, or shall attempt to prevent, hinder, control, or intimidate, any person from exercising . . . the right of suffrage, to whom the right of suffrage is . . . guaranteed by the fifteenth amendment to the Constitution of the United States, by means of bribery, threats, or threats of depriving such person of employment or occupation [or other specified means of economic coercion].[99]

The section failed to require that the intimidation be *because* of race, and indictments drawn without those allegations proved problematic.

As to the sections dealing with private actors, Democratic senators and representatives insisted that the Fifteenth Amendment was limited to state action. By this view, private action directed at intimidating and punishing voters was not within the scope of the Amendment.[100] Though state action was undoubtedly a problem, a major

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94 *Id.* at app. 78 (statement of Rep. Perry).

95 *Id.* at 394 (statement of Rep. Rainey).

96 *Id.*

97 Act of May 31, 1870, ch 114, 16 Stat. 140 (1870).

98 *Id.* at §§ 1–5.

99 *Id.* at § 5.

100 *See, e.g.*, CONG. GLOBE, 41st Cong., 2d. Sess. app. 353–54 (1870) (statement of Sen. Hamilton); *id.* at app. 472 (statement of Sen. Casserly).

problem facing Republicans in the South was private action designed to intimidate voters.

The 1870 Act also had a provision seeking to enforce the Fourteenth Amendment. Section 6 punished

> two or more persons [who] band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizens with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution . . . of the United States, or because of his having exercised the same.[101]

The most extensive debate on constitutional power to reach private violence came in connection with the 1871 Act to Enforce the Fourteenth Amendment.[102] Since a major problem was "private" political violence, the act had sections reaching violence by "private" people aimed at private persons. But it also reached state actors: any person,

> who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States . . . shall be liable to the party injured in any action at law or suit in equity.[103]

Section 2 reached private persons who conspire or

> go in disguise upon the public highway or upon the premises of another for the purposes, either directly or indirectly, of depriving any person or class of persons of the equal protection of the laws, or equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or shall conspire together for the purpose of in any manner impeding, [etc.] the due and equal protection of the laws.[104]

Violators were subject to fine and imprisonment. In addition, in case any person acted in furtherance of the conspiracy set out above, "whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of

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101 Act of May 31, 1870, ch 114, 16 Stat. 140 § 6 (1870).

102 Act of Apr. 20, 1871. ch. 22, 17 Stat. 13 (1871).

103 *Id.* at § 1.

104 *Id.* at § 2. Other parts of the Act reached persons acting to interfere with federal office holders, federal jurors, or grant jurors. It also reached force or intimidation designed to prevent any citizen of the United States lawfully entitled to vote from voting because of electoral support or advocacy in connection with any federal office.

the United States," the person injured was given an action for damages.[105]

Sections of the anti-KKK act of 1871 allowed the president to use the military to enforce the law where ordinary law enforcement was not sufficient.[106] These controversial provisions were copied from the Fugitive Slave Act of 1850.

D. Congressional Debate on Enforcement of the Fourteenth Amendment

Provisions punishing private persons who interfered with federal officers and functions and those that reached persons acting under color of law were less controversial. The sections of the Act that provoked the most debate and disagreement (even among Republicans) were those that aimed at private persons who used political violence against other private persons—the Klansmen who beat, murdered, and abused black and white Republicans.

Democrats (and a few Republicans) embraced the state action syllogism[107]: the Fourteenth Amendment only prohibited state action; private Klansmen were not the state; therefore the enforcement of the Amendment could not reach private persons. By this view, the Fourteenth Amendment (and the Fifteenth) did not create rights. They only imposed limits on government. Since people had no rights under these Amendments, there were no federal rights to enforce.[108] Republicans gave several responses.

Representative Samuel Shellabarger of Ohio defended an early version of the 1871 Act which protected privileges or immunities of citizens of the United States.

> [W]hen the United States inserted into its Constitution . . . that the people of this country, born or naturalized therein, are citizens of the United States and of the States also in which they reside, and that Congress shall have power to enforce by appropriate legislation the requirement that their privileges and immunities as citizens should not be abridged, it was done for a purpose, and that purpose was that the United States thereby were authorized to directly protect and defend throughout the United States those privileges and immunities which are in their nature 'fundamental' . . . and which inhere and belong of right to the citizenship of all free Governments. The making of them United States citizens and authorizing Congress by appropriate law to protect that citizenship gave

105 *Id.*

106 *Id.* at § 4.

107 CONG. GLOBE, 42d Cong., 1st Sess. app. 114 (1871) (statement of Rep. Farnsworth pertaining to the Fourteenth Amendment); *id.* at app. 208 (statement of Rep. Blair).

108 *Id.*; *see* Cruikshank v. United States, 92 U.S. 542, 553–55 (1875) (containing a judicial statement of the state action syllogism).

> Congress power to legislate directly for the enforcement of such rights as are fundamental elements of citizenship.[109]

Shellabarger then cited *Corfield v. Coryell*[110] as to privileges and immunities under Article IV. That case that seemed to give those privileges a fundamental rights reading.

> [W]hat are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental, which belong of right to the citizens of all free Governments. . . . They may . . . be all comprehended under the following general heads: protection by the Government; . . . the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restrains as the Government may justly prescribe for the general good of the whole.[111]

To respond to the state action syllogism Shellabarger compared the Fugitive Slave Clause to the first Section of the Fourteenth Amendment:

> No person held to service of labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on the claim of the party to whom such service or labor may be due.[112]

"Now notice," Shellabarger said, "that this provision is in restraint of the power of the States, just as the first section of the fourteenth amendment is in its last three clauses:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[113]

Both Clauses, he said, were prohibitions on the states, withholding power from the states. They were similar except that the Fugitive Slave Clause had no enforcement clause (in contrast to Section 5 of the Fourteenth Amendment). The Fugitive Slave Clause was "merely a negation upon the power of the States, and an abstract statement that the fugitive shall be delivered upon claim."[114] Yet to enforce this negative limit on the states, in 1850 Congress made it a crime for private persons to assist or harbor an escaping slave and the Supreme

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109 CONG. GLOBE, 42d Cong., 1st Sess. app. 69 (1871) (statement of Rep. Shellabarger).

110 Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

111 CONG. GLOBE, 42d Cong., 1st Sess. app. 69 (1871) (quoting *Corfield v. Coryell*, 6 F. Cas. at 551).

112 *Id.* at app. 70.

113 *Id.*

114 *Id.*

Court held that the Fugitive Slave Law of 1850 was constitutional in all respects.[115]

The analogy suggested by Shellabarger is persuasive. Stripped of its euphemisms the Fugitive Slave Clause provided:

> No [slave] held to service or labor in one State, under the laws thereof, escaping into another shall, in consequence of any law or regulation therein, be discharged from such [slavery], but shall be delivered up on the claim of the [slave owner].[116]

The clause would mean the same thing had it said:

> No state shall by any law or regulation free any slave escaping from another state, but the slave shall be delivered upon the claim of the slave owner.

From a limit on the states in the Fugitive Slave Clause, the Court in *Prigg v. Pennsylvania* implied a right of the slave owner to get the slave back. From that right, it implied the power of Congress to create a remedy reaching private persons, not just state actors. As Representative Shellabarger explained:

> [I]n 1850 . . . [you] legislated a criminal code; you made the harboring of a slave, you made the refusal to return the slave . . . criminal and indictable in the courts of the United States, and all in enforcement of a provision purely negative as to the States . . . . You did everything that is done by this bill . . . . And yet that legislation . . . stood for fifty years. It has stood affirmed, from Prigg vs. Pennsylvania down through the years . . . in every court of the United States; affirmed upon that mere negation upon the power of the States [that] it was the right of Congress to enforce its provisions by affirmative law, both civil and criminal . . . . And . . . shall it be endured now that those decisions which were invoked and sustained in favor of bondage shall be stricken down when first called upon and invoked in behalf of human rights and American citizenship? . . . So long as your Constitution continues to guaranty the rights of American citizenship, so long you can . . . enforce these rights of American citizenship.[117]

Shellabarger's definition of privileges and immunities did not exclude Bill of Rights liberties, but also did not explicitly include them. To critics, the invocation of *Corfield* seemed to give the federal gov-

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115 *Id.* (statement of Rep. Shellabarger); *see* Prigg v. Pennsylvania, 41 U.S. (16 Pet) 539 (1842) (citing the Fugitive Slave Act of 1793). Section 4 of that Act punished persons who knowingly harbored or concealed a fugitive slave or willfully obstructed the claimant in recapturing his or her slave. Fugitive Slave Act of 1793, ch. 7, sec. 1, 1 Stat. 302 (1793). *See also* Ableman v. Booth, 62 U.S. (21 How.) 506, 526 (1859) (proclaiming the 1850 Fugitive Slave Act constitutional in all respects). The 1850 statute punished persons who knowingly directly or indirectly assisted a fugitive slave in escaping or harbored or concealed the slave. Fugitive Slave Act of 1850, ch. 60, sec. 7, 9 Stat. 462, 464 (1850).

116 U.S. CONST. art. IV, § 2.

117 CONG. GLOBE, 42d Cong., 1st Sess. app. 70 (1871) (statement of Rep. Shellabarger).

ernment broad power to legislate over subjects of traditional state concern. Shellabarger noted one limit: Congress was legislating only when the "private" crime was motivated by the intent to deprive citizens of their privileges or immunities.[118]

John A. Bingham's explanation of the privileges or immunities of citizens of the United States was different. They were chiefly those set forth in the Bill of Rights. To identify them Bingham read word for word the first eight Amendments to the Constitution.[119] Before the Fourteenth Amendment, Bingham noted, "the State could deny to any citizen the right of trial by jury, and it was done. Before that the State could abridge the freedom of the press, and it was done in half of the States of the Union."[120]

Bingham had earlier embraced a fundamental rights reading of Article IV. But in 1869 in *Paul v. Virginia,*[121] the Supreme Court had treated the Article IV privileges and immunities as protecting out-of-staters from discrimination in rights the state provided to its own citizens. Bingham now read *Corfield* the same way. He said *Corfield* had "only held that in civil rights the State could not refuse to extend to citizens of other States the same general rights secured to its own."[122] But

> other and different privileges and immunities than those to which a citizen of a State was entitled are secured by the provision of the fourteenth article, that no State shall abridge the privileges and immunities of citizens of the United States, which are defined in the eight articles of amendment.[123]

Bingham said that Congress could pass "laws for enforcing all the privileges and immunities of the citizens of the United States, as guarantied by the amended Constitution and expressly enumerated in the Constitution."[124] These guarantees were essential to American nationality. "The people of the United States are entitled to have their rights guarantied to them by the Constitution of the United States, protected by national law."[125] What, Bingham asked, would the government be worth if it "must rely upon States to execute its grants of power, its limitations of power upon States and its express guarantees

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118 *Id.* at app. 69–70.

119 *Id.* at app. 84 (statement of Rep. Bingham).

120 *Id.*

121 Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180–81 (1869).

122 CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871) (statement of Rep. Bingham).

123 *Id.*

124 *Id.*

125 *Id.* at app. 85.

of rights to the people."[126] Congressional statutes could be preventative as well as remedial. "Why not in advance provide against the denial of rights by States, whether the denial be acts of omission or commission, as well as against the unlawful acts of combinations and conspiracies against the rights of the people?"[127] For Bingham, congressional power to protect the rights of citizens did not exclude the states: "the States have concurrent power to enforce the Constitution."[128]

Congress had previously enforced the negative provisions of the Fifteenth Amendment. "What difference is there between enforcing the negative provision of the fifteenth amendment and enforcing a negative provision of the thirteenth and fourteenth amendments? There is no difference . . . ."[129] For Bingham the rights in the Bill of Rights, now secured against federal or state invasion, were rights of American citizens. They were national rights Congress could protect.

Bingham was faced with the claim that the change in the form of the Amendment showed that federal enforcement of the rights against private individuals in the states was foreclosed. He explained that he had changed the form of his Amendment to comply with the way Chief Justice Marshall had said limits on state power would have had to be crafted to prevent state violation of Bill of Rights liberties.[130] Marshall had said that "no State shall" language was necessary to establish a limit on the states.[131] For Bingham, the revised Amendment was stronger than its predecessor, because it now explicitly limited the states *and* allowed congressional enforcement.

Other congressmen also said that privileges or immunities included those in the Bill of Rights. Congressman Dawes noted that in addition to privileges and immunities under the original Constitution, other privileges or immunities were added. To illustrate these privileges or immunities Congressman Dawes cited one-by-one the guarantees of the Bill of Rights. Then he noted the immunity from slavery under the Thirteenth Amendment. After listing all these privileges and immunities in the original Constitution, the Bill of Rights,

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126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.* at app. 84 ("In reëxamining the case of Barron . . . I noted and apprehended as I never did before, certain words in that opinion of Marshall. . . . 'Had the framers of these amendments intended them to be limitations on the power of the Sate governments they would have imitated the framers of the original Constitution and have expressed that intention [by using "no State shall"].'".

131 *Id.* at app. 83–84.

and the Thirteenth Amendment, Dawes referred to the Fourteenth. "Still further, every person born on the soil was made a citizen and clothed with them all."[132]

Dawes clearly thought the Bill of Rights guarantees did not exhaust the privileges or immunities of American citizens. In any case, however, whoever "invades, trenches upon, or impairs one iota or tittle of the least of them, to that extent trenches upon the Constitution and laws of the United States, and this Constitution authorizes us to bring him before the courts to answer therefor."[133]

Representative Hoar also said that privileges or immunities "comprehend[] all the privileges and immunities declared to belong to the citizen by the Constitution itself" plus "those . . . which all republican writers of authority agree in declaring fundamental and essential to citizenship."[134] He cited and relied also on *Corfield*.[135]

Hoar also relied on the guarantee of a republican form of government. A government might formally be republican, with all the requisite guarantees in its constitution and laws, but still fail to be a republican government. In South Carolina, he said, more than three-fifths of the population was Negroes, and still a larger number were Republicans:

> Now, suppose that in that State, with its constitution providing for trial by jury, providing an independent judiciary, and providing for equality of civil rights, providing for the right to vote and to hold office of every citizen, there should be a conspiracy upon the part of a certain portion of the people that by intimidation, by murder, by outrage, this majority of the people dare not exercise those rights which their State constitution undertakes to declare for them.[136]

In that case, Hoar believed that Congress could and should act.

According to Hoar, Congress could not interfere to remedy ordinary imperfections. But "wherever these evils have attained such a degree as amounts to the destruction, to the overthrow, to the denial to large classes of the people of the blessings of republican government altogether," Congress should act to protect the rights denied to a large class of citizens.[137] Congress was the judge of the necessity. The Equal Protection Clause was an additional source of congressional power. When states systematically failed to secure equal pro-

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132 *Id.* at 475–76 (statement of Rep. Dawes).

133 *Id.* at 476.

134 *Id.* at 334 (statement of Rep. Hoar).

135 *Id.*

136 *Id.* at 333.

137 *Id.* at 334.

tection, Congress could and should have acted to protect citizens' rights.[138]

As Hoar recognized, denials of basic rights were nothing new. History did not suggest that the states would correct the problem. In a large part of the Union, slaves had been denied "all rights, civil, political, and personal."[139]

> So far was there from being any tendency to correct this evil under the operation of existing State constitutions, that the civil right of discussing temperately the rightfulness or expediency of this state of things and the political right of voting to put an end to it was also denied, with penalty of banishment or death to any person of the dominant race whose sense of public duty might so incline him.[140]

Hoar said, somewhat inaccurately, that the penalty was not "expressed in terms on the statute-books," but, he accurately noted, it was enforced by mobs.[141]

Congressman Monroe insisted that

> [a] constitution is a means, and not an end. Life, liberty, and happiness do not exist for the sake of the constitution, but the constitution exists and was framed for their sake . . . . [T]here is a fair presumption that it contains sufficient grants of power to the legislative body to secure the great primal objects for which constitutions and Governments exist.[142]

For Monroe "every free constitution" evolved in similar ways. These free governments had a "natural growth," a growth that did not come only from amendment or change of the letter or spirit.[143] "It is not the intrusion of new principles, but it is the more extended application of old ones. Principles have commonly a much wider application than we suspect."[144]

> A new application of a well-known principle, whether in morals, in science, or in the organic law of the land, takes us by surprise . . . yet it is only what is required by the most logical consistency. When we first study the constitution of a free country we think of its principles only as applicable to that state of society and to those needs of the people which then exist and with which we are familiar. But, in time, new circumstances arise, new social conditions appear, and minds will then be found who will propose to include the new phenomena under the old rule. This will startle many as an innovation, as a violation of the constitution, whereas

138 *Id.*

139 *Id.* at 335.

140 *Id.*

141 *Id.*

142 *Id.* at 370 (statement of Rep. Monroe).

143 *Id.*

144 *Id.*

> it may be only the application of known and admitted principles to new circumstances.[145]

As to privileges and immunities and equal protection, Monroe agreed with Hoar.[146] Others also read privileges and immunities to include rights in the Bill of Rights. For example, Senator Frelinghuysen cited the takings guarantee as one of the privileges or immunities of citizens.[147] Representative Hawley included the right to express opinions as one right protected by the Fourteenth Amendment.[148]

As to equal protection, Frelinghuysen, like Monroe, said states could deny equal protection by inaction as well as by action. A state denied equal protection by failing to protect.[149] Furthermore, it was "the constitutional right and duty of the General Government to see to it that the fundamental rights of citizens of the United States are protected."[150] How, he asked, could the government "protect the privileges of citizens of the United States in the States?"[151] It could not "compel proper legislation and its enforcement; it can only deal with the offenders who violate the privileges and immunities of citizens of the United States."[152]

For these congressmen and senators, the Privileges or Immunities Clause did not simply give Americans of African descent the rights enjoyed by whites under state law. Instead it gave whites and blacks national privileges and immunities that should be absolutely unabridged.

Some, of course, expressed more or less divergent views. Congressman Willard, a Republican of Vermont, insisted that the Privileges or Immunities Clause merely guaranteed equality of privileges with other citizens of the state. He relied on the Civil Rights Act (which he read as merely securing equality in rights states provided) to prove his point. Willard saw enforcement of the Fourteenth Amendment as initially proposed as a violation of the rights of the states.[153] People like Willard believed citizens had a right to equality under state law. They may have found the final language of the statute (punishing private action to deprive people of equal privileges or immunities) consistent with their limited view of privileges or immu-

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145 *Id.*

146 *Id.*

147 *Id.* at 499 (statement of Sen. Frelinghuysen).

148 *Id.* at 382 (statement of Rep. Hawley).

149 *Id.* at 501 (statement of Sen. Frelinghuysen).

150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.* at app. 188 (statement of Rep. Willard).

nities and therefore acceptable. At any rate, Willard voted for the final version of the bill, which reached private conspiracies.[154]

As we have seen, a number of Republicans relied on the Equal Protection Clause as a source of federal power to reach private violence. By an often expressed view, the Equal Protection Clause, by prohibiting state denials of equal protection, required states to *provide* protection of the laws to all. The Clause went beyond requiring laws equal on their face; it also required administration of the law that provided equal protection. To deny protection was to refuse to supply it. People had a right to protection of the laws. Since Southern states were unable to supply protection, Congress under Section 5 of the Fourteenth Amendment could do so. As Senator Morton explained,

> If a State fails to secure to a certain class of people the equal protection of the laws, it is exactly equivalent to denying such protection . . . . [It did not matter whether the failure was] willful or the result of inability . . . . [That was a question] into which it is not important that Congress should enter . . . . If there be organizations in any of the States having for their purpose to deny to any class or condition of men equal protection, to deny to them the equal enjoyment of rights that are secured by the Constitution of the United States, [it was] the right and duty of Congress to make such organizations and combinations an offense against the United States . . . . [C]itizens of the United States, whatever may be their political views [should have] the equal protection of the laws.[155]

Referring to the Equal Protection Clause, Senator Edmunds said that it meant that the citizen "shall have the protection of the law. Although the word is negative in form, it is affirmative in its nature and character."[156] The Equal Protection theory was not necessarily exclusive. A number of congressmen believed that Congress had the power to supply protection when the state failed to do so, *and* that it also had the power to protect any national constitutional right belonging to the citizen against a conspiracy aimed specifically at that right.

Still, a few Republicans accepted the idea that the Privileges or Immunities Clause (whatever it meant), the Due Process Clause, and the Equal Protection Clause merely limited state power. One of the strongest attacks on an earlier version of the statute came from Congressman Farnsworth of Illinois. He felt the time for reconstructing the South had past. "We have reconstructed, and rereconstructed, and we are asked to reconstruct again . . . . I fear we are governing

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154 *Id.* at 808 (statement of Rep. Willard, voting with the majority in favor of the act).

155 *Id.* at 501 (statement of Sen. Frelinghuysen); *id.* at app. 251 (statement of Sen. Morton).

156 *Id.* at 697.

the South too much."[157] Farnsworth believed the proposed version of the statute—providing a remedy for conspiracy "to do any act in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States." and which act would otherwise be criminal under state law[158] imperiled the federal system.[159] "I do not believe in centralization of the powers of Government, nor in abolishing the State lines and State governments or abridging their powers."[160]

Farnsworth reviewed the congressional debates on Bingham's prototype. His review showed significant opposition to the prototype; that it was replaced with the current version of Section 1 with privileges or immunities, due process, and equal protection prefaced with "no State shall;" and that Bingham and others had referred to the revised version as limiting state power.[161]

According to Farnsworth, Section 1 "requires no legislation; 'it is a law unto itself;' and the courts can execute it."[162] To the extent that it excludes the Congress, this view is starkly inconsistent with what leading framers of the Amendment said when it was being framed in the 39th Congress.[163] At any rate, according to Farnsworth, the Amendment was merely a limit on state power, and congressional power could not reach individuals—under equal protection or any other theory apparently.[164] For Farnsworth there was no middle ground. The question was "whether we shall obliterate State lines and abolish State constitutions and State Legislatures, and centralize all the power of these States of ours in one grand despotic, central Government at Washington."[165]

A few others took a very narrow view. Senator Trumbull insisted that the Privileges or Immunities Clause had not extended the rights and privileges of American citizens "one iota" and he insisted it did not protect persons in the states except as to the equality guaranteed

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157 *Id.* at app. 116–17.

158 *Id.* at app. 113 (statement of Rep. Farnsworth, referring to what was then the second section).

159 *Id.* at app. 117.

160 *Id.*

161 *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1063–64 (1866) (statement of Rep. Hale); *id.* at 1095 (statement of Rep. Hotchkiss).

162 CONG. GLOBE, 42d Cong., 1st Sess. app. 117 (1871) (statement of Rep. Farnsworth).

163 *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard) (discussing how Congress will enforce Section 1 under its enforcement powers in Section 5); *id.* at 2542 (statement of Congressman Bingham).

164 CONG. GLOBE, 42d Cong., 1st Sess. app. 117 (1871) (statement of Rep. Farnsworth).

165 *Id.*

by Article IV, Section 2.[166] The states were "the depositories of the rights of the individual against encroachment."[167] At any rate the Amendment only reached "infringement by law."[168]

In the 39th Congress, Republicans had replaced a provision that gave Congress direct power to secure equal protection in life, liberty, or property. The critics understood that provision to allow the Congress to legislate on virtually all state law issues. They were not then facing massive political terrorism, and they did not consider whether the revised Amendment would allow Congress more limited power—to act against private terrorists who acted with the specific intent of punishing the exercise of constitutional rights protected in Section 1.

Congressman Garfield seems to have taken a middle ground. He seemed to read the Privileges or Immunities Clause and the Due Process Clause as equivalent to the first section of the Civil Rights Act.[169] How Section 1 of the Civil Rights Act contained a federal standard of due process the states were required to obey, Garfield did not say. Taken literally, his remarks suggest he found protection for at least one Bill of Rights liberty in the Civil Rights Act.

As to equal protection, Garfield said he might be pushing the words beyond their natural limit, but he believed that the prohibition on denying equal protection required the states to provide equal protection.[170] Garfield did say that when the laws of the state were equal on their face but systematically not enforced, the Enforcement Clause would allow Congress to act to supply Equal Protection:

> Now if the second section of the pending bill can be so amended that it . . . shall employ no terms which assert the power of Congress to take jurisdiction of the subject until such denial be clearly made, and shall not in any way assume the original jurisdiction of the rights of private persons and of property within the States . . . I shall give it my hearty support.[171]

As finally written, the statute reached private action, and it did not condition prosecution on proof of state neglect.[172] Still, Garfield voted for the final version.[173]

The Fifteenth Amendment also had state action language.[174] Here Garfield found power to reach private violators. Garfield said that

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166 *Id.* at 576 (statement of Sen. Trumbull).

167 *Id.* at 577.

168 *Id.* at 576.

169 *Id.* at app. 151; *but see id.* at 152 (statement of Congressman Garfield).

170 *Id.* at app. 153.

171 *Id.*

172 Act of Apr. 20, 1871. ch. 22, 17 Stat. 13 (1871).

173 CONG. GLOBE, 42d Cong., 1st Sess. at 808 (showing the vote).

174 *See* U.S. CONST. amend. XV.

the Amendment plus the power of Congress to regulate the time, place and manner of elections, "arms Congress with the full power to protect the ballot-box at all elections, at least of officers of the United States, and to protect the right of all men within the limit of that clause to the suffrage."[175] He may have doubted that the Fifteenth Amendment alone would be sufficient to reach private violence aimed at the right to vote because of race.

In addition, Garfield found full power to punish persons, including private persons, who denied to blacks the rights in the Civil Rights Act (which he read to secure equal rights with white men) and who violated the right of voters to enjoy the suffrage "guarantied . . . in the main text of the Constitution and in the fifteenth amendment." [176]

Near the end of the debate, Senator Edmunds of Vermont noted that the Fourteenth Amendment secured the rights of "white men" as much as "colored men." He insisted that under the Fourteenth Amendment the national government could

> [P]reserve the lives and liberties of white people against attacks by white people, against rapine and murder and assassination and conspiracy, contrived in order to drive them from the States in which they have been born or have chosen to settle, contrived in order to deprive them of the liberty of having a political opinion.[177]

Moreover,

> The disorders in the South are not like the disorders in many other States, where there always are disorders, the results of private malice. The slaying of men [in the South], as a rule, is not because the murderer and the assassin have any hostility or quarrel with the person who is the victim; but it is one step in the progress of a systematic plan and an ulterior purpose, and that is not to leave in any of those States a brave white man who dares to be a Republican or a colored man who dares to be a voter.[178]

The final version of the 1871 Act satisfied most Republicans. As we have seen, it made it a crime for two or more persons to

> conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or shall conspire together for the purpose of in any

175 CONG. GLOBE, 42d Cong., 1st Sess. app. 149 (statement of Rep. Garfield).

176 *Id.* at app. 153.

177 *Id.* at 696 (statement of Sen. Edmunds).

178 *Id.* at 702.

> manner impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws . . . .[179]

Senator Edmunds had explained that the statute would not reach ordinary crimes or feuds in a state, but if people conspired to injure a person because he was a Democrat, or a Methodist, or a Vermonter the section would reach that conduct.[180] This suggests that he connected congressional power to privileges protected by the Fourteenth Amendment as well as to equal protection.

E. The Proper Scope of Congressional Power Under Section 5 of the Fourteenth Amendment

Some things are clear from Congressional enforcement of the Fourteenth Amendment shortly after its ratification. First, Republicans overwhelmingly concluded that Congress could reach private conduct motivated by a specific intent to deprive people of constitutional rights. Some found the right to protection in the Equal Protection Clause, some in the right to protect liberties in the Bill of Rights, some in the ability to protect less textually explicit fundamental rights, some in the guarantee of republican government, and some in all of these. Many who found the right to protection under Equal Protection found it existed when the state systematically was unable or unwilling to supply protection. But once those facts were present—a matter for Congress to decide—Congress could pass a national statute to be used as necessary.

Having found widespread violence designed to deprive people of their constitutional rights in Southern states, Congress passed a nationwide statute. It did not limit the law to specific districts where the problem currently existed. Nor did it condition prosecution on any finding of a denial of protection by the state. Congress exercised a power to reach private persons who acted with intent to deny to citizens their constitutional rights. The final language was broad enough to cover denials of equal protection, denials of equal constitutional privileges or immunities, and denials of equality under state laws. Prosecutors were not required to prove state neglect, inability, or denial. Virtually all Republicans in the Congress who had been in the 39th Congress voted for the final version.[181]

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179 Act of Apr. 20, 1871, ch. 22, 17 Stat. 13.

180 CONG. GLOBE, 42d Cong., 1st Sess. 567 (1871).

181 *See*, CONG. GLOBE, 39th Cong., 1st Sess. 3149 (1866) (indicating House vote on the final version of the Fourteenth Amendment); *id.* at 3042 (showing passage in the Senate).

Both the Bingham view of privileges and immunities and the Equal Protection theory should have been sufficient to support congressional action reaching private persons who acted with the specific intent to punish people for exercising constitutional rights or to deter them from exercising them or to interfere with constitutionally mandated equality. In addition, Congress should have been able to reach private action with the specific intent to deprive people of the right to vote because of race. In the case of the Fourteenth Amendment, the prohibition against state or federal denial of Bill of Rights liberties should be understood as an implicit recognition that American citizens (and as to process rights all persons) had those rights. Once one accepts that Americans have a right to free speech and press, Congress should have the power to punish the private violence undertaken with the specific intent to prevent or punish free speech and free press. Similarly, a lynch mob could be punished (regardless of the race of the victim) because it acts with the specific intent to deprive the victim of his or her right to a trial in accordance with due process.

When it adopted the Fourteenth Amendment, Congress had been concerned both with individual rights and federalism. It rejected a version that many thought permitted Congress to legislate on any and every subject of state concern. The Enforcement Acts did not do that. Because they were limited by a specific intent requirement, they left ordinary crimes entirely to the states. But they reached politically motivated attempts to use the tactics of terror to prevent the exercise of constitutional rights. This approach protected the fundamental rights of citizens while also protecting the role of the states.

Congress was attempting to protect the democratic process from terrorists. A court more sympathetic to protection of fundamental rights, the democratic process, and the right of the majority to rule should have had little difficulty protecting federalism, fundamental rights, and the democratic process.

A structural argument strongly supports congressional power to reach violence specifically designed to punish or prevent the exercise of constitutional rights. The principle of popular sovereignty asserts that the people have the ultimate political power in both state and national governments. Of course, the class of those entitled to vote has expanded over time. But, subject to constitutional limitations, the majority—as the white-black Republican coalition was in most

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CONG. GLOBE, 42d Cong., 1st Sess. 522 (1871) (showing passage in the House); *id.* at 709 (showing Senate passage).

Southern states—has a right to govern. A healthy representative democracy cannot exist when people on one side of a political dispute are systematically murdered, whipped, exiled, and have their houses and businesses burned and their animals killed—all because of their political opinions. Federal power used to prevent such terrorist outrages does not destroy the role of the states. States can prosecute such crimes under state law as murder, assault, etc. Preemption of such state laws should be foreclosed in the interest of federalism. In the interest of democracy we should remember the Titanic. Redundant safety devices are a wise idea.

The first sentence of Section 1 provides for equal citizenship in the United States and in the state of the citizen's residence.[182] Citizens who are the victims of a systematic plan to terrorize them because of their political views are denied the basics of citizenship. Because of the nature of republican government, at least all adult citizens must have rights of speech, press, petition, and association—whether or not they are legally entitled to vote. For those entitled to vote, systematic terror designed to prevent them from creating a political majority denies the essence of equal citizenship. The first sentence of Section 1 of the Fourteenth Amendment creates a right to citizenship. It is not prefaced with "no State shall."

Political terror should also activate congressional power under Article IV, Section 4 of the Constitution: "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."[183] No state can be Republican where a minority is permitted to use tactics of terror to deny their opponents the rights of speech, press, association, and franchise and to thwart majority rule.[184]

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182 U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

183 U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.").

184 *See* WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 24–27 (1972) (describing the nature of republican government and the obligation imposed by the Guarantee Clause); *id.* at 33 (showing the framers' concerns with mob violence); *id.* at 42 (delegitimizing extra legal violence through the Guarantee Clause); *id.* at 57–59 (securing republican government and securing the states against "dangerous commotions, insurrections and rebellions," according to James Wilson in the Constitutional Convention); *id.* at 59 (describing Professor Wiecek's observations that the Clause was de-

The choice between nationwide statutes (preventative as well as remedial) and targeted ones should be up to Congress. General and national statutes have several advantages. First, they avoid claims that one region is being singled out and remove one source of resentment and resistance. More important, they are in place so new outbreaks of political terrorism can be dealt with immediately. Once in place, they cannot be blocked in Congress by a faction that stands to benefit politically from terrorism. Failure to have the statutes in place allows the forces of terror and fraud to elect their preferred representatives and block remedial legislation. That is what happened in the United States after "Redemption."

As it confronted claims under the Fourteenth Amendment, the Supreme Court often failed to see obvious middle grounds between the utter destruction of federalism and protection of the rights of citizens. For example, in considering the Privileges or Immunities Clause in the *Slaughter-House Cases*,[185] the Court presented the choice as one between turning all matters of state law over to the federal government or limiting the privileges or immunities of citizens to things such as the right to visit the sub-treasuries, to be protected on the high seas, and to be safe in foreign lands.[186] In state action cases, allowing Congress under the Fourteenth Amendment to reach private violence specifically designed to punish or deter the exercise of core constitutional rights would hardly herald the end of the states.[187] Obviously, if congressional power is limited to crimes with the specific intent to deprive people of constitutional rights and the doctrine is carefully developed with a view to federalism, destruction of the role of the states would not follow.

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signed to secure internal order, to prevent the establishment of autocratic governments in the states, and "third, [to] give broad powers to the federal government over the states to achieve the first two objects."); *id.* at 67 (explaining that *The Federalist* 21 suggested that the clause was designed to prevent violent changes in republican institutions); *id.* at 67–68 (supporting the fact that the clause was designed to assure popular control of government, rule by majorities in the states with safeguards for the rights of minorities).

185 83 U.S. (16 Wall.) 36 (1872).

186 *Id.* at 77 ("And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?").

187 *See, e.g.*, United States v. Morrison, 529 U.S. 598, 620 (2000) ("These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government.").

VI. CONGRESSIONAL POWER IN THE COURTS

In 1871, in *United States v. Hall*, the Circuit Court for the Southern District of Alabama considered an indictment under the section of the 1870 statute designed to enforce the Fourteenth Amendment.[188] The government had charged the defendants with conspiring to oppress, injure, threaten, and intimidate citizens for exercising their rights to free speech and freedom to assemble—alleged to be privileges secured to them by the Constitution of the United States.[189] The defendants moved to dismiss the indictment on the ground that the conduct charged did not violate any right or privilege secured by the Constitution of the United States.[190] Judge Woods wrote the opinion (based largely on suggestions he received in correspondence with Justice Bradley).[191]

The United States' attorney contended that the rights of free speech and assembly, while not granted by the Constitution, were secured by it.[192] Speaking for the court, Judge Woods noted that free speech and other rights in the first eight amendments were protected only against federal, not state, legislation. They were partially secured. Still, under the first eight Amendments Congress lacked the power to protect the people of a state from their violation.[193] But "the fourteenth amendment has a vital bearing upon the question."[194] It made a person born in the nation a citizen and "entitled to all the privileges and immunities secured by the constitution of the United States to citizens thereof."[195] The privileges were those that were fundamental and that belonged of right to the citizens of all free states. "Among these we are safe in including those which in the constitution are expressly secured to the people, either as against the action of the federal or state governments," including freedom of speech and the right peaceably to assemble.[196]

Since both Congress and the States were forbidden to impair these rights, they were secured to the people. The Fourteenth Amendment gave Congress enforcement power. Congress had the

188 *See* United States v. Hall, 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282).

189 *Id.* at 79.

190 *Id.* at 79–80.

191 CURTIS, NO STATE SHALL ABRIDGE, *supra* note 2, at 258 n.8.

192 *Hall*, 26 F. Cas. at 80.

193 *Id.* at 80–81.

194 *Id.* at 81.

195 *Id.*

196 *Id.*

power to protect these rights against unfriendly or insufficient state legislation. This was so because the Fourteenth Amendment

> not only prohibits the making or enforcing of laws which shall abridge the privileges of the citizen, but prohibits the states from denying . . . equal protection of the laws. Denying includes inaction as well as action, and . . . includes the omission to protect . . . . [T]o guard against the invasion of the citizen's fundamental rights, and to insure their adequate protection, as well against state legislation as state inaction, or incompetency, the amendment gives congress the power to enforce its provisions by appropriate legislation.[197]

It would be unseemly to interfere directly with state enactments and it could not compel activity of state official. So the

> only appropriate legislation it can make is that which will operate directly on offenders and offenses, and protect the rights which the amendment secures. The extent to which congress shall exercise this power must depend on its discretion in view of the circumstances of each case. If the exercise of it in any case should seem to interfere with the domestic affairs of a state, it must be remembered that it is for the purpose of protecting federal rights, and these must be protected even though it interfere with state laws or the administration of state laws. We think, therefore, that the right of freedom of speech, and the other rights enumerated in the first eight articles of amendment to the constitution of the United States, are the privileges and immunities of citizens of the United States, that they are secured by the constitution, that congress has the power to protect them by appropriate legislation.[198]

The decision combined the individual rights protected by the Privileges or Immunities Clause with the right to equal protection. The result was direct federal power to protect the rights against private violence aimed at punishing people for exercising them and aimed at preventing citizens from exercising them.

The Supreme Court decided the *Slaughter-House Cases*[199] a couple of years later. In that decision it distinguished (appropriately) between privileges and immunities under state law and privileges and immunities of citizens of the United States. But the Court suggested that almost all civil liberties and civil rights were privileges or immunities under state law. Federal privileges or immunities included visiting the seaports, the capital, and sub-treasuries, protection on the high seas and in foreign lands, etc.[200]

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197 *Id.*

198 *Id.* at 81–82.

199 83 U.S. (16 Wall) 36 (1873).

200 *Id.* at 79–80.

In 1874 in *United States v. Cruikshank*,[201] Justice Bradley returned, as a Circuit Justice, to congressional power to reach private violence. The case involved a bloody massacre of black Republicans in connection with a disputed election in Louisiana. The indictment was brought under the sixth section of the 1870 Enforcement Act and also under certain sections seeking to protect the right to vote.

The defendants were convicted under counts that alleged they banded together to injure, oppress, threaten, and intimidate two citizens of the United States of African descent with intent to deprive them of their lawful privilege of peaceable assembly, to deprive them of their lives without due process of law, to deprive them of their right to bear arms for lawful purposes, and to intimidate them from voting.[202]

In *Hall,* the circuit court (with Bradley as a ghost writer) upheld a congressional statute that protected rights secured by the Constitution. By the time of *Cruikshank*, Bradley limited congressional power to the protection of rights "guarantied" or granted by the Constitution.[203] Bradley distinguished *Prigg v. Pennsylvania*[204] as a case where the Constitution had guaranteed the right to get the fugitive slave back. He quoted *Prigg* rule that a right requires a remedy. Bradley explained that Congress could enforce by appropriate legislation every right and privilege "guarantied by the constitution."[205] But with reference to those rights and privileges of the citizen that were merely secured against state or federal denial, Congress could not ordinarily reach private actors.[206] In the 1870 Act, Congress, with many framers of the Fourteenth Amendment present, had a different view. It protected rights *granted or secured* by the Constitution and laws of the United States.[207]

According to Bradley, the Thirteenth Amendment was different. It granted a right not to be enslaved. So Congress could punish private persons who conspired to deprive former slaves of the rights and privileges conferred by the Thirteenth Amendment. As Bradley ex-

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201 25 F. Cas. 707 (C.C.D. La. 1874) (No. 14,897).

202 *Id.* at 708.

203 *Id.* at 709.

204 41 U.S. (16 Pet.) 539 (1842).

205 *Cruikshank*, 25 F. Cas. at 709.

206 *Id.* at 710.

207 Act of May 31, 1870, ch. 114, 16 Stat. 140, 141 ("That if two or more persons shall band or conspire together . . . with intent to . . . injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege *granted or secured* to him by the Constitution or laws of the United States, or because of his having exercised the same . . . .") (emphasis added).

plained it, the Thirteenth Amendment granted blacks the equal enjoyment of the laws, and a crime against them motivated by the specific intent to deny them that equality because of race (for example in owning a farm) would be within the scope of Congress's power.[208]

As to the Fifteenth Amendment, not withstanding its negative language, Bradley concluded it provided a new right to Americans of African descent—not to be denied the right to vote based on race. This right could be, in his opinion, enforced not only against unfriendly state laws but also against individual violence designed to interfere with the right.[209] But enforcement was limited to action on account of race, color, or previous condition of servitude. This sounds helpful. But Bradley explained that under the Fifteenth Amendment, Congress

> can regulate . . . nothing else. No interference with a person's right to vote, unless made on account of his race . . . is subject to congressional animadversion. There may be a conspiracy to prevent persons from voting having no reference to *this discrimination. It may include whites as well as blacks, or may be confined altogether to the latter. It may have reference to the particular politics of the parties. All such conspiracies are amenable to the state laws alone.*[210]

As Bradley must have known, there was a vast conspiracy designed to deprive people of the right to vote *for political reasons*. That is what the Klan was up to. One lower court decision following the Bradley approach suggested that race had to be the *only* reason for the violence.[211]

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208 *Cruikshank*, 25 F. Cas. at 711, 712.

209 *Id.* at 713.

210 *Id.* (emphasis added).

211 Charge to Grand Jury–Civil Rights Act, 30 F. Cas. 1005, 1007 (C.C.W.D. Tenn. 1875) (No. 18,260). The opinion despaired the lack of power in the federal government to protect citizens against, for example, politically motivated murders, such as that of a wealthy young man, killed because he had asked the governor to protect "negroes of his county who were being driven from their homes, their houses burned, and themselves murdered." *Id.* The judge suggested that the Bradley approach still held out the hope of protecting Americans of African descent from "violence upon the negro, *simply because he is such, finding its sole animus in his race and color*" and that such violence "may be made penal by congressional enactment." *Id.* (emphasis added). The judge suggested that the Supreme Court might still (as he hoped) find in the Thirteenth Amendment or the first clause of the Fourteenth the power to punish private persons where "life, liberty, and property are violently taken, solely on account of the race and color" of the victim. *Id.* This was, of course, important and worthwhile, but of no help to white and black Republicans targeted because of their political opinions and activities—which is exactly what the Klan and similar groups were up to. Reading a requirement of racial animus for private violence into Section 1 of the Fourteenth Amendment substantially undermined its potential against private violence. Similar problems existed under the Fifteenth Amendment. *See* United States v. Miller, 107 F. 913, 916 (D. Ind. 1901) ("It cannot be successfully contended that the amendment confers authority to impose penalties for every

By the revised Bradley view, a conspiracy to prevent lawful assembly could not be punished by congressional legislation. According to Bradley's new view, to read the Fourteenth Amendment as allowing Congress to punish individuals for "disturbing" (what a curious word in light of the facts) assemblies would be "a strange inference. That is the prerogative of the states."[212] He granted that the Fourteenth Amendment prohibited states from abridging the privilege (his word) of the right to assemble, but it still gave Congress no power to legislate against private attacks on assemblies.[213] The same was true of the right to bear arms.[214] For Bradley, the distinction between granted and secured rights was crucial.

As to the due process count Bradley noted the lack of any allegation that the state had by its laws interfered with the right or that it did not afford to all equal protection of the laws. So that count of the indictment was also defective. As to the count of conspiracy to interfere with the right of certain Americans of African descent to full and equal benefit of laws for the security of person and property and to vote, the counts failed to allege the deprivations were because of race. Those counts were also fatally defective.[215]

The U.S. Supreme Court affirmed the *Cruikshank* decision.[216] The Court held that the right to assemble and the right to bear arms were not rights granted by the Constitution. They were merely protected against federal denial. They remained subject to state jurisdiction. That was so except for assemblies to petition the federal government.[217] The right to assemble and other rights in the Bill of Rights were not intended to limit the power of the state governments. Just eight years after the ratification of the Fourteenth Amendment, an Amendment designed by its leading framers to overturn the rule in *Barron*, the Court announced it was too late in the day to question this decision.[218]

As the Court saw it, equal protection, like due process, added nothing to the right of one citizen against another. The duty to secure equality of rights remained with the states. The United States

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conceivable wrongful deprivation of the colored man's right to vote. It is only when the wrongful deprivation is on account of race, color, or previous condition of servitude that congress may interfere and provide for its punishment.").

212 *Cruikshank*, 25 F. Cas. at 707, 714.

213 *Id.*

214 *Id.* at 715.

215 *Id.*

216 United States v. Cruikshank, 92 U.S. 542, 559 (1875).

217 *Id.* at 552–53.

218 *Id.* at 552.

was only obligated to see that states did not deny the right.[219] The indictment had alleged that the victims, Americans of African descent, had been injured and oppressed because they voted. But the indictment failed to allege the election was one for federal offices or that the deprivation was because of race.[220]

The *Cruikshank* decision limited the reach of the Fourteenth Amendment to state action. The enforcement statute of 1871 also had a clause that reached state action. It made persons who, under color of law, subjected or caused to be subjected "any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States" liable in a civil action.[221] By excising the rights in the Bill of Rights from the Fourteenth Amendment, the Court deprived this section of much of its power. Only much later—especially during the Second Reconstruction of the 1960s, when the Court began to reinstate the Bill of Rights as a limit on the states under the Fourteenth Amendment—did this statute regain its lost power. In the 1961 case of *Monroe v. Pape*, for example, the Court held that the victims of an unreasonable search and seizure had a damage action against the offending police officers under what is now 42 U.S.C. § 1983.[222] Since the Court had incorporated the protection against unreasonable searches and seizures as a limit on the states, this right joined the expanding set of rights, privileges, and immunities of citizens of the United States protected by the statute.

In the 1883 case of *United States v. Harris*,[223] the Court considered a prosecution under the 1871 KKK Act. In *Harris* the defendants had broken into a jail and beaten and otherwise abused a prisoner awaiting trial. They were charged with violating a section of the 1871 Act that punished two or more persons who conspire for the purpose of depriving a person or class of persons of equal protection of the laws or equal privileges or immunities under the laws or the due and equal protection of the laws. The indictment charged the defendant with denying the victim the due and equal protection of the laws.[224]

The *Harris* Court declared the statute unconstitutional. The Court held the Fourteenth Amendment was merely a "guaranty of

219 *Id.* at 554–55.

220 *Id.* at 555–56.

221 Act of Apr. 20, 1871, ch. 22, sec. 1, 17 Stat. 13 (1871).

222 365 U.S. 167, 171 (1961).

223 106 U.S. 629 (1883).

224 *Id.* at 629–33.

protection against the acts of the State government itself."[225] The lynch mob was not the state. The state had violated no provision of the Fourteenth Amendment. The Court found the statute defective because it applied no matter how well the state had performed its duties. Since the act was directed against private persons without reference to the laws of the state or their administration, it was unconstitutional.[226] Decisions such as *Harris*, and the state action syllogism it embodied, hobbled efforts to pass federal anti-lynching legislation.

There are very few bright spots in these years when congressional power was often being contracted. In 1884, in *Ex parte Yarbrough*,[227] the Court upheld Yarbrough's conviction for intimidating a citizen of African descent in the exercise of this right to vote in a federal election for members of Congress. He had been beaten and otherwise mistreated.[228]

The Court found Congress had power to punish private persons for such crimes under its power to regulate the times, places, and manner of elections. It also invoked structural concerns:

> That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration.[229]

The Court found the government had such power and need not rely on the states. It also said the Fifteenth Amendment substantially conferred "on the negro the right to vote, and Congress has the power to protect and enforce that right." The Court insisted that

> [t]he principle . . . that the protection of the exercise of [the right to vote] is within the power of Congress, is as necessary to the right of other citizens to vote as to the colored citizen, and the right to vote in general as to the right to be protected against discrimination.[230]

The decisions of the Waite and Miller Courts were often bad, but far worse was to follow. Congressional power to enforce the Fifteenth Amendment was limited to state action.[231] But the Court made even

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225 *Id.* at 638 (quoting *Cruikshank v. United States*, 25 F. Cas. 707 (C.C.D. La. 1874) (No. 14,897)).

226 *Id.* at 639.

227 110 U.S. 651 (1884).

228 *Id.* at 656–57.

229 *Id.* at 657.

230 *Id.* at 665.

231 James v. Bowman, 190 U.S. 127, 139 (1903) ("[I]t may be noticed that this indictment charges no wrong done by the State of Kentucky, or by any one acting under its authority. The matter complained of was purely an individual act of the defendant. Nor is it

that barrier ineffective. Soon clever state actions admittedly designed to deny blacks the right to vote were accepted by the Court.[232] In effect, step by step, through a series of decisions, the Court ratified the ability of a political minority to replace majority rule by force, fraud, and later laws designed to disenfranchise American citizens of African descent. Of course, the destruction of democratic government was not completed by the end of Reconstruction. Many Americans of African descent continued to vote in the South for almost thirty years and some white-black political coalitions still existed.[233] More years of violence and fraud and more decisions from a compliant Supreme Court would be required to complete the work the state action syllogism did so much to facilitate.[234]

VII. REFLECTIONS: LEGISLATURES AS GUARDIANS OF LIBERTY

We tend to think of the Court as the institution that protects our rights and the legislature as a threat to them. But throughout our history some of the great advances in liberty and equality have come from the legislature—42 U.S.C. § 1983, the Civil Rights Act of 1866, the Civil Rights Act of 1964, the Equal Pay Act, the Voting Rights Act, not to mention the Bill of Rights, the Thirteenth, Fourteenth, and

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charged that the bribery was on account of race, color or previous condition of servitude.").

232 *See, e.g.*, Giles v. Teasley, 193 U.S. 146, 161–62 (1904) (describing state constitutional provisions that imposed requirements for voting designed to disfranchise Americans of African descent, including proof of literacy and property ownership); Williams v. Mississippi, 170 U.S. 213, 221–22 (1898) (describing "neutral" state constitutional provisions that the state court admitted were designed to remove black voters, including the poll tax).

233 *See, e.g.*, MICHAEL PERMAN, THE STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH 1888–1908 (2000); KEYSSAR, *supra* note 84 (discussing the combination of terrorism and laws to suppress black, Republican, and Populist voters); DEMOCRACY BETRAYED: THE WILMINGTON RACE RIOT OF 1898 AND ITS LEGACY (David S. Cecelski and Timothy B. Tyson eds., 1998) (describing the race riot and political coup that displaced the democratically elected government of Wilmington, North Carolina).

234 For some other discussions of state action, see, for example., Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1404 (2006) (suggesting that the scope of the state action doctrine needs to be limited by democratic principles); see also Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39 (1978) (articulating an account more sympathetic to the role of the Waite Court). For another approach far less critical of the Waite Court's state action cases, see generally Pamela Brandwein, *A Judicial Abandonment of Blacks? Rethinking the "State Action" Cases of the Waite Court*, 41 LAW & SOC'Y REV. 343 (2007). One theory to justify federal power recognizes that the Equal Protection Clause requires protection and failure (for whatever reason) to protect basic constitutional rights is state action. *See generally* Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE. L.J. 1353 (1964).

Fifteenth Amendments—which of course were initiated by the Congress.

As Reconstruction and its aftermath show, the Court has hardly been a consistent champion of liberty. The Court excised the Bill of Rights from the Fourteenth Amendment, and the decision stood for many years. It hobbled statutes designed to reach Klan violence. It struck down the ban on discrimination in inns, theaters, and railroad cars in the *Civil Rights Cases*.[235] The same structural considerations that led the Court to protect the right to vote in federal elections should have led it to uphold statutes aimed at punishing Klan terror designed to punish people for constitutionally protected conduct.

While the Warren Court did much for liberty and equality, one of the chief things it did was to uphold congressional power in the Civil Rights Act of 1964 (under the Commerce Clause)[236] and the Voting Rights Act of 1965.[237] In 1966, in *United States v. Guest*, during another episode of Klan terror, a majority of the Justices (in concurring opinions) rethought the power of Congress to punish private conspiracies undertaken with the intent of punishing people for the exercise of constitutional rights.[238] The suggested expansion was short-lived, however.

In the face of these developments, many thought the Court insufficiently active in protecting states' rights. By this view, embraced at the time by Barry Goldwater and Ronald Reagan, the 1964 Civil Rights Act and the Voting Rights Act were unconstitutional as a violation of states' rights.[239] Goldwater had two brilliant legal advisers, Wil-

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235 109 U.S. 3 (1883).

236 *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 300 (1964) (finding that there was a connection between the restaurants' discrimination against African Americans and effects on interstate commerce); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (upholding the constitutionality of the Civil Rights Act of 1964 to disallow inns from discriminating against guests based on race).

237 South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966) ("We here hold that the portions of the Voting Rights Act properly before us are a valid means for carrying out the commands of the Fifteenth Amendment.").

238 383 U.S 745, 762 (1966) (Clark, J., joined by Justices Black and Fortas, concurring and opining that Congress could—under section 5—reach private conspiracies to interfere with Fourteenth Amendment rights); *id.* at 774–75 (Brennan, J., joined by Chief Justice Warren and Justice Douglas, saying Congress could under section 5 reach private action). The majority opinion was based on the right to travel which does not require state action. *Id.* at 760 ("But if the predominate purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right, then, whether or not motivated by racial discrimination, the conspiracy becomes a proper object of the federal law . . . .").

239 TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963–1965, at 357, 523 (accounting Goldwater opposition to the Civil Rights Act of 1964); Joseph Loftus, *Goldwater Hits Vote Rights Bill*, N.Y. TIMES, Apr. 2, 1965, at 24; LOU CANNON, PRESIDENT REAGAN: THE

liam Rehnquist and Robert Bork. Political changes that began in 1964 eventually brought Rehnquist and others to the Court and produced a Court more concerned with states' rights and less inclined to defer to congressional judgment. The trend crosses doctrinal categories, in cases such as *United States v. Morrison*[240] and *Alden v. Maine*.[241]

The Court has recently reaffirmed limitations on congressional power to enforce the Fourteenth Amendment against private persons. In the Violence Against Women Act (really a gender violence act) Congress sought to punish private persons who committed a crime of violence based on gender—committed the crime, that is, because of the person's gender. In passing the act, Congress had task force reports before it documenting constitutional violations (by state neglect) in at least twenty-one states.

In *United States v. Morrison*, the Court found the part of the statute that reached private persons unconstitutional based on *United States v. Harris* and the *Civil Rights Cases*.[242] To the claim that state action was present in the documented failure to protect, the Court said even if that were a basis for congressional power, the Congress had passed a nationwide statute with no proof of a nationwide problem. The statute was not congruent and proportional to the problem.[243] Congress had reached a very different conclusion on these issues in its Reconstruction enforcement acts. The Rehnquist Court rejected the conclusion of a majority of the justices in *Guest* and returned to the state action syllogism of *Harris*, *Cruikshank*, and the *Civil Rights Cases*.

Of course, history carries us only so far. The congressmen who passed the Fourteenth Amendment embraced a principle against irrational discrimination,[244] but most did not see discrimination against married women as irrational. Though they gave us a principle that

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ROLE OF A LIFETIME 458 (1991); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 204, 233–34, 238, 391–92, 495 (2000) (highlighting Goldwater criticisms of the Warren Court).

240 529 U.S. 598, 617, 627 (2000) (holding that neither the Commerce Clause nor Section 5 of the Fourteenth Amendment authorized Congress to pass the civil remedy provision of the Violence Against Women Act).

241 527 U.S. 706, 712 (1999) (holding that the "powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts").

242 *Morrison*, 529 U.S. at 621–24 (2000).

243 *Id.* at 665.

244 *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1871) (documenting an exchange between Reps. Hale and Stevens on the status of married women). Stevens: "When a distinction is made between two married people or two *femmes sole*, 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." Hale responded that by that logic, treating "negroes and white men" differently would be permissible. *Id.*

reached caste legislation and irrational distinctions, they did not understand the principle as applicable to gender distinctions. We can follow their principle or their expected application, but not both. We should follow the more general principle.

This article may seem to be ancient history. Still, the issue of private violence aimed at constitutional rights is still pertinent. The 1871 anti-KKK Act has survived in part in 42 U.S.C. § 1985 which provides a civil action for conspiracy to deprive a person of equal protection of the laws or equal privileges or immunities under the law. The Court has read the statute narrowly, however. In 1993 in *Bray v. Alexandria Women's Health Clinic*, for example, the Court held 42 U.S.C. § 1985 inapplicable to a private conspiracy to block access to abortion clinics.[245]

CONCLUSION

Federalism is an important and valid interest. But far too often the Court and others have assumed a grave threat to the role of the states in cases where it was not there and was never designed to be there—sounding the alarm if the Bill of Rights were to limit the states, if Congress had the power to strike at Klan violence designed to punish people for the exercise of constitutional rights, and if Congress could punish private violence motivated by gender. Reaching "private" Klan violence or gender violence need not impair the role of the states. States would remain free to punish the crimes against state law. Preemption does not seem a threat here, but if it were the Court could insist on the concurrent power of the states to punish assaults and murders in their jurisdictions.

Curiously, while the Court has vigorously limited congressional power to protect constitutional rights against private persons in the interest of federalism, it has been equally active in preempting state laws in traditional state areas—where the justification for preemption is far from clear under the applicable statutes. The result is to totally disable state power to protect its citizens in the areas preempted. So the Court has protected us from a congressional power that seems to reinforce liberty and does not significantly interfere with the ability of

245 560 U.S. 263, 276–77 (1993) ("The federal guarantee of interstate travel . . . . protects interstate travelers against two sets of burdens: 'the erection of actual barriers to interstate movement' and 'being treated differently' from intrastate travelers. . . . [F]rom this record, the only 'actual barriers to . . . movement' that would have resulted from petitioners' proposed demonstrations would have been in the immediate vicinity of the abortion clinics, restricting movement from on portion of . . . Virginia to another.").

states to prosecute crimes arising from the same transaction, while preempting state common law actions and statutes designed to protect basic common law rights (for example, in tort law) when the justification for doing so is weak and state power is totally disabled.[246]

How are we to explain court decisions that hobbled efforts to punish the use of terror tactics against political enemies—tactics used to deter their exercise of their constitutional rights and undermine democratic government? It is a difficult question to answer. Writing after he lost the case of *Plessy v. Ferguson*,[247] Plessy's counsel, Albion Tourgee, suggested that the Court had always been a consistent enemy of equal justice and equal rights.[248] Certainly it has often fallen short.

The Court is made up of human beings who are affected by the tenor of the times. When the Court was narrowing and striking down anti-Klan legislation, many in the nation were reacting against both Reconstruction and democracy. As Alexander Keyssar has noted, "By the middle of the 1870s, a scant few years after passage of the Fifteenth Amendment, leading intellectuals and politicians voiced deep reservations about universal or manhood suffrage."[249] Many of these had been abolitionists and had supported the Fifteenth Amendment. Now they opposed universal suffrage in sweeping and systematic terms.[250] In 1874 Democrats recaptured the House of Representatives, flipping a 199-88 Republican majority into a 169-109 Democratic one.[251] In 1875, in Boston's Faneuil Hall, Wendell Phillips was shouted down when he called for federal protection for black rights in Louisiana.[252] By 1875–1876, according to historian David Blight, "[t]he will for federal intervention to stop violence and intimidation by 'white liners' against white Republicans and blacks had all but vanished."[253] In 1877, the *Nation* magazine complacently announced that the "negro will disappear from the field of national politics. Henceforth, the nation as a nation, will have nothing more to do with him."[254] The story of the supposed horrors Reconstruction inflicted

246 Geier v. American Honda Motor Co., 529 U.S. 861, 874 (2000) (holding that a common law tort action was preempted by a federal safety standard concerning airbags).

247 163 U.S. 537 (1896).

248 Michael Kent Curtis, *Albion Tourgée: Remembering Plessy's Lawyer on the 100th Anniversary of* Plessy v. Ferguson, 13 CONST. COMMENT. 187, 193 (1996).

249 KEYSSAR, *supra* note 84 at 119.

250 *Id.*

251 DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 130 (2001).

252 *Id.* at 131.

253 *Id.* at 135.

254 *Id.* at 138.

on the South and the abandonment of white and black Republicans by the nation served a purpose, according to David Blight. That purpose was to facilitate reunion, a reunion on terms desired by the elites who controlled the South.[255]

At the same time that many former supporters were repudiating Reconstruction and the nation was retreating from it, the Court facilitated the retreat. The Court also suggested that national protection of citizens' rights would be the end of federalism.

In the turbulent civil rights struggles of the 1960s, the nation renewed its commitment to democracy and equal rights, with the Congress, the Executive, and the Court all moving in the same direction. In those years, faced again with political terror tactics, the Court moved away—for a short time as it turned out—from the state action syllogism.

By hobbling Reconstruction statutes designed to protect citizens against political terrorism, the Court has provided examples of mistakes we should avoid. If the Court were more fully aware of its role after the Civil War in undermining democracy, majority rule, liberty, and equality for citizens in the South, it might be more circumspect in praising or following decisions like *Cruikshank* and *Harris*.

255 *Id.* at 139.