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Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction

Robert J. Kaczorowski

Fordham University School of Law, rkaczorowski@law.fordham.edu

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The meaning and scope of the fourteenth amendment and the Civil Rights Act of 1866 remain among the most controversial issues in American constitutional law. Professor Kaczorowski contends that the issues have generated more controversy than they warrant, in part because scholars analyzing the legislative history of the amendment and statute have approached their task with preconceptions reflecting twentieth century legal concerns. He argues that the most important question for the framers was whether national or state governments possessed primary authority to determine and secure the status and rights of American citizens. Relying on records of the congressional debates as well as letters, newspaper clippings, and other contemporaneous evidence of the views of congressmen, federal judges, and federal attorneys, Professor Kaczorowski describes a Republican consensus that such power must ultimately lie in the national government. He concludes that this Republican commitment to the primacy of national citizenship helps explain why racist politicians, with the support of racist constituents, worked to ensure legal protection for the civil rights of blacks.

INTRODUCTION

The Civil War and Reconstruction era witnessed a heroic effort by federal judges and legal officers in the South to protect the civil rights of American citizens. This effort was successful in diminishing, if not eliminating, the use of terrorism and violence as political weapons. Federal prosecutions of civil rights violators decimated the Ku Klux Klan and brought a period of relative peace to Southern life. Klansmen were prosecuted in their individual capacities for violating citizens' Bill of Rights guarantees and for acts such as murder and assault that would normally be punished under state criminal codes. These prosecutions were brought under Reconstruction civil rights statutes enacted to implement

* Professor of Law, Fordham University. B.S.C., 1960, Loyola University (Chicago); M.A., 1967, DePaul University; Ph.D., 1971, University of Minnesota; J.D., 1982, New York University.

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1 See generally R. Kaczorowski, The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876 (1985). The author is also grateful to the University of Cincinnati, which provided research funds to assist in the writing of this Article.

the thirteenth\(^3\) and fourteenth\(^4\) amendments, and federal judges uniformly upheld the constitutionality of these prosecutions. A striking feature of this extraordinary story is the uniformity with which federal judges and legal officers interpreted the scope and meaning of the thirteenth and fourteenth amendments. Judges' and federal attorneys' interpretations of these amendments and the Civil Rights Act of 1866\(^5\) were not only uniform among themselves; they also conformed to interpretations expressed by Republican congressmen and senators in the congressional debates leading to the adoption of the amendments and the Act. What emerges from this congressional, administrative, and judicial record is a commonly shared theory of national civil rights enforcement authority under the thirteenth and fourteenth amendments.

I have recounted the administrative and judicial aspects of this legal history elsewhere.\(^6\) This Article focuses upon the legislative history of the fourteenth amendment and the Civil Rights Act of 1866. It analyzes the Republican theory of national civil rights enforcement authority under the thirteenth amendment, which the Civil Rights Act was intended to implement, and the fourteenth amendment. This Article traces this theory into the lower federal courts and the Department of Justice prior to 1873, the date of the Supreme Court's decision in the *Slaughter-House* Cases.\(^7\) With this decision the Supreme Court ultimately rejected the interpretation of the Civil Rights Act of 1866 and Reconstruction amendments suggested by the Republican theory of civil rights enforcement.

Despite the voluminous literature relating to the origins of the thirteenth and fourteenth amendments and the Civil Rights Act of 1866, other scholars have failed to identify the existence of this shared theory in the era of the Civil War and Reconstruction. Other studies have addressed only aspects of this question, or have approached the question from perspectives that were not shared by the framers. Thus, the meaning and scope of the fourteenth amendment and the Civil Rights Act of 1866 remain among the most controversial issues of American constitutional law.\(^8\) Because meaning and scope devolve to questions of the

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\(^3\) U.S. Const. amend. XIII.
\(^4\) Id. amend. XIV.
\(^5\) Ch. 31, 14 Stat. 27.
\(^6\) See R. Kaczorowski, supra note 1.
\(^7\) 83 U.S. (16 Wall.) 36 (1873).
\(^8\) One of the earliest questions relating to the intent of the framers of the fourteenth amendment debated among legal scholars was prompted by Justice Hugo Black's assertion that the framers intended to incorporate the Bill of Rights into the amendment. See Adamson v. California, 322 U.S. 46, 71-72 (1947) (Black, J., dissenting). Charles Fairman published a rebuttal to Justice Black, see Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5 (1949), and was in turn rebutted by William Crosskey, see
framers' intent, these questions of constitutional law are also unsettled
issues of constitutional and legal history.\footnote{9}

The attempt to determine legislative intent is often a dubious project
at best.\footnote{10} The framers' view of the purpose, meaning, and scope of a

Crosskey, Charles Fairman, "Legislative History" and the Constitutional Limitations on State
Authority, 22 U. Chi. L. Rev. 1 (1954). Fairman answered Crosskey in the same journal. See
Fairman, A Reply to Professor Crosskey, 22 U. Chi. L. Rev. 144 (1954). This debate was
resurrected by the publication of Raoul Berger's Government by Judiciary, which interprets
the intent of the framers of the fourteenth amendment narrowly and censures the Warren
Court for extending federal authority to secure civil rights far beyond the framers' intentions.
to respond with a strong assertion of the incorporation theory, and debate ensued. See Curtis,
The Bill of Rights As a Limitation on State Authority: A Reply to Professor Berger, 16 Wake
Forest L. Rev. 45 (1980); Berger, Incorporation of the Bill of Rights in the Fourteenth
Amendment: A Nine-Lived Cat, 42 Ohio St. L.J. 435 (1981); Curtis, The Fourteenth Amend-
ment and the Bill of Rights, 14 Conn. L. Rev. 237 (1982); Berger, Incorporation of the Bill of

Justice Black was not the first student of the origins of the fourteenth amendment to
assert that its framers intended to incorporate the Bill of Rights. Three of the earliest discus-
sions of the origins of the fourteenth amendment concluded that the framers intended to secure
the Bill of Rights against discriminatory state action. See 1 J. Burgess, Political Science and
Comparative Constitutional Law 224-25 (1890); J. Burgess, Reconstruction and the Constitu-
tion, 1866-1876, at 70-77, 252-58 (1902) [hereinafter J. Burgess, Reconstruction and the Con-
stitution]; H. Flack, The Adoption of the Fourteenth Amendment 19-22, 40, 45, 57, 68-69, 94,
152-53 (1908).

An issue raised even earlier than Justice Black's dissent in \textit{Adamson} was the "conspiracy
theory" of the fourteenth amendment. This theory depicts the amendment's framers as con-
spiratorially devising an instrument for the protection of property interests and shielding their
true purposes behind the smoke screen of equal rights. See E. Bates, The Story of Congress:
1789-1935, at 233-34 (1936); 2 C. Beard & M. Beard, The Rise of American Civilization 112-
13 (1927); M. Josephson, The Robber Barons: The Great American Capitalists, 1861-1901, at
52 (1934); Lerner, The Supreme Court and American Capitalism, 42 Yale L.J. 668, 691 (1933).
This conspiracy theory of the fourteenth amendment has been effectively dispelled. See 2 L.
Boudin, Government by Judiciary 404 & n.3 (1932); Boudin, Truth and Fiction About the
Fourteenth Amendment, 16 N.Y.U. L. Q. Rev. 19 (1938); Graham, The Conspiracy Theory of
the Fourteenth Amendment: 2, 48 Yale L.J. 171 (1938); Hamilton, Property—According to
Locke, 47 Yale L.J. 371 (1938); McLaughlin, The Court, the Corporation, and Conkling, 46
Am. Hist. Rev. 45 (1940); Hurst, Book Review, 52 Harv. L. Rev. 851-60 (1939).

\footnote{9} Perhaps it would be more accurate to say that these remain questions of constitutional
law because they are unsettled questions of constitutional and legal history. For more on the
intersection of law and history, and particularly judicial uses of history in dispute resolution,
see C. Miller, The Supreme Court and the Uses of History (1969); Murphy, Time to Reclaim:
analyses of the Supreme Court's use of history in deciding questions of legislative intent con-
cerning the Civil Rights Act of 1866, see Casper, Jones v. Mayer: Clio, Bemused and Confused
Muse, Sup. Ct. Rev. 89, 99-108, 111-22 (1968) (arguing Civil Rights Act of 1866 was not
intended to secure fair housing); Kelly, Clio and the Court: An Illicit Love Affair, Sup. Ct.
Rev. 119 (1965) (suggesting Supreme Court's historical analysis is simplistic and naive); Kohl,
The Civil Rights Act of 1866, Its Hour Come Round at Last: Jones v. Alfred H. Mayer Co., 55
Va. L. Rev. 272, 285-93 (1969) (arguing Civil Rights Act of 1866 was intended to prohibit
private discrimination against blacks in sale of housing).

\footnote{10} See R. Dickerson, The Interpretation and Application of Statutes 137-97 (1975); J. Ely,
statute or constitutional amendment can only be discerned to relative degrees of certainty. Nevertheless, the legislative history of the fourteenth amendment and the Civil Rights Act of 1866 has generated more controversy than is necessary. To a significant degree, this excessive uncertainty is attributable to the reasons prompting scholars to study and explain this legislative history. Scholars seek to find answers to twentieth-century constitutional questions—questions arising as the Supreme Court has applied the fourteenth amendment and the Civil Rights Act to secure civil rights and civil liberties in ways and in circumstances that the framers did not anticipate in 1866.\footnote{See authorities cited in note 8 supra; see also Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 56-65 (1955) (Congress did not intend to desegregate public schools in 1866, but did leave open possibility of future court-ordered desegregation); Frank & Munro, The Original Understanding of “Equal Protection of the Laws,” 50 Colum. L. Rev. 131 (1950) (equal protection clause of fourteenth amendment was intended to authorize Congress to prohibit racially discriminatory state action or inaction related to property, to fair and impartial administration of criminal and civil justice, and to segregated public accommodations such as inns and public carriers); Kelly, The Fourteenth Amendment Reconsidered: The Segregation Question, 54 Mich. L. Rev. 1049, 1079-86 (1956) (framers of fourteenth amendment did not intend to prescribe segregated schools and juries); Kohl, supra note 9, at 285-93 (framers of Civil Rights Act of 1866 intended to prohibit private discrimination against blacks in sale of housing).}

Preoccupation with the issues of their own times has deterred scholars from focusing upon the issue that the framers identified and addressed as the critical constitutional question related to congressional civil rights enforcement authority. The most important question for the framers was whether the national or the state governments possessed primary authority to determine and secure the status and rights of Ameri-
This is the first Article to explore this question and explain the connection made by the framers between the primacy of national citizenship and the primacy of the national government's authority to enforce civil rights. Because they believed that national citizenship was primary and state citizenship derivative, the congressional framers of the fourteenth amendment and the Civil Rights Act of 1866 also believed that Congress possessed primary authority to secure the civil rights of United States citizens. In emphasizing this neglected dimension of the legislative history, this Article presents new evidence that illuminates the framers' understanding of the fourteenth amendment and the Civil Rights Act of 1866.

This Article also presents new evidence from sources outside the congressional debates that provides valuable insight into the constitutional theories of civil rights enforcement authority prevalent during the Civil War and Reconstruction era. The efforts of the United States

12 See text accompanying notes 24-65, 83-113, 147-58 infra. In their excellent study of the natural rights basis of congressional Republican constitutionalism, David Farber and John Muench correctly conclude that the fourteenth amendment was intended to empower the national government to protect the natural rights of its citizens. Farber & Muench, The Ideological Origins of the Fourteenth Amendment, 1 Const. Com. 235, 275-77 (1984). However, they assume that Congress merely intended to secure these rights against discriminatory state action. Id. at 271 & n.138. This assumption, coupled with their belief that "[t]oday . . . the most significant question is the identity of the fundamental rights protected by the fourteenth amendment," id. at 277, leads them to conclude that "[t]he most important question raised by the debates is what rights the amendment was to protect." Id. at 274. Farber and Muench thus overlook important portions of the constitutional debate that demonstrate that the framers regarded the specific rights they were securing as a less important question than the constitutional source of Congress's authority to secure the fundamental rights of citizens and the method by which Congress might secure these rights without supplanting state authority over fundamental rights. They also overlook portions of the debates that call into question their assumption that Congress merely intended to protect citizens against discriminatory state action.


14 See text accompanying notes 94-131, 137-58 infra.

15 Other scholars have relied primarily on legislative debates and Supreme Court decisions when examining these issues. See, e.g., Buchanan, The Quest for Freedom: A Legal History of the Thirteenth Amendment (pts. 1-4), 12 Hous. L. Rev. 1, 331, 592, 843 (1974-1975) (tracing
Attorney General and other federal legal and judicial officers, such as United States Attorneys' marshals and agents of the Freedmen's Bureau, as well as the decisions of the federal district and circuit courts in the 1860s and early 1870s, reveal the ways in which legal and judicial officers charged with implementing national civil rights enforcement authority understood the nature and scope of their authority under the Reconstruction amendments and civil rights statutes. This is not to suggest that subsequent interpretations and applications of congressional enactments constitute conclusive evidence of legislative intent. However, the interpretations and applications of the Reconstruction civil rights guarantees by federal judges and legal officers during the 1860s and early 1870s are of special importance to our understanding of the legislative history because these judges and legal officers were contemporaries of the framers who knew what the framers intended and tried to interpret and apply these civil rights guarantees as the framers intended. Moreover, this Article finds that federal judges and attorneys interpreted the meaning and scope of the thirteenth and fourteenth amendments and Civil Rights Act of 1866 in the same way as the framers. Their interpretations, therefore, must be regarded as persuasive evidence of legislative intent. The similarity in the interpretations expressed by members of the different branches of government reveals the existence of a coherent theory of constitutional law that scholars have missed when attempting to explain the original intent of the framers of the fourteenth amendment.

The failure of other studies to identify the critical importance of the primacy of national citizenship to the framers' understanding of the scope of Congress's authority to enforce civil rights is also attributable to

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16 For more on federal efforts to enforce civil and political rights in the South during Reconstruction, see W. Gillette, Retreat from Reconstruction, 1869-1879, at 25-55 (1979); A. Trelease, White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction 399-418 (1971); Swinney, Enforcing the Fifteenth Amendment, 1870-1877, 28 J.S. Hist. 202 (1962).

17 For two excellent studies of the legal activities of the Freedmen's Bureau, see G. Bentley, A History of the Freedman's Bureau (1955); D. Nieman, To Set the Law in Motion (1979); see also D. Flanigan, The Criminal Law of Slavery and Freedom, 1800-1868 (1973) (unpublished dissertation available at Fondren Library, Rice University).

other weaknesses in approach. Most scholars appear to have come to this legislative history with state action preconceptions.\(^1\) This presumption helps explain why scholars have ignored or overlooked important evidence of the framers' intent and have failed to understand critical aspects of the framers' legal theories of congressional civil rights enforcement authority. This Article will conclude that the framers intended to grant Congress authority to protect the fundamental rights of all American citizens, regardless of the source of the infringement.

\(^{19}\) Although he notes that the Radical Republican "argument contends that the Thirteenth Amendment nationalized personal liberty and civil rights by giving Congress plenary legislative power to protect civil rights against violations by other state governments or private citizens," Professor Herman Belz concludes that the framers rejected this sweeping view and "interpreted the antislavery amendment as giving Congress power to legislate only against state action that denied Negroes civil rights." H. Belz, Emancipation and Equal Rights, supra note 13, at 117. Without citing supporting evidence, Belz reasoned that "most Republicans... were opposed to federal assumption of local criminal jurisdiction to the extent that legislation against private discrimination would have required." Id.; see also H. Belz, A New Birth of Freedom, supra note 13, at 157-77 (arguing drafters of civil rights legislation intended to restrict state actions relating to blacks but did not intend to supersede state power over private actions violating blacks' rights). Professor Phillip Paludan studied five leading legal thinkers of the Civil War era and concluded that their legal theories were conservative in that they reflected a greater commitment to localism, states rights, and racism than to civil rights enforcement. P. Paludan, supra note 15, at 281-82. Because of their legal-constitutional conservatism, Paludan and Belz fail to recognize the legal theory that congressional Republicans believed could secure lasting black equality through national law.

Professor Paludan, in fact, does not show any direct connection between the legal theories and theorists he studied and congressional Republican themes. He simply assumes what he aims to establish, that these legal thinkers were representative of the framers' views of constitutionalism and the role of law. Professor Michael Les Benedict also concludes that conservative constitutional theories prevented congressional Republicans from enacting legislation that permanently and effectively secured the rights of blacks. See M. Benedict, A Compromise of Principle: Congressional Republicans and Reconstruction, 1863-1869, at 56-58 (1974). While he concedes that, on its face, the Civil Rights Act of 1866 seems to achieve this radical goal, Benedict refuses to accept the statute's apparent radical constitutionalism because such a vast expansion of national civil rights enforcement authority would have been inconsistent with the assumed political and constitutional conservatism of its author, Senator Lyman Trumbull, and the majority of Republicans. Id. at 147-49. Benedict suggests that the statute preserved what he describes as the traditional balance between the national and state governments over fundamental rights by requiring only that the states replace their racially discriminatory statutes with new ones that provided equal protection for the rights of blacks. When the states changed their laws, national jurisdiction over civil rights would end. Thus, the congressional enforcement of civil rights was intended to be only temporary and was limited to racially discriminatory state action. Id. at 123-36, 148-49, 170. Dismissing evidence to the contrary, Benedict's conclusions seem to be more the result of logical reasoning from an assumed premise than a close adherence to the sources. For an additional example, see Benedict, Preserving the Constitution: The Conservative Basis of Radical Reconstruction, 61 J. Am. Hist. 65 (1974). Other scholars have used similar reasoning to reach similar conclusions. See H. Hyman, A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution 446-90 (1973) [hereinafter H. Hyman, A More Perfect Union]; Hyman, Reconstruction and Political-constitutional Institutions: The Popular Expression, in New Frontiers of the American Reconstruction I (H. Hyman ed. 1966); Kelly, Comment on Harold M. Hyman's Paper, in New Frontiers of the American Reconstruction, supra, at 40.
Scholars have also overlooked important aspects of the historical context of the Civil War era. In addition to the debilitating effect this oversight has on understanding the framers' constitutional theory of congressional civil rights enforcement authority, it also presents a problem for those seeking to explain why the Thirty-ninth Congress attempted to secure the civil rights of blacks in the first place. Racism unquestionably characterized white America during the 1860s. The proposition that white racists legislated, and a white racist constituency supported legislative efforts, to secure the civil rights of a hated race presents a very complicated issue of historical explanation, especially for those scholars who argue that the framers were personally committed to securing the civil rights of blacks. Thus, other scholars argue that the persistence and virulence of racism during the Civil War and Reconstruction era combined with conservative constitutional values and theories to preclude a strong Northern commitment to civil rights enforcement. These schol-

20 See Kaczorowski, Searching for the Intent of the Framers of the Fourteenth Amendment, 5 Conn. L. Rev. 368 (1973). The first professionally trained historian to investigate the intent of the framers of the fourteenth amendment was Benjamin B. Kendrick, a student of William Dunning at Columbia University. Imbued with the Dunning interpretation of Reconstruction, Kendrick portrayed Reconstruction generally and the fourteenth amendment specifically as the product of a vengeful group of Radical Republicans who used the cause of black rights to perpetuate their own ascendance in national politics. See B. Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction (1914). Because of his view of the group he believed was in control of Reconstruction, Kendrick was overly concerned with the fourteenth amendment's relationship to voting rights. He consequently failed to see the significance of the framers' equation of natural rights with the status of freedom conferred by the thirteenth amendment upon all inhabitants of the United States. See Kaczorowski, supra, at 375. Thus, he ingenuously concluded that "emancipation vitalizes only natural rights, not political rights." B. Kendrick, supra, at 203.

Joseph James also attempted to explain the meaning of the fourteenth amendment by referring to the historical context within which it was framed. See J. James, Framing the Fourteenth Amendment (1956). However, he made the same two historical assumptions that Kendrick made, both of which have subsequently been disproved. See authorities cited in note 22 infra. He assumed that only the Radical Republicans worked for equal rights and framed the amendment, and that the Radicals were motivated purely by partisan self-interest and not a commitment to securing the civil rights of blacks. He nevertheless maintained that the Radicals intended to incorporate the Bill of Rights into the fourteenth amendment to secure these guarantees from state action. See id. at 3-20, 47, 105, 200-01. He thus unwittingly raised the question of why the Radicals would so revolutionize the federal constitutional structure and secure civil rights, such as Bill of Rights guarantees, when this drastic constitutional change was unnecessary to their partisan interests.


23 See M. Benedict, supra note 19; W. Gillette, supra note 16; H. Hyman, A More Perfect Union, supra note 19; M. Keller, Affairs of State (1977); P. Paludan, supra note 15.
ars conclude that the Reconstruction amendments added little to the national government's authority to enforce civil rights and that the efforts of federal officers to enforce civil rights were meager and ineffective.

This Article challenges these views by analyzing Congress's efforts to enforce civil rights in the context of the political and constitutional history of the era. It attempts to explain why a politically dominant group of racist politicians, with the support of their racist constituents, would act to provide effective legal protections for the civil rights of blacks.

I

THE POLITICAL AND CONSTITUTIONAL HISTORICAL BACKGROUND

In 1866, Congress was confronted with the necessity of expressing in law the military resolution of the Civil War. The North fought the Civil War to prevent secession and to abolish slavery.24 These issues encompassed constitutional questions of enormous importance. The legal expression of these aims would define the division of constitutional authority between national and state governments to determine and protect the status and rights of Americans, and thereby the nature of American federalism.

Prior to the Civil War, the states defined the status and enforced the rights of the individual.25 The states served as the traditional guardians of life, liberty, and property, and through their institutions, statutes, and court decisions, defined the status and rights of different groups of state residents. States enforced and secured fundamental rights through legal institutions that punished crimes and resolved civil disputes.

Black Americans, however, were treated differently from whites. In the Southern states, slavery, which relegated blacks to a legal status akin to chattel, was legally sanctioned.26 Free blacks were relegated to a second class citizenship in both Northern and Southern states. They were denied basic rights that state statutes extended to white citizens as inalienable rights of free men.27

24 See generally P. Parish, The American Civil War 80-99, 225-37 (1975) (discussing differences between North and South that led to Civil War).
26 See K. Stampp, The Peculiar Institution 192-236 (1956) (although slaves possessed dual status as persons and property, statutory language reveals slaves legally considered more like property than persons); cf. E. Genovese, Roll, Jordan, Roll 25-49 (1972) (although slaves possessed few legal rights, treatment of slaves as chattel was largely legal fiction; they were, in practice, granted certain rights).
Although the states functioned as the primary guarantors of the fundamental rights of American citizens, they did so without a settled legal theory authorizing their exercise of this power. Legal theories of citizenship and the primacy of state as opposed to national authority over the status and fundamental rights of citizens were disputed at the outbreak of the Civil War. Legal theorists agreed that citizenship conferred on individuals a right to governmental protection of a broad range of rights and privileges in return for the individual's allegiance to the government. However, individuals were citizens of both the nation and a state. National and state citizenship were considered to be different aspects of the same status. The citizen, therefore, owed allegiance to both the nation and the state, and both the national and the state governments theoretically possessed the constitutional authority and obligation to enforce and protect the fundamental rights of citizenship.

Ambiguities in legal theory became urgent political questions as disagreements over the authority to determine the status and rights of slaves and fugitive slaves increasingly divided North and South. The conflict over slavery forced the nation to resolve these ambiguities and determine both whether a citizen owed his primary allegiance to the national or state government, and which of these governments had primary authority over the status and rights of the individual. The resolution of this question was a corollary of the more fundamental constitutional issue central to the Civil War, namely, whether ultimate sovereignty was constitutionally delegated to the national or to the state governments. The constitutional conflict between national supremacy and union on the one side and state sovereignty and secession on the other would determine whether the United States was a sovereign political community that transcended state boundaries or a federation of sovereign and independent states. The determination of which government possessed ultimate sov-

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28 In an 1862 official opinion on citizenship, President Abraham Lincoln's Attorney General, Edward Bates, complained that he searched law books and court decisions "for a clear and satisfactory definition of the phrase citizens of the United States, [but could] find no such definition, no authoritative establishment of the meaning of the phrase." Citizenship, 10 Op. Att'y Gen. 382 (1862) (emphasis in original). He concluded that "the subject is now as little understood in its details and elements, and the question as open to argument and to speculative criticism, as it was at the beginning of the Government." Id. at 383. Several congressmen and senators of the Thirty-ninth Congress made the same observation during debates on the fourteenth amendment and the Civil Rights Act of 1866. See Cong. Globe, 39th Cong., 1st Sess. 504-05 (1866) (statement of Sen. Johnson); id. at 2764-67 (statement of Sen. Howard); id. at 2768-69 (statement of Sen. Wade); id. at 1295-96 (statement of Rep. Latham); 2 J. Blaine, Twenty Years of Congress 189 (1886). Professor Kettner masterfully analyzes the conflicting theories of federal citizenship before the Civil War. See J. Kettner, supra note 25, at 248-333.


30 See J. Kettner, supra note 25, at 248-86.

31 See id. at 287-333.
ereignty would also resolve the issue of which government possessed primary authority over the status and rights of citizens.\textsuperscript{32}

The South's secession forced the resolution of ultimate sovereignty because the constitutional theories proferred to justify secession or deny its legality were predicated upon conflicting conceptions of the nature of the federal union and sovereignty.\textsuperscript{33} The secession of the Southern states was defended as a matter of constitutional right under two principles. In addition to the right of revolution set forth in the Declaration of Independence,\textsuperscript{34} the Southern states argued that the federal Union was a confederation of sovereign and independent states that retained the right to withdraw whenever the compact binding them together was broken.\textsuperscript{35} This theory of secession presumed that each state was a separate sovereign power, that the Union was merely the states' agent, and that the government of the United States possessed only those powers delegated to it to fulfill the limited purposes for which it was created. Sovereignty remained in the states except "as the same has been delegated by voluntary compact to a Federal Government."\textsuperscript{36} Thus, the citizen owed his or her first allegiance to the state, which possessed primary authority to determine and secure the status and rights of its citizens and inhabitants.

President Abraham Lincoln and the Northern states rejected this constitutional justification of secession. In addition to insisting upon the indestructibility of the Union, they argued that the Union predated the Constitution and that "the Constitution was the creation of the sovereign people in their aggregate capacity and their national character."\textsuperscript{37} Under this view, the nation was sovereign and the "States [had] neither more nor less power than that reserved to them in the Union by the Constitution—no one of them ever having been a State out of the Union."\textsuperscript{38} Lincoln defined sovereignty "as 'a political community without a political superior'"\textsuperscript{39} and he insisted that the national political community

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\bibitem{32} Id. at 334. Under the Republicans' natural rights theory of government, the authority of the government to secure the rights of its citizens in return for their allegiance was an attribute of sovereignty. See text accompanying notes 77-82, 111-36 infra.
\bibitem{33} These conflicting constitutional theories were expressed in the Southern states' resolutions relating to secession, see Mississippi Resolutions on Secession (Nov. 30, 1860), reprinted in 1 Documents of American History 371 (H. Commager 7th ed. 1963); South Carolina Declaration of Causes of Secession (Dec. 24, 1860), reprinted in 1 Documents of American History, supra, at 372; President Davis's Message to Congress (Apr. 29, 1861), reprinted in 1 Documents of American History, supra, at 389, and in President Lincoln's messages to Congress, see, e.g., President Lincoln's Message to Congress in Special Session (July 4, 1861), reprinted in 1 Documents of American History, supra, at 393.
\bibitem{34} The Declaration of Independence (U.S. 1776).
\bibitem{35} See President Davis's Message to Congress, supra note 33, at 389-91.
\bibitem{36} Mississippi Resolutions on Secession, supra note 33, at 371.
\bibitem{37} J. Kettner, supra note 25, at 339.
\bibitem{38} President Lincoln's Message to Congress in Special Session, supra note 33, at 394.
\bibitem{39} Id. (citation omitted in original).
\end{thebibliography}
was without a political superior. For Lincoln, and most Northerners, this view of American federalism and sovereignty had two important consequences: the Southern states could not legally secede, and American citizens owed primary allegiance to the nation.

Professor James Kettner has noted that from this perspective: [T]he Civil War was a struggle over the nature of the community created in 1789—a bloody contest over allegiance. The lines now were sharply drawn between those who stressed the primacy of the state communities of allegiance and those who insisted that the Union had created one nation and one people. Years of evasion and compromise in Congress and the courts had delayed the confrontation between these two points of view. But now the time of decision was at hand, and open conflict would determine which side would prevail.\(^4\)

By determining to which government the citizen owed primary allegiance, the Civil War would resolve whether the national or the state government possessed primary authority to define and secure the status and rights of the individual.

Constitutional questions concerning sovereignty and primary authority over the status and rights of Americans also took political form in relation to slavery.\(^4\) President Lincoln’s Emancipation Proclamation\(^4\) not only emancipated Southern slaves, but also broadened the Northern war effort to include the abolition of slavery. This emancipation again raised the antebellum issue of which government possessed primary authority to determine the status and rights of Americans. Thus, because of the nature of Northern war aims, the Civil War would determine ultimate sovereignty and, consequently, the location of primary authority to determine the status and secure the rights of Americans.

II

THE MOTIVATION FOR CIVIL RIGHTS ENFORCEMENT

A. Preserving the Union Victory

Although the Union armies were militarily successful, it remained uncertain whether the North’s victory, coupled with ratification of the thirteenth amendment abolishing slavery, would actually secure national supremacy and emancipation. After the Civil War, Southerners continued to resist emancipation and express disdain for national authority.\(^4\)

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\(^4\) J. Kettner, supra note 25, at 340.


\(^4\) 12 Stat. 1267 (1863).

Southerners expressed their defiance of national authority and black emancipation by their political opposition to the groups, interests, and objectives associated with unionism and emancipation, and in their economic intimidation and violent assaults upon the federal officers and individuals who were the primary beneficiaries of national supremacy and emancipation.\(^4\)

Moreover, the statutes, legal institutions, and law enforcement officers of state and local governments sanctioned and assisted the recalcitrance of individual Southerners.\(^4\) Finally, President Andrew Johnson, a Democratic Conservative, actually encouraged Southern resistance through his policy of appeasement.\(^4\) This continuing Southern hostility to the Union led Republicans and Southern Unionists to believe that the spirit that had led the South to secede had survived the Civil War.\(^4\)

\(^4\) See Joint Comm. on Reconstruction, Report on Reconstruction, 31st Cong., 1st Sess. (1866). Correspondence from this period indicates both that Southerners assaulted and intimidated unionists and freedmen and that this abuse was interpreted as hostility toward federal authority. See Letter from J.W. Shafter to Lyman Trumbull (Dec. 12, 1865), Letters from T.J. Gretlou to Lyman Trumbull (Jan. 8, 19, 1866), Letter from A.A. Smith to Lyman Trumbull (Jan. 18, 1866), Letter from Grant Goodrich to Lyman Trumbull (Feb. 1, 1866), collected in 63 Lyman Trumbull Papers (collection available in Library of Congress); Letter from Brig. Gen. J.W. Sprague to John Sherman (Apr. 4, 1866), collected in 98 John Sherman Papers (collection available in Library of Congress); Letter from Gen. George A. Custer to Zachariah Chandler (Jan. 4, 1866), collected in Zachariah Chandler Papers container 4 (collection available in Library of Congress); Letter from Judge John C. Underwood to Benjamin F. Butler (Jan. 24, 1866), collected in Benjamin F. Butler Papers box 37 (collection available in Library of Congress); Letter from William Ware Peck to Charles Sumner (Jan. 1, 1866), Unsigned Letter to Charles Sumner (Jan. 9, 1866), collected in 76 Charles Sumner Papers (collection available in Houghton Library, Harvard University).

\(^4\) R. Kaczorowski, supra note 1, at 27-44; D. Nieman, supra note 17; J. Sefton, The United States Army and Reconstruction, 1865-1877 (1967); T. Wilson, The Black Codes of the South (1965).

\(^4\) E. McKitrick, supra note 22; M. Perman, supra note 43.

\(^4\) See Letter from Grant Goodrich to Lyman Trumbull, supra note 44; Letter from William Ware Peck to Charles Sumner, supra note 44; Letter from Gen. George A. Custer to Zachariah Chandler, supra note 44; Letter from G. Koerner to Lyman Trumbull (Jan. 11, 1866), collected in 63 Lyman Trumbull Papers (collection available in Library of Congress); Letter from John Dietrich to Lyman Trumbull (July 16, 1866), collected in 68 Lyman Trumbull Papers, supra; Letter from Tho. Shankland to Judge Adj. Gen. Joseph Holt (May 19, 1866), collected in 52 Joseph Holt Papers (collection available in Library of Congress); Letter from George W. Kingsbury to Justin S. Morrill (June 18, 1866), collected in 10 Justin S. Morrill Papers (collection available in Library of Congress); Letter from H.B. Allis to Benjamin F. Wade (Mar. 21, 1866), collected in Benjamin F. Wade Papers (collection available in Library of Congress); Letter from H.S. Parmenter to John Sherman (Jan. 29, 1866), collected in 92 John Sherman Papers (collection available in Library of Congress); Address by J. Gibson, The Pending Issues—Equal Rights to All Men (Mar. 8, 1866) (on file at New York University Law Review) [hereinafter Address by J. Gibson]; Address by A. Dostie, Delivered Before the Republican Association of New Orleans (May 9, 1866) (on file at New York University Law Review) [hereinafter Address by A. Dostie]; Address by J. Garfield, National Politics: An Able Review of the Situation (Sept. 1, 1866) (on file at New York University Law Review) [hereinafter Address by J. Garfield].
By the end of 1865, the process of restoring the Southern states to the Union appeared to many Northern Republicans to have become a problem of preserving the fruits of war.\(^{48}\) Continuing Southern recalcitrance led to what historian Eric McKitrick describes as "an uneasy conviction" among Northern Republicans "that somehow the South had never really surrendered after all."\(^{49}\) On April 7, 1866, Republican Congressman William Lawrence of Ohio expressed the feeling that the conflict between the North and South continued beyond the end of armed hostilities when he asserted: "Many people suppose that because flagrant war has ceased actual peace has returned. But peace has not yet come in fact.\(^{50}\)

Indeed, conflict between the North and the South did continue after the Civil War, and this continuing conflict evolved out of the Civil War issues of secession and emancipation. After the North suppressed the South's attempted secession, many questioned whether the former Confederates would recognize and respect the supremacy and authority of the national government. Similarly, the constitutional abolition of slavery evolved into the question of whether national government could successfully protect the freedom of the ex-slaves, both in law and in fact, in the face of Southern refusals to accept emancipation.\(^{51}\) Consequently, national supremacy became intertwined with black freedom, civil rights guarantees, and the protection of white Unionists. Underlying all of

\(^{48}\) See Cong. Globe, 39th Cong., 1st Sess. 3031, 3034-35 (1866) (statement of Sen. Henderson); Letter from Justice Stephen J. Field to Chief Justice Salmon P. Chase (June 30, 1866), collected in Salmon P. Chase Papers container 97 (collection available in Library of Congress); Letter from Horace White to Secretary of War Edwin Stanton (Mar. 17, 1866), collected in 30 Edwin Stanton Papers (collection available in Library of Congress); Letter from Grant Goodrich to Lyman Trumbull, supra note 44; Letter from Jason Marsh to Lyman Trumbull (Jan. 8, 1866), collected in 63 Lyman Trumbull Papers (collection available in Library of Congress); Letter from D.L. Phillips to Lyman Trumbull (July 14, 1866), collected in 68 Lyman Trumbull Papers, supra; Address by J. Gibson, supra note 47; Address by J. Dostie, supra note 47; Address by J. Garfield, supra note 47; T. Burton, John Sherman 165-66 (1906); W. Dickson, The Absolute Equality of All Men Before the Law, The Only True Basis of Reconstruction (1865); E. McKitrick, supra note 22; A. Moore, The Life of Schuyler Colfax 289, 296-301 (1868); 1 C. Schurz, The Reminiscences of Carl Schurz 358 (1913); Joint Resolutions of the Legislature of Wisconsin, reprinted in S. Misc. Doc. No. 101, 39th Cong., 1st Sess. (1866).

\(^{49}\) E. McKitrick, supra note 22, at 21.

\(^{50}\) Cong. Globe, 39th Cong., 1st Sess. 1834 (1866).

\(^{51}\) See id. at 474 (statement of Sen. Trumbull); Letter from R. E. Fenton to Lyman Trumbull (Apr. 9, 1866), collected in 65 Lyman Trumbull Papers (collection available in Library of Congress); Address by J. Gibson, supra note 47; Address by Governor T. Swann, Delivered before the Conservative Mass Meeting (June 21, 1866) (on file at New York University Law Review); Address by G. Loring, Safe and Honorable Reconstruction (1866) (on file at New York University Law Review); Address by G. Loring, Delivered upon the Resolution on the State of the Union (Mar. 12, 1866) (on file at New York University Law Review); 1 Nation 711 (1865); 2 Nation 262-63, 422-23, 430-31 (1866). LaWanda and John Cox argue convincingly that securing the freedom of the former slaves was the principle purpose of Reconstruction. L. Cox & J. Cox, supra note 22.
these issues was the need to establish loyal political leadership in the South. It was to secure these objectives that the restoration of the confederate states to the Union became the Reconstruction of the federal Union.52

B. Nationalism Overcomes Racism

The context of civil rights enforcement after the Civil War was so unusual that the racial prejudice that ordinarily would have precluded the protection of the civil rights of black Americans was largely inoperable. Because Northern Republicans needed to preserve their Civil War victory over state sovereignty and slavery, they established in law the primacy of United States citizenship and with it the primacy of Congress's authority to secure the rights of American citizens.53 The issue of civil rights enforcement transcended racial considerations. In addition, when Congress declared all citizens of the nation to be free men54 and provided effective guarantees for the freedom of the ex-slaves,55 it also provided for the security of its white representatives in the South. Thus, while Reconstruction civil rights enactments were intended primarily for the protection of blacks, they were also intended to protect whites.56

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52 See Letter from D.L. Phillips to Lyman Trumbull, supra note 48; Letter from Judge John C. Underwood to Benjamin F. Butler, supra note 44; Letter from H.S. Parmenter to John Sherman, supra note 47; Letter from I.G. Wilson to Lyman Trumbull (Jan. 21, 1866), Letter from J. Gardiner to Lyman Trumbull (Jan. 28, 1866), collected in 63 Lyman Trumbull Papers (collection available in Library of Congress); Letter from Captain W.E. White to Lyman Trumbull (May 27, 1866), collected in 66 Lyman Trumbull Papers, supra; Letter from Simeon Nash to John Sherman (Jan. 27, 1866), collected in 92 John Sherman Papers (collection available in Library of Congress); Letter from Chaplain John Seage to Zachariah Chandler (May 16, 1877), collected in Zachariah Chandler Papers (collection available in Library of Congress); Letter from M.D. Bickman to Benjamin F. Wade (Mar. 18, 1866), collected in 11 Benjamin F. Wade Papers (collection available in Library of Congress); Letter from John C. Underwood to Salmon P. Chase (May 21, 1866), collected in Salmon P. Chase Papers (collection available in Library of Congress); Address by J. Gibson, supra note 47; Address by A. Dostie, supra note 47; Address by C. Smith, What We Have Secured by War and What Remains To Be Secured (Dec. 7, 1865) (on file at New York University Law Review); Address by B. Butler, The Status of the Insurgent States upon Cessation of Hostilities (Apr. 11, 1866) (on file at New York University Law Review); W. Dickson, supra note 48; 3 C. Schurz, supra note 48, at 241; 2 Memoirs of Gustave Koerner, 1809-1896, at 458 (T. McCormack ed. 1909).

53 See text accompanying notes 77-82, 154-57 infra. For the most part, the Reconstruction of the Union after the Civil War by Congress did not involve the participation of the congressmen and senators of the former Confederate states. Those states had withdrawn their representatives at the time of their secession from the Union and did not obtain a voice in Congress until their representatives were allowed to return beginning in 1868. J. Burgess, Reconstruction and the Constitution, supra note 8, at 198 (1902).

54 See text accompanying notes 147-58 infra.

55 See text accompanying notes 109, 137-46 infra.

56 See text accompanying notes 147-58 infra. However, the scope of civil rights protection was not intended to be limited to the South. The House floor manager of the bill, Congressman James Wilson of Iowa, explained that the bill's supporters intended the Civil Rights Act...
fact that these enactments benefited their Southern white political allies gave Congressional Republicans an additional incentive to make them effective. It also made the enactments more attractive to rank and file Republicans. Finally, Congress was acting to break Southern resistance to national authority in passing legislation designed to secure effectively the civil rights of American citizens in the South.\textsuperscript{57}

Racism notwithstanding, Republicans were morally committed to civil rights enforcement in 1866. They felt a general obligation to secure the rights of Americans because they believed that in return for an allegiance to government, citizens were entitled to the protection of the government.\textsuperscript{58} Republicans felt that Congress had a special obligation to protect Americans because they had insisted that citizens owed their primary allegiance to the federal government. Additionally, many Congressional Republicans felt a particular obligation to protect blacks\textsuperscript{59} because
to protect the civil rights of every citizen "throughout the entire domain of the Republic." Cong. Globe, 39th Cong., 1st Sess. 1117 (1866). The same point was made by other senators and congressmen. See id. at 41 (statement of Sen. Sherman); id. at 504-05 (statement of Sen. Johnson); id. at 595 (statement of Sen. Davis); id. at 603 (statement of Sen. Cowan); id. at 3035 (statement of Sen. Henderson); id. at 1066-67 (statement of Rep. Price); id. at 1120-21 (statement of Rep. Rogers); id. at 1263, 1265 (statement of Rep. Broomall); id. at 1264 (statement of Speaker Colfax); id. at 1291, 1292, 2542 (statement of Rep. Bingham); id. at 1833-35 (statement of Rep. Lawrence). Federal legal officers and judges also understood the Civil Rights Act of 1866 and the fourteenth amendment to apply to white as well as black citizens. See text accompanying notes 159-78, 256-75 infra.

\textsuperscript{57} For more on the objectives of the Civil Rights Act of 1866 and the fourteenth amendment, see text accompanying notes 43-52 supra and 77-82 infra.

\textsuperscript{58} This natural rights theory of government was expressed by a number of the framers, both in and out of Congress. See Cong. Globe, 39th Cong., 1st Sess. 1118, 1294-95 (1866) (statement of Rep. Wilson); id. at 1152-54 (statement of Rep. Thayer); id. at 1262 (statement of Rep. Broomall); id. at 1293 (statement of Rep. Shellabarger); id. at 3145 (statement of Rep. Finck); id. at 2779 (statement of Sen. Elliot); id. at 2964 (statement of Sen. Stewart); Letter from Senator William M. Stewart to President Andrew Johnson (June 5, 1866), quoted in Reminiscences of Senator William M. Stewart 227 (G. Brown ed. 1908); A. Moore, supra note 48, at 291.

\textsuperscript{59} See Cong. Globe, 39th Cong., 1st Sess. 504 (1866) (statement of Sen. Howard); id. at 602, 741 (statement of Sen. Lane); id. at 605, 1759 (statement of Sen. Trumbull); id. at 1123-24 (statement of Sen. Cook); id. app. at 156 (statement of Sen. Morrill); id. at 1159 (statement of Rep. Windom); id. at 2535 (statement of Rep. Eckley); Address by J. Scovel, Our Relations with the Rebellious States (Feb. 27, 1866) (on file at New York University Law Review); Address by J. Gibson, supra note 47; W. Dickson, supra note 48; Republican Congressional Comm., The Policy of Congress in Reference to the Restoration of the Union (1867); see also Daily Chronicle, Apr. 7, 1866, collected in Scrapbook on the Civil Rights Bill 69 (E. McPherson ed. n.d.), in Edward McPherson Papers container 99 (collection available in Library of Congress) [hereinafter Scrapbook on the Civil Rights Bill] (covering Republican efforts to protect blacks); World, Apr. 6, 1866, collected in Scrapbook on the Civil Rights Bill, supra, at 72 (same); Bradford Reporter, Apr. 5, 1866, collected in Scrapbook on the Civil Rights Bill, supra, at 65 (same); Springfield Republican, n.d., collected in Scrapbook on the Civil Rights Bill, supra, at 52, 57 (same); Troy Times, n.d., collected in Scrapbook on the Civil Rights Bill, supra, at 53 (same); Yonkers Statesman, n.d., collected in Scrapbook on the Civil Rights Bill, supra, at 58 (same).
they were responsible for the changed status of the former slaves. They also felt obligated to blacks because of the latter's contribution to the Northern war effort during the Civil War.

C. Republican Party Ideology and Political Self-interest

The Republicans' commitment to civil rights enforcement went beyond the plight of blacks. It emanated from the core of the Republican party's Civil War ideology of natural rights, individual liberty, and equal opportunity, which became a source of Northern sectional consciousness in the struggle against the Southern conservative state sovereignty doctrine. This consciousness became a "new national ideology" through which the Republican Party defined its conception of American freedom and democracy and upon which it defended its principles of a free society against the Southern slavocracy. Republicans perceived the South as having rejected natural rights in its assault upon human rights and democratic government. They saw the rejection as a threat to American freedom generally, not merely the freedom of the former slaves.

The behavior of former Confederates after the Civil War convinced Northern Republicans that the preservation of American freedom required a positive state to destroy the danger posed by the South to natural rights, individual liberty, and equal opportunity. The Republican party's liberal ideology, therefore, ironically provided the moral imperative to secure individual liberty through the active intervention of the national government. Action was needed to combat what Republicans perceived as the South's unabated commitment to localism and disloyalty to the nation, and the degradation of human rights and human freedom. Republicans believed that they were locked in a struggle with the South that pitted nationalism and individual liberty against states' rights and tyranny. The moral commitment to civil rights enforcement, then, was prompted by more than personal concern for blacks. Republicans believed that the very existence of the personal freedom of all Americans was at stake. Thus understood, Reconstruction was as much a moral cause as the Civil War. Indeed, it was essentially the same cause because the Republican commitment to natural rights, individual liberty, and equal opportunity that had led to the Republicans' uncompromising opposition to the expansion of slavery before the Civil War similarly led to their uncompromising defense of civil rights after the war.

Partisan self-interest buttressed moral principle. Historians John

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62 See Y. Arieli, supra note 60, at 297-322; G. Fredrickson, supra note 21, at 177-81.
and LaWanda Cox have shown that the protection of black Americans' civil rights became the driving wedge that split President Johnson and Congressional Republicans.63 Presidential opposition to civil rights enforcement became one of the primary bases for the Democratic Conservative political coalition the President and others attempted to establish to oppose congressional Republicans. The issue of civil rights was a central political issue that divided Democratic Conservatives and Republicans. The protection of the Freedmen thus served as a rallying point behind which Republicans united.64 The Republican Party in 1866

63 L. Cox & J. Cox, supra note 22, at 195-232. Further research confirms this conclusion. See Letter from H.B. Allis to Benjamin F. Wade (Mar. 21, 1866), collected in 11 Benjamin F. Wade Papers (collection available in Library of Congress); Letter from Smith Nichols to Lyman Trumbull (Apr. 2, 1866), collected in 65 Lyman Trumbull Papers (collection available in Library of Congress); Letter from Governor Sam Cony to Edwin Stanton (May 17, 1866), collected in 30 Edwin Stanton Papers (collection available in Library of Congress); Letter from Warner Bateman to John Sherman (Mar. 30, 1866), collected in 98 John Sherman Papers (collection available in Library of Congress); Letter from William P. Fessenden to James S. Pike (Apr. 6, 1866), quoted in C. Jellison, Fessenden of Maine 200 (1962); Address by R. Yates, Delivered at Grand Ovation Tendered Him by the Citizens of Jacksonville, in Approval of His Course in the 39th Congress (Sept. 15, 1866) (on file at New York University Law Review) [hereinafter Address by R. Yates]; 3 C. Schurz, supra note 48, at 228-33; 1 J. Sherman, Recollections of Forty Years in the House, Senate and Cabinet 368-69 (1895); H. White, The Life of Lyman Trumbull 272-73, 277 (1913); 2 The Diary of Gideon Welles 489 (1911). Moreover, the Republicans' support of civil rights enforcement involved political risks that, to some extent, rendered their unyielding support of the Civil Rights Act of 1866 and the fourteenth amendment an act of courage. Despite the Northern Republicans' general approval of black freedom, white Americans, North and South, were racists. With the ostensible leader of their party breaking from them because of their policy on civil rights enforcement and appealing to racial animosities, Congressional Republicans worried that they might face defeat in the 1866 elections if the North supported the President. See Letter from N. B. Bateman to Lyman Trumbull (Jan. 15, 1866), Letter from C.H. Ray to Lyman Trumbull (Feb. 7, 1866), collected in 63 Lyman Trumbull Papers (collection available in Library of Congress); Letter from Henry L. Dawes to his wife (Mar. 31, 1866), collected in Henry L. Dawes Papers (collection available in Library of Congress); 2 J. Blaine, supra note 28, at 180.

64 The breadth of congressional Republican support for civil rights protection is reflected in the overwhelming majorities with which both houses of Congress passed the Civil Rights Act of 1866, ch. 31, 14 Stat. 27. The Senate originally passed the bill by a vote of 33 to 12, and later enacted it over the President's veto by a vote of 33 to 15. Journal of the Senate, 39th Cong., 1st Sess. 132, 317 (1866); Cong. Globe, 39th Cong., 1st Sess. 1809 (1866). The votes in the House were 111 to 38 with 34 not voting and 122 to 41 with 21 not voting. Cong. Globe, 39th Cong., 1st Sess. 1367, 1861 (1866).

Only one Republican Senator, James H. Lane of Kansas, changed his vote under presidential pressure. This defection was described as an act of "moral cowardice" by the Cincinnati Commercial, Apr. 13, 1866, at 2. Lane's action "cost him his confidential intercourse with his former associates in the Senate, and brought upon him stinging manifestations of disapproval from his constituents." 3 C. Schurz, supra note 48, at 238. Deeply affected when rejected by his Senatorial colleagues, Lane committed suicide on July 11, 1866. Id.; 2 J. Blaine, supra note 28, at 185. Republican Senator James Doolittle of Wisconsin did not vote when the Civil Rights Bill was originally enacted by the Senate, but did vote to sustain the President's veto. This act prompted the Wisconsin legislature to pass a joint resolution that censured him for disregarding the express instructions of his state constituents and demanded his resignation. See Joint Resolutions of the Legislature of Wisconsin, Declaring It to Be the Duty of
stood for and continued to be identified with the Union's Civil War struggle for republican government and human rights. Consequently, political self-interest, ideology, and moral principle fortuitously coincided with and reinforced one another. Republican liberalism and racism may have precluded other actions, such as land distribution, that in retrospect might have been more beneficial to blacks. However, the fortunate blending of self-interest and ideology made possible a Northern Republican commitment to the protection of the fundamental rights of the freedmen through law.

D. Objectives of Civil Rights Enforcement

Guaranteeing civil rights of black Americans did not threaten the social and economic status of white Northerners in 1866 as it has in our own times. First, Northern whites perceived the problem of civil rights enforcement as essentially a Southern problem. In addition, although Republicans were virtually unanimous in their support for the protection of the civil rights of blacks, they divided over the question of securing blacks' voting rights. Ultimately, suffrage was intentionally excluded

Senator Doolittle to Resign the Office of United State Senator, S. Misc. Doc. No. 101, 39th Cong., 1st Sess. (1866). The legislature declared that his act "was a desertion of the cause of human rights and republican government" for which the Civil War had been fought, and rendered him "totally unworthy to occupy any position representing a free people." Id. Senator Doolittle did not resign, but was replaced by Matthew H. Carpenter when his term expired.


See Cong. Globe, 39th Cong., 1st Sess. 39-41, 603 (1865-1866) (statement of Sen. Wilson); id. at 41-42 (1865) (statement of Sen. Sherman); id. at 476, 538, 603, 605, 1759-60 (1866) (statement of Sen. Trumbull); id. at 503 (statement of Sen. Howard); id. at 573 (statement of Sen. Henderson); id. at 575, 577 (statement of Sen. Davis); id. at 602-03 (statement of Sen. Lane); id. at 1151-53 (statement of Sen. Thayer); id. at 1117-19, 1294 (statement of Rep. Wilson); id. at 1123 (statement of Rep. Rogers); id. at 1123-24 (statement of Rep. Cook); id. at 1156 (statement of Rep. Eldridge); id. at 1157 (statement of Rep. Thornton); id. at 1158-60 (statement of Rep. Windom); id. at 1262-65 (statement of Rep. Broomall); id. at 1267 (statement of Rep. Raymond); id. at 1270 (statement of Rep. Kerr); id. at 1291 (statement of Rep. Bingham); id. app. at 158 (statement of Rep. Delano); N.Y. Tribune, Mar. 1, 1866, at 4; id., Feb. 5, 1866, at 4; Chicago Tribune, Jan. 12, 1866, at 2; 2 Nation 422-23 (1866); 2 J. Blaine, supra note 28, at 173; 3 C. Schurz, supra note 48, at 228-31; 2 Memoirs of Gustave Koerner, 1809-1896, supra note 57, at 458. Indeed, racist fears of black migration to the North paradoxically provided additional incentives for Northerners to support legislation that would secure the civil rights of blacks in the South. See Woodward, supra note 21, at 2. See generally V. Voegeli, supra note 21 (describing profound racism of midwesterners and development of their ideas regarding blacks and black civil rights during Civil War).

For two good discussions of the political aspects of the suffrage issue, see W. Gillette, The Right to Vote (1965); Cox & Cox, Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography, 33 J.S. Hist. 303 (1967). For the views expressed in Congress on the issue of black suffrage, see Cong. Globe, 39th Cong., 1st Sess. 476, 599 (1866) (statement of Sen. Trumbull); id. at 704 (statement of Sen. Fessenden); id. at 768 (statement of Sen. Johnson); id. at 2890 (statement of Sen. Cowan); id. at 3039 (statement of
from the rights that the fourteenth amendment and Civil Rights Act of 1866 were to guarantee.\textsuperscript{68} The exclusion of suffrage thus helped to reduce political opposition to the measures by neutralizing racist opposition within the Republican party. Consequently, even erstwhile racists rallied to the cause of civil rights enforcement.\textsuperscript{69}

The exclusion of suffrage from the framers’ definition of civil rights was also dictated by prevailing legal opinion. Legal thinkers defined suffrage as a political privilege to be exercised by competent individuals, not as a natural right of free men.\textsuperscript{70} Thus, principles of law buttressed political expediency. Most Congressmen and the general public accepted this distinction and believed that suffrage should not be included among the

\textsuperscript{68} Cong. Globe, 39th Cong., 1st Sess. 1291, 1294-96, 1366-67 (1866). The citations to the Congressional Globe in note 67 supra evince the framers’ intention to exclude suffrage from the civil rights protection they intended to provide in the Civil Rights Act of 1866 and fourteenth amendment. See also notes 70-73 and accompanying text infra (arguing that exclusion of suffrage was dictated by prevailing legal opinion).

\textsuperscript{69} One of Ohio Republican Senator John Sherman’s constituents wrote to complain about “this everlasting tinkering about the Negroes.” He informed Sherman that Ohio Republicans “despise[d]” the radical doctrine of black suffrage. Letter from L.M. Workman to John Sherman (Apr. 1, 1866), collected in 98 John Sherman Papers (collection available in Library of Congress). Yet, three days later he wrote Sherman about the President’s veto of the Civil Rights Bill. He affirmed his opposition to black suffrage by approving the veto if the Civil Rights Bill granted blacks the right to vote. But he added,

\begin{quote}
If its [sic] simply giving them all other rights such as holding property [sic] making contracts, suing [sic] & being sued; & the right of testifying in courts, etc., etc., I think he has done very wrong in vetoeing [sic] the Bill; & I hope Congress will pass it over his head . . . .
\end{quote}

Letter from L.M. Workman to John Sherman (Apr. 4, 1866), collected in 98 John Sherman Papers, supra; see also Letter from Schuyler Colfax to Justin S. Morrill (Apr. 23, 1866), collected in Justin S. Morrill Papers box 54 (collection available in Library of Congress); Letter from Jason Marsh to Lyman Trumbull, (Jan. 8, 1866), collected in 63 Lyman Trumbull Papers (collection available in Library of Congress); Letter from C.H. Ray to Lyman Trumbull (Feb. 2, 1866), collected in 17 Lyman Trumbull Papers, supra.


However, in Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 2,230), Justice Bushrod Washington included suffrage within the meaning of the privileges and immunities secured by the comity clause of the Constitution, which he noted as securing fundamental rights. Chancellor Kent similarly included suffrage within the meaning of the privileges and immunities secured by the comity clause. See 2 J. Kent, Commentaries on American Law 85 (O. Holmes 12th ed. 1873). In light of Kent’s discussion of suffrage qualifications, see 1 id. at 235-39, he probably meant that a citizen had the right to be treated equally by the state in enjoying the privileges of voting and holding office. Thomas Cooley, however, asserted that suffrage was not a natural right, but that access to the franchise should be denied only for lack of capacity or moral fitness. T. Cooley, supra, at 29.
rights directly secured by the fourteenth amendment and the Civil Rights Act of 1866. Although opponents of federal civil rights protection argued for their own political purposes that these measures secured political privileges, proponents of the measures adamantly insisted that they did not.

The objectives that were positive goals of the Civil Rights Act of 1866 and the fourteenth amendment had little potential for racist backlash. Congress was not attempting to integrate American society. The objectives of civil rights protection in 1866 must be distinguished from the goals of the recent civil rights movement to appreciate how elemental the earlier objectives were. In 1866, Congress sought only to establish and enforce in law the status and rights of blacks as freemen, a status Southern whites had refused to recognize. This modest objective was an expression of most Americans’ sense of fundamental justice.

More specifically, Congress did not try to integrate housing; rather, it attempted to establish in law and enforce with federal authority the right of blacks to buy, own, rent, and sell property under the same conditions as white citizens. Nor did Congress try to end employment discrimination. It tried to secure for blacks the right to enforce employment contracts in federal and state courts. Most importantly, however, Congress sought to protect Southern blacks (and whites) from corrupt law enforcement practices that allowed crimes against them to go unpunished, and subjected them to arrest, trial, and conviction of crimes by hostile and prejudiced sheriffs, judges, and juries. In order to provide

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71 In addition to the citations to the Congressional Globe in notes 67-68 supra, see Cong. Globe, 39th Cong., 1st Sess. 606, 1757 (1866) (statement of Sen. Trumbull); id. app. at 103 (statement of Sen. Yates); 3 Nation 430-31 (1866); Chicago Tribune, Feb. 4, 1866, at 2, col. 1; 2 The Diary of Gideon Welles, supra note 63, at 489. However, some proponents of civil rights enforcement believed that suffrage was an inalienable right of citizenship. See Cong. Globe, 39th Cong., 1st Sess. 768 (1866) (statement of Sen. Wade); id. at 1058 (statement of Rep. Kelley); id. at 1291 (statement of Rep. Bingham); id. at 2462 (statement of Rep. Garfield). Senator Trumbull privately conceded to Congressman Bingham that he thought that the privileges of voting and holding public office were civil rights. Id. at 1291.


73 See id. at 1255 (statement of Sen. Wilson); id. at 1757 (statement of Sen. Trumbull); id. at 3027 (statement of Sen. Sumner); id. at 3039 (statement of Sen. Howard); id. at 1151 (statement of Rep. Thayer); id. at 1263 (statement of Rep. Broomall); id. at 1294 (statement of Rep. Wilson); id. at 1832 (statement of Rep. Lawrence). Indeed, the primary reason that the fourteenth amendment was criticized by Radical Republicans as too moderate or conservative was that it did not provide the same protection for voting rights that it did for civil rights. See, e.g., id. at 673-75, 783-84 (statement of Sen. Sumner).

74 See N.Y. Times, Mar. 31, 1866, at 4, col. 2; text accompanying notes 126-47 infra. For examples of the kinds of civil rights infringements that Northern Republicans sought to redress, see sources cited in notes 51-62 supra; see also N.Y. Times, Jan. 4, 1866, at 4, col. 4 (reporting that Southern legislatures had passed laws prohibiting blacks from owning land).

75 Congressman Wilson summed up Congress's intent when he said, "I would merely en-
these elemental guarantees of justice, congressional Republicans pro-
posed and enacted the fourteenth amendment and the Civil Rights Act of
1866. They believed that these laws would secure the natural rights of
free men—the rights to life, liberty, and property—as the basic civil
rights of United States citizens.

III
THE REPUBLICAN THEORY OF NATIONAL SOVEREIGNTY
AND CONGRESSIONAL CIVIL RIGHTS
ENFORCEMENT AUTHORITY

A. The Primacy of National Citizenship and Civil Rights
Enforcement Authority

The Reconstruction amendments and the statutes enacted to enforce
them were the Northern Republican controlled Congress’s translation of
the North’s Civil War victory into law. Through these amendments and
statutes, Northern Unionists imposed upon the nation their view of na-
tional supremacy: sovereignty centered in the nation, the primacy of citi-
zens’ allegiance to the nation, the primacy of national citizenship, and
the primacy of national authority to secure and enforce the civil rights of
United States citizens. Republican senators and congressmen repeatedly asserted these
views. Senator Richard Yates of Illinois, for example, unequivocally de-
clared that the Civil War had established the supremacy of national au-
thority over states’ rights and the constitutional authority of Congress to
enforce the rights of American citizens throughout the nation. Congres-
sman John A. Bingham, the “father” of the fourteenth amendment,
similarly proclaimed that the preservation of “American nationality” re-
quired national protection of fundamental rights. Congressman John M.
Broomall, noting the link between sovereignty and the national gov-
ernment’s authority to enforce the fundamental rights of its citizens, sug-

force justice for all men; and this is lawful, it is right, and it is our bounden duty.” Cong.
Globe, 39th Cong., 1st Sess. 1118 (1866). Other legislators made similar points. See id. at 474
(statement of Sen. Trumbull); id. at 2798 (statement of Sen. Stewart); id. at 3032-35 (statement
of Sen. Henderson); id. at 5 (statement of Rep. Colfax); id. at 1159 (statement of Rep.
Windom); id. at 2535 (statement of Rep. Eckley); Letter from Lyman Trumbull to Mrs. Gary
(June 27, 1866), collected in 67 Lyman Trumbull Papers (collection available in Library of
Congress); O. Hollister, Life of Schuyler Colfax 270-72 (1866); A. Moore, supra note 48, at
284.
76 U.S. Const. amend. XIV; ch. 31, 14 Stat. 27; see L. Cox & J. Cox, supra note 22, at 204-
07, 209-12, 223-28.
77 For another discussion reaching a similar conclusion, see J. Kettner, supra note 25, at
334-51.
79 Id. at 1034, 1090.
gested that the United States government would cease to be a government if it lacked the requisite authority to protect the rights of its citizens.\textsuperscript{80} Having declared that the authority to secure the rights of citizens "belongs to every sovereign Power, and is essentially a subject of national jurisdiction,"\textsuperscript{81} Congressman William Lawrence transformed this point of political theory into a matter of practical necessity when he warned that congressional protection of civil rights was "essential to preserve the national life and the means of national existence."\textsuperscript{82}

The Republican belief in congressional enforcement of civil rights paralleled the predominant antebellum theory of federal citizenship.\textsuperscript{83} Some of the most eminent antebellum jurists and legal theorists suggested that the status and fundamental rights of freemen were those of United States citizenship. John Codman Hurd, for example, made an exhaustive study of citizenship before the Civil War.\textsuperscript{84} He concluded that the law of individual rights for persons of white or European race, which, in the colonies, was maintained by the national or imperial authority, operating equally in every part of the empire, and which maintained those rights in the case of any such person, even against the local authority of any colony or several jurisdiction,

\textsuperscript{80} Id. at 1262-63.

\textsuperscript{81} Id. at 1832.

\textsuperscript{82} Id. at 1836. The Philadelphia American urged ratification of the fourteenth amendment in an editorial emphasizing that the need for the primacy of United States citizenship was revealed by the Civil War.

\begin{quote}
If there be one lesson written in bloody letters by the war, it is that the national citizenship must be paramount to that of the State. We propose to make it so . . . . This [citizenship] provision is one of the most vital principles developed by the war. Without it we shall inevitably be exposed to new wars of secession and State nullification.
\end{quote}


Governor Lucius Fairchild transmitted a copy of the proposed fourteenth amendment to the Wisconsin Legislature on January 10, 1867, with a letter urging ratification of the amendment "because, in view of the terrible events of the past five years, we deem these guarantees necessary to the life of the nation, and we insist that those who saved that life have an undeniable right to demand all guarantees essential to its future preservation." Reprinted in unidentified newspaper, collected in Scrapbook on the Fourteenth Amendment, supra, at 63. The New York Times printed a letter by "Madison" that urged ratification of the fourteenth amendment because "[o]ur Government . . . will never be complete, as a great Republic, until it clearly defines citizenship and protects every man entitled to the name of American citizen, wherever upon earth he may lawfully be . . . . The theory of State allegiance to the exclusion of national allegiance is now forever exploded." N.Y. Times, Nov. 15, 1866, at 2, col. 1.

\textsuperscript{83} See text accompanying notes 84-106 infra; J. Kettner, supra note 25, at 258-61, 287, 311-33.

\textsuperscript{84} See J. Hurd, supra note 41.
was absorbed into national law. Consequently, civil rights were enforceable by the national government as rights of United States citizenship.

According to Hurd, the comity clause of the Constitution incorporated this "national or imperial" citizenship into United States citizenship and national law. Although Hurd recognized that many authorities believed that the specific rights of national citizenship were defined by the states, he reasoned that "the general character of the Constitution," as well as other authority, suggested that a national standard of fundamental rights existed that could not be denied by any state to any citizen. Hurd posited two classes of rights: fundamental, inalienable rights that comprised the rights of United States citizenship, and state conferred privileges that were not fundamental rights and therefore did not require national uniformity. The fundamental rights were enforceable throughout the nation by the federal courts.

In support of this view, Hurd pointed to two opinions authored by Supreme Court Justices. In *Dred Scott v. Sanford*, one of the most notorious decisions in Supreme Court history, Chief Justice Roger B. Taney declared that black Americans could never become citizens of the United States. Taney was forced to this position by the logic of his constitutional analysis: his interpretation of the privilege of United States citizenship, the rights secured by the privileges and immunities clause of article IV, section 2, and the national guarantee of fundamental rights secured by the fifth amendment. Most scholars have overlooked this aspect of Taney's opinion and have thus missed a critical part of the constitutional theory he expressed in *Dred Scott*.

Taney's theory of citizenship and rights was essentially the same as Hurd's. If free blacks were admitted to United States citizenship, the comity clause would guarantee them the fundamental rights of free men. The Constitution would thereby bar the states from denying free blacks the status and rights of citizens. Indeed, the Constitution would require the states to recognize free blacks as full citizens and to secure to

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85 2 id. at 376.
86 U.S. Const. art. IV, § 2.
87 See 2 J. Hurd, supra note 41, at 342, 352-53.
88 2 id. at 375-76.
89 2 id. at 354-55.
91 60 U.S. (19 How.) 393, 404 (1857).
92 U.S. Const. art. IV, § 2.
93 Id. amend. V.
94 See text accompanying notes 80-82 supra.
95 See *Dred Scott*, 60 U.S. (19 How.) at 422-23.
them the fundamental rights that comprised the privileges and immunities of the comity clause.

However, Taney believed that the founders had not intended that blacks be granted the status of citizens. In addition, he interpreted the fifth amendment as a national guarantee of life, liberty, and property which secured to slaveholders a property right in their slaves. Therefore, he declared unconstitutional the Compromise of 1820 in which Congress had statutorily excluded slavery from the Louisiana Territory and held that the Constitution secured a slaveholder's property right in his slaves throughout the United States. Having adopted this theory of United States citizenship and rights which the Constitution secured to citizens, Taney would have had to concede that the fifth amendment and the comity clause guaranteed these fundamental rights to blacks if they enjoyed the status of United States citizenship. Indeed, because the fifth amendment speaks of persons and not just citizens, the legality of slavery would have been in doubt under Taney's theory of nationally enforceable constitutional rights if black Americans were recognized as members of the polity. Taney observed that

if persons of the African race are citizens of a State, and of the United States, they would be entitled to all of these privileges and immunities in every State, and the State could not restrict them; for they would hold these privileges and immunities under the paramount authority of the Federal Government, and its courts would be bound to maintain and enforce them, the Constitution and laws of the State to the contrary notwithstanding.

Taney concluded that blacks were "not included, and were not intended to be included, under the word 'citizens' in the Constitution, and [could], therefore, claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States." In short, blacks "had no rights which the white man was bound to respect; and . . . the Negro might justly and lawfully be reduced to slavery for his benefit.

In addition to Dred Scott, Hurd relied on Corfield v. Coryell, an 1823 circuit court opinion by Justice Bushrod Washington that defined the privileges and immunities secured to United States citizens under the comity clause. Justice Washington declared that privileges and immuni-

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96 Id. at 450-52. This is the earliest judicial affirmation of the theory that became known as substantive due process.
97 Id. at 452.
98 Id. at 423.
99 Id. at 404.
100 Id. at 407.
ties are "those [rights] which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union." The fundamental rights secured by the comity clause belonged to all citizens of the several states, and no state could deny these rights to citizens of any other state. These fundamental rights of United States citizenship were distinct from other rights that states might confer upon their own citizens. Since the state-conferred rights were not fundamental, states were not required to extend them to citizens of other states.

Hurd also suggested that his view of federal citizenship was consistent with the views of both Justice Joseph Story and Chancellor James Kent. Although Justice Story did interpret the comity clause as creating a general or national citizenship that entitled citizens of the United States to the same privileges and immunities as citizens of a particular state, he also implied that the state determined these rights. Nevertheless, when introducing his Civil Rights Act to the Senate, Senator Lyman Trumbull quoted Justice Story's interpretation of the comity clause in arguing that the clause conferred on citizens a "'general citizenship'" that secured to all citizens "[s]uch fundamental rights as belong to every free person."

Chancellor Kent distinguished between the privileges and immunities secured by the comity clause, which he equated to the fundamental rights to life, liberty, and property, and the rights of state citizenship. Kent interpreted the comity clause both to require national uniformity in fundamental rights and to ensure that citizens could enjoy these rights regardless of the state of their residence. Kent also interpreted the comity clause to confer upon United States citizens a right tantamount to the equal protection of state laws, which would require a state to extend the privileges it conferred upon its own citizens to all other citizens of like description.

This section has revealed the existence of a significant body of legal authority before the Civil War suggesting that the rights of national citizenship were those civil rights that were fundamental in nature and that the rights of state citizenship were those privileges that were not funda-

102 Id. at 551.
103 For example, in Corfield, the right in question was the right to gather oysters in the state's rivers, which New Jersey had reserved to its own citizens.
106 2 J. Kent, Commentaries on American Law *71-72.
107 Id.
mental. States could therefore choose to extend or not extend these rights of state citizenship to their citizens. However, there was a basic weakness in the national government's authority to secure the rights of national citizenship under the comity clause even when that clause was interpreted broadly. The theory underlying this clause presumed that a state would secure the fundamental rights of its own citizens impartially, but that it might discriminate against a citizen of another state. Consequently, national authority to secure basic rights under the comity clause was applicable only when a citizen's rights were infringed in a state other than that of his state citizenship. The national government had no authority to secure citizens' rights under the comity clause if they were infringed within or by the state in which he was a state citizen.

Moreover, in *Barron v. Baltimore*, the Supreme Court had held that the fifth amendment and presumably the entire Bill of Rights were limitations upon the power of the national government, not delegations of affirmative authority to secure fundamental rights. Consequently, neither the comity clause nor the Bill of Rights gave the national government authority to secure the fundamental rights of its citizens within the state of the citizens' residence, even under the broad antebellum nationalist view of citizenship.

This constitutional deficiency was one of the problems the framers of the fourteenth amendment and Civil Rights Act of 1866 sought to remedy. Congressman James Wilson made this point as floor manager of the Civil Rights Act when he introduced the bill in the House.

If the States would all observe the rights of our citizens, there would be no need of this bill. If the States would all practice the constitutional declaration, that

The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, and enforce it, as meaning that the citizen has the right of 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; to claim the benefit of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the State; to take, hold, and dispose of property, either real or personal; to be exempt from higher taxes or impositions than are paid by the other citizens of the State.

we might very well refrain from the enactment of this bill into law. If they would recognize that 'general citizenship' (Story on the Constitution, volume two, page 604) which under this clause entitles every citizen to security and protection of personal rights, we might safely

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withhold action. And if, above all, Mr. Speaker, the States should admit, and practice the admission, that a citizen does not surrender these rights because he may happen to be a citizen of the State which would deprive him of them, we might, without doing violence to the duty devolved upon us, leave the whole subject to the several States. But, sir, the practice of the States leaves us no avenue of escape, and we must do our duty by supplying the protection which the States deny.109

Opponents of Congressional civil rights enforcement acknowledged this objective when they complained that the Civil Rights Act was intended to protect the rights of every citizen even “where that citizen is domiciled in the State in which he was born, and when he has no purpose to leave and is not in the act of leaving that State to go into another.”110

B. The Natural Law Basis of Congressional Republican Constitutional Theory

After the Civil War, some congressional Republican supporters of civil rights enforcement embraced the antebellum radical abolitionist theory of constitutionalism. They argued that the national government had always possessed the authority to secure the natural rights of American citizens because the function of securing these natural rights is the primary purpose of all free governments.111 For example, Congressman


110 Id. at 595 (statement of Sen. Davis).

111 See Cong. Globe, 39th Cong., 1st Sess. 1062 (1866) (statement of Sen. Kelley); id. at 1757 (statement of Sen. Trumbull); id. at 1832-33 (statement of Sen. Lawrence); id. at 1293-94 (statement of Sen. Shellabarger); id. at 1118-19 (statement of Rep. Wilson); id. at 1159 (statement of Rep. Windom); id. at 1262-63 (statement of Rep. Broomall). For a discussion of antebellum anti-slavery and abolitionist constitutionalism, see W. Wiecek, supra note 41. Jacobus tenBroek has also argued that the abolitionists’ constitutional theories concerning natural rights, the purpose and function of government, and equal protection of the laws provided the theoretical grounding for the Radical Republicans’ understanding of the thirteenth and fourteenth amendments. See J. tenBroek, Equal Under Law 176-79, 181, 188-89, 191-97, 209-11 (rev. enlarged ed. 1965); tenBroek, Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment, 39 Calif. L. Rev. 171 (1951). However, tenBroek does not adequately show that those theories were expressed by Radical Republicans or that moderate Republicans, the group that comprised the majority of Republicans that controlled Congress and was primarily responsible for the adoption of these amendments, shared abolitionists’ constitutional doctrines. Howard Jay Graham also examined the antislavery background of the fourteenth amendment and more convincingly demonstrated the influence of abolitionist concepts, such as due process of law and equal protection of the law, on the Radical Republicans’ understanding of citizenship as incorporating inalienable rights referred to in the Declaration of Independence. See Graham, Our “De-
Henry Wilson declared that "citizens of the United States, as such, are entitled to possess and enjoy the great fundamental civil rights which it is the true office of Government to protect."112 Thus, he reasoned that "possession of these rights by the citizen raises by necessary implication the power in Congress to protect them."113

Republicans derived this theory of national civil rights enforcement authority to a significant degree from the Declaration of Independence. In this document, Thomas Jefferson succinctly expressed the natural rights political theory which justified the American Revolution and provided the theoretical basis of American government.114 The Declaration of Independence states that free governments are established to secure to their citizens the inalienable rights of life, liberty, and property with which they are endowed by their Creator.115 Under this theory, the citizen gives his allegiance to the government in return for the government’s protection of the citizen’s fundamental rights.

While few in 1866 disagreed with this general theory, the critical question raised by American federalism was which government, the national or the state, possessed the primary power and responsibility for securing citizens’ fundamental rights. Congressional Republicans in 1866 attributed this governmental authority and responsibility to the national government. Thus, Congressman Wilson elaborated on the central thesis of the Declaration of Independence and applied it to Congress.

Before our Constitution was formed, the great fundamental rights which I have mentioned, belonged to every person who became a member of our great national family. No one surrendered a jot or tittle of those rights by consenting to the formation of the Government. . . . Upon this broad principle I rest my justification of this bill. I assert that we possess the power to do those things which Governments are organized to do; that we may protect a citizen of the United States against a violation of his rights . . . ; that this power permeates our whole system, is a part of it, without which the States can run riot over every fundamental right belonging to citizens of the United States; that the right to exercise this power depends upon no express delegation,
but runs with the rights it is designed to protect; that we possess the
same latitude in respect to the selection of means through which to
exercise this power that belongs to us when a power rests upon express
degregation; and that decisions which support the latter maintain the
former. And here, sir, I leave the bill to the consideration of the
House.\footnote{Cong. Globe, 39th Cong., 1st Sess. 1119 (1866).}

This view seemed so obvious to Congressman M. Russell Thayer
that he chided opponents of civil rights enforcement who denied Con-
gress possessed this authority.

\[D\]oes it not seem at the first blush to be a very singular proposition to
say that the United States under its Constitution have no rights to
guaranty to its own citizens, by positive law, those great fundamental
rights of citizenship which are enumerated in this bill . . . ? Would it
not be an extraordinary circumstance if the framers of the Constitution
had made a Constitution which was powerless to protect the citizens of
the United States in their fundamental civil rights, their rights of life,
liberty, and property? And yet to that position are these gentlemen
driven who deny the existence of any power which authorizes Con-
gress to pass this bill.\footnote{Id. at 1152.}

Even Maryland's Democratic Senator Reverdy Johnson conceded that
Congress had the power to protect the rights of all
\footnote{Id. at 530.}
citizens,\footnote{Id. at 1777. Senator Johnson was considered the leading constitutional authority in the
Senate during the Reconstruction era. He was also a Democrat from a former slave state.
For these reasons, his views concerning Congress's authority to enforce the fundamental rights
of Americans are particularly significant. Senator Johnson seems to have persisted in the view
that the fourteenth amendment delegated to Congress primary authority to enforce civil rights.
See R. Johnson, A Further Consideration of the Dangerous Condition of the Country, the
Causes Which Led to It, and the Duty of the People, by a Marylander (Baltimore 1867);
Senator Johnson's argument for the defense in United States v. Crosby, 25 F. Cas. 701
(C.C.D.S.C. 1871) (No. 14,893), reprinted in Proceedings in the Ku Klux Trials at Columbia,
S.C. in the United States Circuit Court, November Term, 1871, at 68-88 (1872). The proceed-
ings of these South Carolina Ku Klux Klan trials are also reprinted in S. Rep. No. 41, 42d
Cong., 2d Sess., pt. 5, at 1615-1990 (1872) [hereinafter KKK Report]; see also R.
Kaczorowski, supra note 1, at 124-25.}

Radical Republican Thaddeus Stevens of Pennsylvania, House floor
manager of the fourteenth amendment, expressed the same theory when
he introduced the proposal that became section one of the fourteenth
amendment. He described the provisions of this section as incorporating
the concept of liberty as it was defined in the Declaration of Indepen-
dence and the Bill of Rights. "I can hardly believe that any person can be
found who will not admit that every one of these provisions is just,"\footnote{Cong. Globe, 39th Cong., 1st Sess. 2459 (1866).}
Stevens declared. "They are all asserted, in some form or other, in our Declaration [of Independence] or organic law. But the Constitution limits only the action of Congress," he continued, "and is not a limitation on the States. This amendment supplies that defect . . . ."\footnote{121} Stevens's colleague from Pennsylvania, Congressman George F. Miller, also thought that section one was "so clearly within the spirit of the Declaration of Independence of the 4th of July, 1776, that no member of this House can seriously object to it."\footnote{122}

Similar comments were made in the Senate debates concerning the proposed fourteenth amendment. Senator Richard Yates of Illinois insisted that the Civil War had validated the Declaration of Independence's establishment of the equality of all men, and he interpreted the proposed amendment as incorporating this principle into the Constitution by conferring the "great and inalienable rights" of citizenship upon black Americans.\footnote{123} Senator Luke Poland of Vermont affirmed Yates's view of the amendment and described its clauses as "essentially declared in the Declaration of Independence and in all the provisions of the Constitution."\footnote{124} Like the Civil Rights Act, which Congress had just enacted into law, Senator Poland observed, this proposal manifested Congress's desire and intention to remove any doubt as to "the power of Congress to enforce principles lying at the very foundation of all republican government."\footnote{125}

\section*{C. The Thirteenth Amendment as the Positive Law Formulation of Natural Rights Legal Theory}

The Speaker of the House of Representatives, Schuyler Colfax of Indiana, opened the Thirty-ninth Congress in December 1865 by announcing that the protection of the natural rights of all American citizens was to be one of the major objectives of the forthcoming Congress.\footnote{126} Because he was one of the recognized leaders of congressional Republicans, Colfax's views were widely regarded as the principal statement of the Republicans' intentions regarding Reconstruction.\footnote{127} In a speech only a few weeks before he was to open Congress, Colfax had complained that President Andrew Johnson's reconstruction plan neglected the nation's commitment to secure the freedom of the former

\begin{footnotesize}
\begin{itemize}
\item[121] Id.
\item[122] Id. at 2510.
\item[123] Id. at 3037; Address by R. Yates, supra note 63, at 13.
\item[125] Id.
\item[126] Cong. Globe, 39th Cong., 1st Sess. 5 (1866).
\item[127] O. Hollister, supra note 75, at 269-79; A. Moore, supra note 48, at 284-86; 2 The Diary of Gideon Welles, supra note 63, at 385, 410.
\end{itemize}
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slaves. In the speech, he broadened this commitment to include the protection of the fundamental rights of all Americans as the promise and obligation arising from the Declaration of Independence. "[T]he Declaration of Independence must be recognized as the law of the land, and every man, alien and native, white and black, protected in the inalienable and God-given rights of life, liberty, and the pursuit of happiness."\textsuperscript{128} Colfax suggested that Congress had an even greater obligation to secure the freedom of the former slaves than that imposed by the Declaration of Independence to secure the rights of other Americans. President Abraham Lincoln in his Emancipation Proclamation not only freed the slaves, Colfax explained, "but [he] declared that the [national] Government would maintain that freedom."\textsuperscript{129} Maintaining this freedom, Colfax insisted, required that black Americans "be protected in their rights of person and property," for "they should be regarded now as free men of the Republic."\textsuperscript{130} Similar views were later expressed in the Senate.\textsuperscript{131}

Although the Declaration of Independence and the natural rights theory it expressed could be interpreted to outlaw slavery, American positive law provided legal protection to slaveholders and legally sanctioned the status of slaves as chattel.\textsuperscript{132} Thus, positive law starkly contradicted natural law. Chief Justice Roger B. Taney attempted to reconcile this contradiction by excluding blacks from the American polity and holding that blacks could never become citizens of the United States.\textsuperscript{133} This holding implicitly assumed that black Americans were subhuman; as a justification, the Court relied on the fact that blacks had historically possessed no rights.\textsuperscript{134} The Chief Justice reasoned, therefore, that blacks should be excluded from the protection of life, liberty, and property ostensibly guaranteed all Americans in the Declaration of Independence.\textsuperscript{135} The framers of the Civil Rights Act of 1866 thus needed a basis in positive law with which to overturn the Supreme Court's exclusion of blacks from the American guarantee of liberty. They found this basis in the

\textsuperscript{128} Address by S. Colfax (Nov. 18, 1865), quoted in O. Hollister, supra note 75, at 270-72 [hereinafter Address by S. Colfax].

\textsuperscript{129} Id.; see also Cong. Globe, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson) (recognizing inherent in freeing slaves and passing thirteenth amendment was national commitment to maintain freedom of former slaves); id. at 1151 (statement of Rep. Thayer) (noting Civil Rights Bill was "the just sequel to, and the proper completion of, that great measure of national redress which opened the dungeon doors of four million human beings").

\textsuperscript{130} Address by S. Colfax, supra note 128.

\textsuperscript{131} See Cong. Globe, 39th Cong., 1st Sess. 39 (1865) (statement of Sen. Wilson); id. at 42 (statement of Sen. Sherman); id. at 43 (statement of Sen. Trumbull); id. at 504 (1866) (statement of Sen. Howard); id. at 602 (statement of Sen. Lane).

\textsuperscript{132} See authorities cited in note 26 supra.

\textsuperscript{133} Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 404 (1857).

\textsuperscript{134} Id. at 407.

\textsuperscript{135} For a more detailed discussion of \textit{Dred Scott}, see text accompanying notes 91-103 supra.
thirteenth amendment. In arguing that an amendment that, on its face, only abolished slavery also constituted a delegation of congressional authority to secure civil rights, Republicans applied natural law principles to explain positive law. This legal reasoning is critical to our understanding of how supporters of congressional civil rights enforcement explained the purposes, meaning, and scope of the thirteenth and fourteenth amendments and the statutes they enacted to secure civil rights.

D. The Thirteenth Amendment as Positive Law Authority for Congressional Enforcement of Citizens' Rights

Congressional supporters of the Civil Rights Act of 1866 expressed their theory that the thirteenth amendment represented constitutional authorization for the congressional enforcement of civil rights early in the Thirty-ninth Congress, before the introduction of the bill that was to become the Act. In December 1865, before the thirteenth amendment was ratified, Senator Henry Wilson of Massachusetts introduced a bill to enforce the civil rights of the former slaves. The bill stated that any racially discriminatory laws and regulations in the former confederate states were null and void, and provided that anyone who attempted to enforce these laws was guilty of a misdemeanor and subject to a fine of not less than $500 nor more than $10,000 and imprisonment of between six months and five years. Senator Wilson found legal authority for this bill in the Emancipation Proclamation, reasoning that it had imposed an obligation on the federal government to maintain the freedom of the emancipated slaves.

Because the bill was based on the Emancipation Proclamation, it was limited in application to former slaves in those states that had been in rebellion. Thus, while Senator John Sherman of Ohio "sympathize[d] heartily with the purpose of the bill," he urged that it be postponed until the thirteenth amendment was ratified. Sherman explained that "[t]he moment the constitutional amendment is adopted, then our legislation on this subject may be general throughout the United States." Quoting the first section of the thirteenth amendment, which prohibits slavery, Sherman declared, "This section secures to every man within the United States liberty in its broadest terms."

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136 See text accompanying notes 147-53, 159-74 infra.
137 See Cong. Globe, 39th Cong., 1st Sess. 39 (1865). Senator Wilson's bill was the predecessor to the bill introduced by Senator Lyman Trumbull and enacted as the Civil Rights Act of 1866.
140 Id. at 41.
141 Id.
142 Id. (emphasis added).
which grants Congress the “power to enforce this article by appropriate legislation,” Sherman further declared, “Here is not only a *guarantee of liberty to every inhabitant* of the United States, but an express grant of power to Congress to secure this liberty by appropriate legislation.”\(^{143}\)

Senator Lyman Trumbull of Illinois, the person who was to author and, as Chairman of the Senate Judiciary Committee, serve as the Senate floor manager of the Civil Rights Bill, agreed with Senator Sherman’s interpretation of the thirteenth amendment. Indeed, he said that he had “reported from the Judiciary Committee the second section of the constitutional amendment for the very purpose of conferring upon Congress authority to see that the first was carried out in good faith.”\(^{144}\) Not only would the thirteenth amendment authorize Senator Wilson’s bill, asserted Trumbull, it would also authorize “a bill that [would] be much more efficient to protect the freedman in his rights.”\(^{145}\) Listing as rights essential to freedom the right to freedom of movement, to buy and sell property, and to enter into and enforce contracts, Senator Trumbull pre-saged his Civil Rights Bill.

I give notice that, if no one else does, I shall introduce a bill and urge its passage through Congress that will secure to those men every one of these rights: they would not be freemen without them. It is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his rights. These are rights which the first clause of the constitutional amendment meant to secure to all . . . \(^{146}\)

In later urging the Senate to pass his Civil Rights Bill, Senator Trumbull explained that the thirteenth amendment “declared that *all persons in the United States* should be free. This measure is *intended* to give effect to that declaration and *secure to all persons within the United States* practical freedom.”\(^{147}\)

Noting that “[t]here is very little importance in the general declara-tion of abstract truths and principles unless they can be carried into ef-fect,”\(^{148}\) Senator Trumbull, in an obvious reference to the Declaration of Independence, queried:

Of what avail was the immortal declaration “that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness,” and “that to secure these rights Governments are instituted among

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\(^{143}\) Id. (emphasis added).

\(^{144}\) Id. at 43.

\(^{145}\) Id.

\(^{146}\) Id.

\(^{147}\) Id. at 474 (1866) (emphasis added).

\(^{148}\) Id.
men,"... And of what avail will it now be that the Constitution of the United States has declared that slavery shall not exist, if in the late slaveholding States laws are to be enacted and enforced depriving persons of African descent of privileges which are essential to freemen? Implicitly equating "freeman" with "citizen," he explained that his civil rights bill was intended to secure the liberty which a person enjoys in society... [T]he liberty to which every citizen is entitled, that is the liberty which was intended to be secured by the Declaration of Independence and the Constitution of the United States originally, and more especially by the Amendment which has recently been adopted.

Although the framers of the Civil Rights Bill intended blacks to be its primary beneficiaries, they were not the only intended beneficiaries. The Civil Rights Bill, Senator Trumbull explained, "applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights." People both in and out of Congress understood that the Civil Rights Act of 1866 was intended to enforce and protect the rights of white citizens as well as black citizens.

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149 Id. (quoting the Declaration of Independence para. 2 (U.S. 1776)).
150 Id.
151 Id.
152 Id. at 599. These comments suggest that when the framers said "all people" shall enjoy equal rights, they meant to protect all men.
153 In an editorial concerning the Civil Rights Bill, the Philadelphia Evening Bulletin commented approvingly, "Congress has done nobly in seeking to secure to the lately emancipated race, as well as to the oppressed white at the South, the fullest advantages which result from the victory of the Union arms over the forces of the Rebellion." Philadelphia Evening Bull., Mar. 30, 1866, collected in Scrapbook on the Civil Rights Bill, supra note 59, at 47. Senator Trumbull expressed the same views in a speech to the Illinois Assembly one day after he was re-elected to the United States Senate in the fall of 1866. He explained that his Civil Rights Act "was intended as a practical rights measure, for the protection in his equal rights of every human being in the land, no matter from what quarter of the globe he or his ancestors may have come, or what color may have been stamped upon his face by a European or an African line." Unidentified newspaper clipping, n.d., collected in Scrapbook on the Civil Rights Bill, supra note 59, at 132. He explained that "[i]t was the generally received opinion that, after the adoption of the constitutional amendment abolishing slavery, all native-born persons were citizens.... [Therefore,] every inhabitant of the land has secured to him all the rights pertaining to citizenship." Id. (emphasis added). Contemporary newspaper articles confirm that the public perceived Republican supporters of both the Civil Rights Act and the fourteenth amendment to be securing the rights of all Americans, not just black Americans. See, e.g., Philadelphia Am. & Gazette, Apr. 7, 1866, collected in Scrapbook on the Civil Rights Bill, supra note 59, at 79; Philadelphia N. Am., Apr. 7, 1866, collected in Scrapbook on the Civil Rights Bill, supra note 59, at 78; N.Y. Evening Post, Apr. 2, 1866, collected in Scrapbook on the Civil Rights Bill, supra note 59, at 61-62; id., Mar. 28, 1866, collected in Scrapbook on the Civil Rights Bill, supra note 59, at 32; Baltimore Am., Mar. 23, 1866, collected in Scrapbook on the Civil Rights Bill, supra note 59, at 4; Philadelphia Press, n.d., 1866, collected in Scrapbook on the Civil Rights Bill, supra note 59, at 25-26; Rochester Democrat, n.d., collected in Scrapbook on the
The Civil Rights Act of 1866 was not a mere equal protection guarantee against racial discrimination. Rather, congressional Republicans defined in law a national citizenship that they believed to apply to all Americans, and they attempted to secure a corpus of fundamental rights that they were to enjoy as United States citizens.

The language of the Act shows that its framers intended it to define a uniform citizenship to all American citizens. Section one is a general definition of United States citizenship and the rights that Americans were to enjoy as citizens of the United States.

All persons born in the United States, and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such 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 as is enjoyed by white citizens . . . .

Congressional Republicans found a legal basis for this section in the thirteenth amendment, which in guaranteeing liberty to every inhabitant of the United States, also guaranteed to them the status and natural rights of freemen. They asserted that this constitutional guarantee of freedom delegated to Congress the authority to secure the status and natural rights of freemen to every inhabitant of the United States. Relying on


Supporters of the Civil Rights Act also intended that the protection of civil rights not be limited to the South, but rather extended to every citizen "throughout the entire domain of the Republic." Cong. Globe, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson); id. at 504-05 (statement of Sen. Johnson); id. at 595 (statement of Sen. Davis); id. at 603 (statement of Sen. Cowan); id. at 3035 (statement of Sen. Henderson); id. at 1120-21 (statement of Rep. Rogers); id. at 1263 (statement of Rep. Broomall); id. at 1291, 2542 (statements of Rep. Bingham); Letter from Jason Marsh to Lyman Trumbull (Jan. 8, 1866), collected in 63 Lyman Trumbull Papers (collection available in Library of Congress).

154 Ch. 31, § 1, 14 Stat. 27, 27 (1866).
155 Cong. Globe, 39th Cong., 1st Sess. 474, 605 (1866) (statements of Sen. Trumbull); id. at 503-04 (statement of Sen. Howard); id. at 570 (statement of Sen. Morrill); id. at 602 (statement of Sen. Lane); id. at 768 (statement of Sen. Johnson); id. at 1118 (statement of Rep. Wilson); id. at 1124 (statement of Rep. Cook); id. at 1152 (statement of Rep. Thayer); id. at 1159 (statement of Rep. Windom).
156 Id. at 474, 476, 527-28, 573-74, 600, 1756, 1780-81 (statements of Sen. Trumbull); id. at
this delegated authority, congressional Republicans enacted a statute to secure the status and rights of freemen to all persons born in the United States, conferring on them United States citizenship and granting them the rights Republicans believed to be incidental to life, liberty, and property.\textsuperscript{157}

The framers of the Civil Rights Act of 1866 and the fourteenth amendment were expressing in law the primacy of national citizenship. State citizenship was subordinated and made derivative of national citizenship. The individual's membership in the national body politic conferred upon him legal recognition of his status as freeman and secured to him the natural rights of freemen. Thus, Senator Trumbull declared:

To be a citizen of the United States carries with it some rights; and what are they? They are those \textit{inherent, fundamental rights which belong to free citizens as free men} in all countries such as the rights enumerated in this bill, and they belong to them in all the States of the Union. The rights of American citizenship mean something.\textsuperscript{158}

\begin{footnotesize}
\begin{enumerate}
\item See sources cited in note 156 supra. Indeed, many supporters of the Civil Rights Act of 1866 asserted that the Act, in conferring citizenship and the fundamental rights of citizenship, restated existing law under the thirteenth amendment. This position was taken by Supreme Court Justice Noah H. Swayne in United States v. Rhodes, 27 F. Cas. 785 (C.C. D. Ky. 1867) (No. 16,151), the first reported federal decision interpreting the constitutionality, meaning, and scope of the Civil Rights Act of 1866. See text accompanying notes 167-73 infra.
\item Cong. Globe, 39th Cong., 1st Sess. 1757 (1866) (emphasis added). Persons outside Congress also noted the significance of this congressional conferral of citizenship upon all native-born Americans. Referring to the citizenship clause of the fourteenth amendment, the Philadelphia American declared:

\textit{We have frequently urged that the primary importance of this portion of the amendment lies in the fact that it specifically places the citizenship of the Republic above that of the States, and makes every man, native or naturalized, a citizen of the United States, so}
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IV

JUDICIAL ENFORCEMENT OF PRIMARY NATIONAL CITIZENSHIP AND CIVIL RIGHTS UNDER THE CIVIL RIGHTS ACT OF 1866

Prior to 1873, all federal courts and most state appellate courts evaluating the Civil Rights Act of 1866 adopted the Republican theory of the thirteenth amendment and found the Act to be constitutional. The most significant of these federal court decisions, United States v. Rhodes, was the first officially reported. This decision was particularly significant because Supreme Court Justice Noah Swayne was apparently dispatched to Kentucky by Chief Justice Salmon Chase to sit as Circuit Court Justice and explain the authority for the statute. After consulting the statute's author, Senator Trumbull, Justice Swayne travelled to Louisville, Kentucky, and wrote an opinion that upheld the constitutionality of the Act and articulated the Republican theory of congressional civil rights enforcement authority.

Justice Swayne noted that the thirteenth amendment "trenches directly upon the power of the states and of the people of the states." Before the amendment was adopted, Justice Swayne explained, "the that hereafter there shall be no excuse for Rebels as that their paramount allegiance was due to their respective States.

Philadelphia Am., n.d., collected in Scrapbook on the Fourteenth Amendment, supra note 82, at 41.

The evidence presented in this section renders implausible the view that congressional Republicans acted in the belief that fundamental rights were derived from state citizenship, that the states therefore possessed exclusive plenary authority to define and enforce the fundamental rights of citizens, and that they consequently intended merely to extend a nominal United States citizenship to blacks that protected only the civil rights of blacks, and then only against racially discriminatory state action.

159 R. Kaczorowski, supra note 1, at 4-7; see United States v. Rhodes, 27 F. Cas. 785 (C.C.D. Ky. 1867) (No. 16,151); Slaughter-House Cases, 15 F. Cas. 649, 652-53, 655 (C.C.D. La. 1870) (No. 8,408), rev'd, 83 U.S. (16 Wall.) 36 (1873); In re Hobbs, 12 F. Cas. 262, 264 (C.C.N.D. Ga. 1871) (No. 6,550); State v. Washington, 36 Cal. 658, 664-65 (1869); Smith v. Moody, 26 Ind. 299, 307 (1866).

160 27 F. Cas. 785 (C.C.D. Ky. 1867) (No. 16,151).

161 The United States Attorney for Kentucky wrote to Senator Trumbull expressing concern that courts might interpret the statute's third section to deprive federal courts of jurisdiction over cases removed from state courts. See Letter from Benjamin H. Bristow to Lyman Trumbull (Jan. 7, 1867), collected in Benjamin H. Bristow Papers container 1 (collection available in Library of Congress). United States District Judge Bland Ballard wrote to Chief Justice Chase requesting that Justice Swayne, Circuit Justice for Kentucky, join Ballard to decide this constitutional challenge to the Civil Rights Act of 1866. See Letter from Bland Ballard to Salmon P. Chase (Aug. 16, 1866), collected in 97 Salmon P. Chase Papers (collection available in Library of Congress).

162 Professor Webb has suggested that Senator Trumbull and Justice Swayne conferred before Swayne left Washington for Kentucky. See R. Webb, Benjamin Helm Bristow: Border State Politician 56 (1969).

163 Rhodes, 27 F. Cas. at 788.
power [to define the status and rights of their citizens] belonged entirely to the states." The thirteenth amendment "reversed and annulled the original policy of the constitution." Referring to many of the legal and judicial authorities utilized by congressional Republicans, Justice Swayne equated the status of freeman to that of citizen and announced "that the emancipation of a native born slave by removing the disability of slavery made him a citizen."

Justice Swayne reasoned that the thirteenth amendment conferred upon all inhabitants of the United States the status and rights of citizenship. Citing English legal treatises and English and American common law, he asserted that "the term "citizen," as understood in our law, is precisely analogous to the term subject, in the [English] common law." Therefore, as "[a]ll persons born in the allegiance of the King are natural born subjects, ... [s]o all persons born in the allegiance of the United States are natural born citizens." There were historically two exceptions to this rule: the children of ambassadors of other countries and American-born slaves. By removing the disability of slavery, Justice Swayne concluded, the thirteenth amendment made the former slave a free inhabitant and citizen of the United States.

Justice Swayne further asserted that the thirteenth amendment did not secure only former slaves the status and natural rights of freemen. Rather, the amendment "throws its protection over every one, of every race, color, and condition within [the jurisdiction of the United States]. ... The constitution, thus amended, consecrates the entire territory of the republic to freedom."

Embracing the Republicans' nationalist theory of constitutional interpretation, Justice Swayne reached two significant legal conclusions with respect to the thirteenth amendment. First, because the "necessary and proper" clause of the Constitution expressly empowers Congress to exercise its constitutional powers, Swayne concluded, "the first section of the [thirteenth] amendment, [gave] congress ... authority to give full effect to the abolition of slavery." The second section, according to

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164 Id. at 790.
165 Id. at 794.
166 Id. at 791.
167 Id. at 789.
168 Id. at 788 (quoting State v. Manuel, 20 N.C. (4 Dev. & Bat.) 20, 26 (1839) (emphasis omitted in original)).
169 Id. at 789.
170 Id. at 793.
171 Id.
Swayne, "was added out of abundant caution . . . [and] authorize[d] congress to select, from time to time, the means that might be deemed appropriate to" secure the status and natural rights of freemen conferred and recognized by the amendment. 172 Second, since the thirteenth amendment recognized and secured to all Americans the status and rights of citizenship, "the provision in the act of Congress conferring citizenship was unnecessary, and is inoperative." 173 Nevertheless, in thus interpreting the thirteenth amendment as a guarantee of the status and natural rights of freemen, Justice Swayne wrote that he had "no doubt of the constitutionality of the act in all its provisions," 174 which he understood Congress to have enacted to effectuate the amendment's guarantee of liberty.

While United States v. Rhodes was a particularly significant federal decision, it is also significant that every other federal judge who considered the constitutionality of the Civil Rights Act of 1866 upheld it. 175 Indeed, Justice Swayne was not the only Supreme Court Justice to interpret the thirteenth amendment as a constitutional delegation of congressional authority to secure the status and civil rights of Americans. Chief Justice Salmon Chase, for example, upheld the statute's constitutionality in an 1867 decision that held that the thirteenth amendment "interdicts slavery and involuntary servitude . . . and establishes freedom as the constitutional right of all persons in the United States." 176 Justice William Strong, only weeks before the Supreme Court's decision in the Slaughter-House Cases, 177 similarly held that the amendment conferred upon all persons the constitutional right to personal liberty, and upon Congress the requisite authority to secure this right. 178 Finally, even after the

172 Id.
173 Id. at 789; see also Smith v. Moody, 26 Ind. 299, 307 (1866) (noting that Civil Rights Act of 1866 "[i]s[o] far as it defines . . . citizenship is declaratory. There is no attempt to enlarge or abridge the right of citizenship.").
174 Rhodes, 27 F. Cas. at 794.
175 Indeed, even the United States Supreme Court found the Act constitutional in a decision that did not articulate a theory of congressional civil rights enforcement authority. See Blyew v. United States, 80 U.S. (13 Wall.) 581 (1871). The Court, however, addressed the issue of national civil rights enforcement authority in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). For an analysis of Blyew, see R. Kaczorowski, supra note 1, at 135-43.
176 In re Turner, 24 F. Cas. 337, 339 (C.C.D. Md. 1867) (No. 14,247). In Turner, Chief Justice Chase applied the Civil Rights Act to void a private apprenticeship indenture between a black girl and her former master. The legality of the indenture was challenged because it did not provide the girl with financial and educational benefits to which white apprentices were entitled under Maryland indenture statutes. The Chief Justice voided the indenture contract on the ground that it failed to give the girl the "full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." Id. at 339. The Chief Justice thus applied the Act to void a contract between two private parties who did not conform to state law. Id. at 339-40.
177 83 U.S. (16 Wall.) 36 (1873).
178 See United States v. Given, 25 F. Cas. 1324, 1325 (C.C.D. Del. 1873) (No. 15,210). In Given, Justice Strong was joined by United States District Judge Edward Bradford, who pub.
Supreme Court’s *Slaughter-House* decision, Justice Joseph P. Bradley insisted that the thirteenth amendment conferred upon Congress “the power not only to legislate for the eradication of slavery, but the power to give effect to this bestowment of liberty.”

State courts also assessed the constitutionality of the Civil Rights Act of 1866. The most comprehensive and explicit articulation of the nationalist theory by a state appellate court was the California Supreme Court’s 1869 decision in *State v. Washington*, which upheld the constitutionality of the Act. The majority held that the thirteenth amendment, in abolishing slavery, established freedom as the condition of all inhabitants of the United States and conferred upon those who were born or naturalized in the United States the status of citizen. This secured to them personal liberty and security, and all of the rights essential to liberty. Defining the civil rights secured by the Civil Rights Act as “the absolute rights of persons,” the court described those as “the rights which, according to the fundamental principles of American Government, are inalienable.” The court held that the thirteenth amendment conferred upon Congress the authority to enact legislation, such as the Civil Rights Act of 1866, to secure rights that are “essential to the full enjoyment of personal liberty.”

V

THE DEMOCRATIC CONSERVATIVE THEORY OF STATE SOVEREIGNTY: EXCLUSIVE STATE AUTHORITY OVER CITIZENSHIP AND CIVIL RIGHTS

In contrast to the Republican theory of national supremacy, President Andrew Johnson and the Democratic opponents of congressional civil rights enforcement vehemently insisted upon the primacy of state citizenship. For them, national citizenship was subordinate to and den...
rivative of state citizenship. Consequently, the state possessed exclusive authority over civil rights.

President Johnson expressed his opposition to the primacy of national citizenship by his veto of the Civil Rights Act. In a peroration to his veto message that expressed an important and substantial objection to the legal theory underlying the Act, Johnson warned that the proposed statute represented

an absorption and assumption of power by the General Government which, if acquiesced in, must sap and destroy our federative system of limited powers and break down the barriers which preserve the rights of the states. It is another step, or rather stride, toward centralization and the concentration of all legislative powers in the National Government. 185

Like President Johnson, Senator Garrett Davis of Kentucky understood that the Republican view of the union and national sovereignty that underlay the Civil Rights Act of 1866 “would wholly absorb all reserved state sovereignty and rights.”186 He expressed the Democrats’ opposition to the Act and the fourteenth amendment as a matter of constitutional theory.187 Before the Constitution was adopted, Davis explained, the states were sovereign and independent. The union was formed by the people as a confederation of sovereign states when they delegated portions of their sovereignty to the national government “according to the provisions of the Constitution.”188 The states retained sovereignty and all powers not vested in the federal government or explicitly removed from the states by the Constitution.

Senator Davis did acknowledge that “[t]he exact line of partition” of power between the national and state governments “was a most interesting problem, that was early and generally discussed by the people.”189 Although he recognized that “[t]his discussion has continued ever since, without a full and satisfactory solution having been reached,”190 he nonetheless posited a theory of dual sovereignty in which “the ordinary administration of criminal and civil justice, which is the immediate and visible guardianship of life and property . . . belong exclusively to the States.”191 Davis feared that “[t]he principles involved in this bill, if they are legitimate and constitutional, would authorize Congress to pass civil

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185 Cong. Globe, 39th Cong., 1st Sess. 1681 (1866); see also id. at 1777 (statement of Sen. Johnson) (expressing similar objections to legal theory underlying Civil Rights Act). For a rebuttal to President Johnson’s veto message, see id. at 1780-81 (statement of Sen. Trumbull).
186 Id. app. at 185.
187 Id. app. at 181-85.
188 Id. app. at 183.
189 Id.
190 Id.
191 Id. app. at 183-84.
and criminal codes for every State of the Union."\(^{192}\)

Similarly, Congressman Charles A. Eldridge of Wisconsin correctly noted that if the view of Congress's authority to secure civil rights held by congressional Republicans were correct, "then the power conferred on Congress by this [thirteenth] constitutional amendment is an indefinite power, unlimited except by the passions or caprice of those who may assume to exercise it."\(^{193}\)

Opponents of civil rights enforcement understood the fundamental changes in American federalism that would result from the recognition of even concurrent national and state authority over citizenship and citizens' rights. Because of the supremacy clause of the Constitution, conceding to Congress even shared authority over civil rights could eventually result in the states' complete exclusion from this area.\(^{194}\) Recognition of such authority would not only upset the Democrats' conception of the constitutional theory of American federalism, but could also lead to the restructuring of the United States into a unitary, consolidated political entity. Republicans believed that Congress possessed primary authority over civil rights because the thirteenth amendment conferred citizenship and the fundamental rights of citizenship on all Americans. To concede this meant that Congress would not have to refer to questionable theories of the supremacy clause to deprive the states of all authority to secure the rights of Americans. Because civil rights were rights per-

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\(^{192}\) Id. at 1414.

\(^{193}\) Id. at 1156. Other evidence also reveals that opponents of the thirteenth amendment feared that Republicans would have unlimited authority to secure civil rights under their theory of the amendment. See id. at 1679 (President Johnson's Veto Message); id. at 499-500 (statement of Sen. Cowan); id. at 506, 1777-79 (statements of Sen. Johnson); id. at 595, app. at 182 (statements of Sen. Davis); id. at 601 (statement of Sen. Guthrie); id. at 1268 (statement of Sen. Kerr); id. app. at 156-58 (statement of Sen. Davis); id. at 1120 (statement of Rep. Rogers); id. at 1156-57 (statement of Rep. Thornton); id. at 1266 (statement of Rep. Raymond); id. at 1295-96 (statement of Rep. Latham).

\(^{194}\) See note 193 supra. Thus, Congressman Henry Raymond declared that "the right of citizenship involves everything else. Make the colored man a citizen of the United States and he has right which you or I have as citizens of the United States under the laws and Constitution of the United States." Cong. Globe, 39th Cong., 1st Sess. 1266 (1866). Congressman Raymond's newspaper, the New York Times, implicitly endorsed the Congressman's support of President Johnson's veto of the Civil Rights Act in an editorial condemning the Republican theory of citizenship. See N.Y. Times, Apr. 7, 1866, at 4, col. 3. The New York Times observed that under the Republicans' view, citizenship was national. If so, "the Federal Government has jurisdiction of all questions affecting the protection of citizens as such," which the editor condemned as "a principle so pregnant with danger to the rightful authority and jurisdiction of States, that it more than justifies the position assumed by President Johnson," not to mention Congressman Raymond. Id. at 4, col. 4. Chief Justice Taney's recognition of this danger had led him to assert in his opinion in Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 404 (1857), that blacks could never become citizens of the United States. See text accompanying notes 91-100 supra.
taining to United States citizenship, Congress would possess potentially exclusive authority over them.

Opponents of the Civil Rights Act strongly protested the Republican theory of congressional enforcement authority. Senator Willard Saulsbury of Delaware, for example, warned that “this bill positively deprives the State of its police power of government.” Senator Davis adamantly objected that the states are sovereign, “especially in regard to the administration of justice, and in the regulation of property and estates, the laws of marriage and divorce, and the protection of the persons of those who live under their jurisdiction.” Therefore, Democrats argued, it followed that Congress had no authority to legislate on the subject of civil rights.

196 Id. at 596 (quoting Albert v. Bayley, 23 Mass. (6 Pick.) 89, 93 (1827)). Other senators and congressmen also argued that the bill usurped state authority. See Cong. Globe, 39th Cong., 1st Sess. 479-80 (1866) (statement of Sen. Saulsbury); id. at 499, 1782 (statements of Sen. Cowan); id. at 597, app. at 183-84 (statements of Sen. Johnson); id. at 1063 (statement of Rep. Hale); id. at 1120, 1122 (statements of Rep. Rogers); id. at 1154 (statement of Rep. Eldridge); id. at 1268, 1270-71 (statements of Rep. Kerr); id. at 1292 (statement of Rep. Bingham); id. at 2500 (statement of Rep. Shanklin).

Because the same theory of federal citizenship and primary authority over citizenship was expressed in the thirteenth and fourteenth amendments, the fourteenth amendment was also viewed by opponents as granting Congress authority to supplant state administration of civil and criminal justice. Ex-Governor William Sharkey of Mississippi complained to the incumbent governor that the fourteenth amendment delegated to Congress authority to enforce the privileges and immunities of citizens, and that with the exercise of this authority, “We may find Congress assuming absolute control over all the people of a State and their domestic concerns, and this virtually abolishes the State.” Letter from William Sharkey to Governor Benjamin Humphreys (Sept. 17, 1866), reprinted in unidentified newspaper, n.d., collected in Scrapbook on the Fourteenth Amendment, supra note 82, at 23. The Texas Legislature refused to ratify the proposed fourteenth amendment on October 13, 1866. The report of the Committee of Federal Relations stated:

There is scarcely any limit to the power sought to be transferred by this [first] section from the States to the United States. Congress might declare almost any right or franchise whatever to be the privilege or immunity of a citizen of the United States, and it would immediately attach to every citizen of every State, whether white man or descendant of African. To estimate the comprehensive scope of the power herein sought for Congress, that body might declare miscegenation a “privilege or immunity.”

Report of the Comm. of Fed. Relations, quoted in unidentified newspaper, n.d., collected in Scrapbook on the Fourteenth Amendment, supra note 82, at 2; see also N.Y. Times, Nov. 4, 1866, at 2, col. 6 (discussing Texas legislature’s rejection of fourteenth amendment). The Arkansas Senate Committee on the Fourteenth Amendment took the same position on December 12, 1866. Memphis Avalanche, n.d., collected in Scrapbook on the Fourteenth Amendment, supra note 82, at 55.
VI

OPPOSITION TO THE PRIMACY OF NATIONAL CITIZENSHIP
AND CIVIL RIGHTS ENFORCEMENT AUTHORITY
IN STATE COURTS

Protests by Democratic Conservative congressmen concerning the expanded scope of national authority over civil rights were not simply rhetorical sensationalizations intended for political effect. State judges who opposed the Civil Rights Act of 1866 expressed many of the same objections to the Republican theory of national civil rights enforcement authority as did congressional Democrats.¹⁹⁷

Justice Crockett's dissent in State v. Washington¹⁹⁸ stands out for its clear and comprehensive articulation of the Democratic Conservative critique of the Republican theory of congressional civil rights enforcement authority. Justice Crockett observed that

[...] those who maintain the constitutionality of the [Civil Rights] Act insist that these rights and privileges are incident to and inseparable from citizenship and the state of freedom secured to all classes of native born citizens by the Thirteenth Amendment, and consequently, that legislation tending to secure these rights is "appropriate legislation" within the true sense of that amendment.¹⁹⁹

Quoting from the majority opinion, Justice Crockett continued:

If I comprehend these propositions aright, they may be summed up as follows, to wit: First—That the object of the Thirteenth Amendment was to secure personal freedom to all native born citizens of the United States. Second—That the right to personal freedom and personal security, together with the right to acquire and enjoy private property, constitute the elements of one's civil rights. Third—That the right of personal security, and the right to acquire and enjoy private property, are powerful auxiliaries to the maintenance of personal freedom. Fourth—That being such auxiliaries, whatever legislation tended to secure them was "appropriate legislation" within the true intent of the second section of the Thirteenth Amendment.²⁰⁰

Having accurately summarized the Republican theory of the thirteenth amendment and national civil rights enforcement authority, Justice Crockett examined the implications the theory held for American federalism.

¹⁹⁸ 36 Cal. 658, 672 (1869). For a discussion of the majority opinion, see text accompanying notes 180-83 supra.
¹⁹⁹ Washington, 36 Cal. at 678.
²⁰⁰ Id. at 678-79.
If this be the correct theory, and if the Thirteenth Amendment embraces so wide a scope as this, it results of necessity that Congress has supreme authority over all our civil rights, and may at its discretion change, modify, or abolish all State laws relating to personal security or the acquisition and enjoyment of private property, and substitute others in their stead, on the pretext that it is necessary to do so in order to secure personal freedom to all. On the plea that it is necessary to provide safeguards for personal security, as an auxiliary to personal freedom, it may regulate in detail, in every State, the actions of assault and battery or false imprisonment, and particularly the writ of *habeas corpus*, prescribing when and how it shall issue, and what shall or shall not be competent evidence in these and similar actions. On the pretext of securing to all the rights to acquire and enjoy private property, as an auxiliary to the right of personal freedom, it may define tenures of property, regulate the law of descents, provide appropriate remedies for violations of every right of property, and practically supersede all State laws on these important subjects. If Congress possesses these enormous powers, it only remains for it to put them into execution.

If Congress exercised these powers, Justice Crockett concluded, "the State Governments had as well be abolished, as a useless, expensive, and cumbersome machinery, no longer of any practical value."  

Some state appellate courts declared the Civil Rights Act unconstitutional and rejected the legal theory on which it was based in favor of the state sovereignty theory articulated by congressional Democrats. The Kentucky Court of Appeals declared the Civil Rights Act unconstitutional and upheld a state statute that prohibited black witnesses from testifying against whites in state courts. The court rejected the notion that the second section of the thirteenth amendment gave Congress the power to legislate over civil rights in the states, holding that the amendment merely authorized Congress to prevent the reenslavement of the former slaves. Authority over civil rights, the court insisted, was retained by the states.

Justice Williams's concurring opinion noted that the Civil Rights Act purported to give all Americans "the civil rights of actual native-born citizens of the states." In one fell swoop, therefore, the statute invaded the sovereignty of the states and regulated state domestic and internal affairs relating to life, liberty, property, locomotion, and domes-

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201 Id. at 679.  
202 Id.  
203 See cases cited in note 197 supra.  
205 Id. at 8.  
206 Id. at 10.  
207 Id. at 30.
tic relationships. Justice Williams argued that this unreasonably grave change in the character of American federalism justified the court’s rejection of the statute and retention of state authority over civil rights.

Some state judges were more narrow in their resistance to the Civil Rights Act. The case of People v. Rash, for example, presented to the Delaware Court of General Sessions a conflict between the Civil Rights Act and the state’s rules of evidence that prohibited black witnesses from testifying in criminal prosecutions when white witnesses were available to give evidence. Chief Justice Gilpin acknowledged that “[t]he question presented here . . . is a naked question of power.”

The chief justice, however, deftly avoided the question of whether Congress possessed the constitutional power to secure civil rights. The question before the court, he declared, was whether Congress possessed the authority to regulate state judicial procedure. He queried, “Has Congress power to prescribe rules of evidence, and regulate the mode of proceeding in a State Court?” He concluded that it did not, reasoning that “this [would be] an alarming stretch of federal power, an aggressive and an unconstitutional invasion of the judicial authority of the State . . . which, if tolerated, must ultimately prove destructive of the independent administration of public justice.”

Still, the chief justice declared the state statute unconstitutional as a matter of state law and held that black witnesses had the same right to testify in Delaware courts as whites enjoyed. Thus, the court achieved the objective of the Civil Rights Act by declaring its regulation of state judicial procedure unconstitutional. Indeed, the chief justice affirmed the underlying legal theory of the Civil Rights Act. “Congress has power to provide an appropriate and speedy remedy, to be administered by the federal judiciary,” he declared, “for any illegal interference with, or restraint of personal liberty . . . .”

208 Id.
210 Id. at 271.
211 Id. at 279.
212 Id. at 275.
213 Id. at 276.
214 Id. at 280.
215 Id. at 279.
216 Id. at 278-79.
VII

THE FOURTEENTH AMENDMENT AND THE INCORPORATION OF PRIMARY NATIONAL CITIZENSHIP AND CIVIL RIGHTS ENFORCEMENT AUTHORITY INTO THE CONSTITUTION

As the previous discussion suggests, reliance upon the thirteenth amendment's abolition of slavery as authority for the congressional enforcement of civil rights was precarious as a matter of constitutional law. Congressional Republicans could not be certain that the courts would not narrowly interpret the amendment to merely abolish slavery, rather than to guarantee liberty and the natural rights of freemen. Moreover, securing civil rights by statute would permit a future Congress to repeal the statute and eliminate the safeguards that congressional Republicans sought to achieve in 1866. Consequently, they acted to incorporate the Civil Rights Act into the Constitution through the first section of the fourteenth amendment.217

When introducing the proposed fourteenth amendment in the House, Congressman Thaddeus Stevens urged its adoption in part to avert the danger of repeal of the Civil Rights Act,218 a danger that some congressional supporters of civil rights enforcement feared would occur when the congressional representatives from the Southern states were permitted to sit in the House and Senate.219

Congressmen and senators also urged adoption of the amendment to dispel any doubt about the constitutionality of the newly enacted Civil Rights Act. In fact, Representative John Bingham, a supporter of congressional civil rights enforcement, had opposed the Act because he doubted its constitutionality.220 Although Congressmen Frederick E.
Woodbridge, James A. Garfield, M. Russell Thayer, and John M. Broomall, and Senator Luke Poland, believed the statute was constitutional, they urged passage of the proposed amendment to put any doubts to rest.\textsuperscript{221} Congressman Broomall revealed this motive for supporting the amendment when he stated that

\[\text{[i]he fact that all who will vote for the pending measure, or whose votes are asked for it, voted for this proposition in another shape, in the civil rights bill, shows it will meet the favor of the House. It may be asked, why should we put a provision in the Constitution which is already contained in an act of Congress? The gentleman from Ohio [Mr. Bingham]... says the act is unconstitutional.... [W]hile I differ from him upon the law, yet it is not with that certainty of being right that would justify me in refusing to place the power to enact the law unmistakably in the Constitution. On so vital a point I wish to make assurance doubly sure.}\textsuperscript{222}

Opponents of the congressional Republicans used the fact that the proposed amendment incorporated the statute for political effect. Senators James R. Doolittle and Garrett Davis attacked the proponents’ credibility by emphasizing the irregularity of adopting a constitutional amendment to establish the constitutionality of a statute after the statute had been enacted into law.\textsuperscript{223} Congressmen Henry J. Raymond of New York opposed the Civil Rights Act but supported the proposed amendment, because the amendment conferred upon Congress the authority to accomplish the goal intended by the statute. Raymond identified this goal as “an absolute equality in civil rights in every State of the Union.”\textsuperscript{224}

As a matter of constitutional interpretation and statutory construction, the identity in meaning, scope, and application of the Civil Rights Act of 1866 and section one of the fourteenth amendment cannot be overestimated. In both measures, the framers defined United States citizenship as the status of freemen and congressionally enforceable rights of United States citizens as the natural rights of freemen. If the thirteenth amendment did not delegate to Congress the authority to secure this status and these rights, the fourteenth amendment clearly did.

The identity in meaning and purpose between the statute and the amendment is important for another reason. Because both were understood by their framers to secure the rights of all Americans, not just

\begin{itemize}
\item \textsuperscript{221} See id. at 1088 (statement of Rep. Woodbridge); id. at 2462 (statement of Rep. Garfield); id. at 2465 (statement of Rep. Thayer); id. at 2498 (statement of Rep. Broomall); id. at 2961 (statement of Sen. Poland).
\item \textsuperscript{222} Id. at 2498.
\item \textsuperscript{223} See id. at 2896 (statement of Sen. Doolittle); id. app. at 240 (statement of Sen. Davis).
\item \textsuperscript{224} Id. at 2502.
\end{itemize}
black Americans, the fourteenth amendment, like the Civil Rights Act, was more than a negative prohibition against racially discriminatory state action. It was an affirmative exercise of constitutional authority, and its framers understood it to be a self-executing guarantee of civil rights.

Nevertheless, the amendment was negatively worded, a result of several influences upon the framers. The framers were guided by a legal framework that included the Declaration of Independence and natural rights theory, and instructed that free governments, by their nature, possessed the authority to secure the fundamental rights of their citizens. Indeed, under this framework, securing these rights was the primary function of free governments. In addition, congressional Republicans embraced the nationalist theory of constitutional interpretation, which held that the constitutional recognition of a right authorized Congress to enforce it in whatever manner Congress deemed appropriate, consistent with the Constitution. The negative wording of the fourteenth amendment also served to emphasize that the states were the primary source of civil rights infringement in 1866.

The fourteenth amendment explicitly confers both United States and state citizenship on all Americans born or naturalized in the United States and subject to its jurisdiction. Because the framers defined United States citizens to be freemen, they interpreted the privileges and immunities of citizenship as the natural rights of freemen. By adopting an amendment that defined and conferred citizenship upon all Americans, the framers and supporters of the fourteenth amendment believed they were explicitly incorporating into the Constitution the guarantees of the fundamental rights of all Americans implied in the thirteenth amendment.

The citizenship clause of the fourteenth amendment translated this theory of federal citizenship into constitutional law. By conferring dual citizenship, the amendment defines United States citizenship as primary and state citizenship as derivative. Understood within the context of the Declaration of Independence, natural rights theory, and nationalist constitutionalism, the citizenship clause of the fourteenth amendment

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225 See text accompanying notes 147-58 supra.
226 This was the same framework that the framers had referred to when interpreting the thirteenth amendment's negative prohibition of slavery as an affirmative guarantee of the natural rights of freemen. See text accompanying notes 114-31, 142-53, 159-83, 199-202 supra.
227 See text accompanying notes 112-19 supra and 230-33 infra.
228 See text accompanying notes 109, 140-58 supra.
229 See text accompanying notes 217-24 supra.
230 See U.S. Const. art XIV, § 1. This provision rebutted the theory of the Democratic opponents of the Civil Rights Act which posited United States citizenship as derivative of, and subordinate to, state citizenship. See text accompanying notes 184, 194-96 supra.
delegated the constitutional authority to secure affirmatively the fundamental rights of American citizens.

Supporters of the fourteenth amendment relied upon the Supreme Court's decisions in *Prigg v. Pennsylvania* and *McCulloch v. Maryland* as authority for the doctrine that the recognition of a right in the Constitution confers upon Congress the authority to enforce that right. Since the amendment explicitly confers citizenship, the framers believed that a clause delegating to Congress the authority to enforce the status and rights of citizens was superfluous. Nevertheless, they added an enabling clause to place beyond question Congress's authority to enforce the fundamental rights of citizenship which the amendment recognized and secured.

Still, the original version of the fourteenth amendment was nothing more than an explicit delegation of authority to Congress to secure the civil rights of United States citizens in every state of the nation. It stated:

> The Congress shall have the 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.

Congress's purpose in adopting a revised version of the amendment partially explains why the original version was worded as a delegation of authority. Congressman John A. Bingham noted that the purpose of his proposed amendment was to arm Congress with the constitutional authority to enforce the Bill of Rights. This represented a departure from the natural rights theory described above and can be explained by the Supreme Court's ruling in *Barron v. Baltimore*. In this 1833 decision, the Court held that the Bill of Rights did not apply to state governments, but was rather intended solely as a limitation on the national government.

*Barron* thus created a gap in the constitutional guarantee of fundamental rights. Because, after *Barron*, a citizen had to rely on the state

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231 41 U.S. (16 Pet.) 539 (1842).
234 This conclusion follows from the nationalist theory of constitutional interpretation employed by congressional Republicans. See text accompanying notes 142-58, 226-33 supra and 261-72 infra.
236 Id. at 1088.
237 See text accompanying notes 111-53 supra.
239 Id. at 250.
government to enforce fundamental rights, he had no means of redress if the state infringed or refused to redress infringements of these rights. A breakdown in state enforcement of fundamental rights was precisely the condition that confronted Congress in 1866. To fill this gap in the governmental guarantee of fundamental rights, Bingham worded his proposed amendment as an express delegation of congressional authority to enforce civil rights.

However, the proposed amendment was changed at the behest of Congressman Giles W. Hotchkiss of New York. Hotchkiss complained that by merely empowering Congress to enact laws for the protection of civil rights at some future date, the proposal actually left the citizen unprotected. A future Congress, he feared, could block legislation designed to protect civil rights. Congress might even enact laws that had the opposite effect. Hotchkiss wanted civil rights "secured by a constitutional amendment that legislation [could not] override." He sought an amendment that did more than merely authorize legislation; one that was self-executing, so that the protection of citizens' rights would not have to depend upon the uncertainty of future legislation. He added, "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." In jest, Hotchkiss taunted Bingham: "I think the gentleman from Ohio [Mr. Bingham] is not sufficiently radical in his views upon this subject. I think he is a conservative. [Laughter] I do not make the remark in any offensive sense. But I do want him to go to the root of this matter."

Consequently, the wording of the proposed amendment was changed from a mere delegation of authority to Congress to enforce civil rights to include a self-executing guarantee of the fundamental rights of American citizens. In addition to conferring and securing the status

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240 The black codes of the former confederate states and the failure of state and local law enforcement officers and institutions to protect persons and property were, of course, major sources of civil rights infringements. There were others as well. Republicans were informed of and sought to remedy infringements committed by private individuals. See text accompanying notes 44-52, 74-76 supra. Judges and federal attorneys understood this to be the framers' intent. See R. Kaczorowski, supra note 1, at 1-26, 32-48, 117-43, 166-67; see also text accompanying notes 159-79 supra (describing judicial enforcement) and 261-86 infra (describing congressional and executive efforts to assert authority over private violations of civil rights).

241 Congressman Bingham's explanation of his proposed amendment is reported in Cong. Globe, 39th Cong., 1st Sess. 1088-94 (1866).
242 Id. at 1095.
243 Id.
244 Id.
245 Id.
246 Bingham subsequently referred to the exchange with Hotchkiss in explaining why he changed his original proposal to the amendment that Congress adopted. See Cong. Globe, 42nd Cong., 1st Sess. app. at 81-86 (1871). This statement and comments Bingham made at the time the revised version was passed by Congress show that Bingham believed that the
and rights of freemen as citizens of the United States, the amendment prohibited the states from infringing the civil rights of American citizens and the rights of all persons to life, liberty, and property, the due process of law, and the equal protection of the laws. In thus prohibiting the states from infringing fundamental rights, congressional Republicans were acting to fulfill the obligation imposed by the Declaration of Independence and natural rights theory upon the government to secure fundamental rights for its citizens.

The framers did not understand the amendment's prohibition against state infringement of the privileges and immunities of United States citizens to be the full extent of its guarantee of fundamental rights, or of the authority it delegated to Congress to enforce fundamental rights. Republicans understood the amendment's citizenship clause, as well as its prohibition on the states from infringing the privileges and immunities of United States citizens, to be an affirmative recognition of the fundamental rights of these citizens. Under the Republicans' theory of constitutionalism, the amendment did not merely secure the right to be free from state infringements of fundamental rights, it delegated to Congress the requisite authority to secure these rights directly, in whatever manner it deemed appropriate, consistent with other provisions of the Constitution.

Similarly, the amendment's due process and equal protection clauses authorized Congress to secure the rights against infringement. Congressman Bingham's motion to postpone indefinitely his proposed amendments, which would have explicitly given Congress unconditional authority over the enforcement of civil rights, demonstrates that lawmakers interpreted the fourteenth amendment as a general grant of congressional authority to secure these rights against abuses by the states. According to Bingham, "[T]he Constitutional Amendment already passed by the House covers the whole subject matter." It is understandable, therefore, that congressional opponents of national civil rights enforcement opposed the proposed amendment on many of the same grounds on which they opposed the Civil Rights Act. They charged that the proposed amendment would radically change the federal system of government by conferring upon Congress the authority

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247 U.S. Const. amend. XIV, § 1.


to supplant state administration of civil and criminal justice.\footnote{See id. at 1063-64 (statement of Rep. Hale); id. at 1083-87 (statement of Rep. Davis); id. at 2500 (statement of Rep. Shanklin); id. at 2538 (statement of Rep. Rogers); id. at 3147 (statement of Rep. Harding); id. at 2987 (statement of Sen. Cowan).} To give Congress the authority delegated by the amendment would produce a revolution worse than the Civil War, opponents warned, because it would transfer all state authority over citizens' civil rights from state to national government, producing irreconcilable conflicts in federal-state jurisdiction.

As with the Civil Rights Act, Republicans acknowledged these revolutionary changes in American federalism, while denying the dire consequences Democratic Conservatives insisted would ensue.\footnote{See id. at 1065-67 (statement of Rep. Higby); id. at 1066 (statement of Rep. Price); id. at 2534-35 (statement of Rep. Eckley); id. at 2942 (statement of Sen. Howard); id. at 2961 (statement of Sen. Poland).} Senator Luke Poland asserted that the fundamental political and social changes brought about by the Civil War and the thirteenth amendment rendered the proposed fourteenth amendment both necessary and proper to secure the natural rights of all Americans throughout the United States.\footnote{See id. at 2961.} Congressman Ephraim R. Eckley expressed the same idea in the House, insisting that the "revolution in our affairs . . . renders such a change absolutely necessary."\footnote{Id. at 2534-35.} Senator Jacobus Howard, acting as the Senate floor manager of the proposed amendment, suggested that the amendment recognized the revolutionary changes in American federalism produced by the Civil War and the thirteenth amendment when he declared that Congress was "now settling the fundamental principles upon which our government is to be conducted hereafter."\footnote{Id. at 2942.}

The framers felt justified in transforming American federalism because they believed that the guarantees of fundamental liberties and safety of persons and property were properly subjects of national jurisdiction and congressional authority. Congress therefore acted affirmatively to secure these rights in the specific manner provided in the privileges and immunities, due process, and equal protection clauses of the fourteenth amendment. The framers understood the fundamental rights of citizenship to be the privileges and immunities of United States citizens,\footnote{See text accompanying notes 142-58, 185-96, 199-202 supra and 257-60, 287-311 infra.} and therefore believed Congress could proffer a change in the Constitution that would fundamentally redefine the nature of American federalism. The new amendment required each state to recognize the fundamental rights of every American citizen and to provide all inhabitants of the United States the protections offered by its codes and com-
mon law, and prohibited the states from infringing fundamental rights or denying any person procedural fairness.

VIII
JUDICIAL AND DEPARTMENT OF JUSTICE ENFORCEMENT OF PRIMARY AUTHORITY OVER CITIZENSHIP AND CIVIL RIGHTS UNDER THE FOURTEENTH AMENDMENT

Federal judges and legal officers, like Republican congressmen, interpreted the fourteenth amendment as a delegation of primary authority to enforce civil rights, regardless of the source of the infringement. The revolutionary change in citizenship that Justice Noah Swayne attributed to the thirteenth amendment in United States v. Rhodes was also attributed to the fourteenth amendment by future Supreme Court Justice William B. Woods in a case he decided as a United States Circuit Court Judge in Alabama. In United States v. Hall, Judge Woods stated:

By the original constitution citizenship in the United States was a consequence of citizenship in a state. By this [citizenship] clause this order of things is reversed. Citizenship in the United States is defined; it is made independent of citizenship in a state, and citizenship in a state is a result of citizenship in the United States. So that a person born or naturalized in the United States, and subject to its jurisdiction, is, without reference to state constitutions or laws, entitled to all the privileges and immunities secured by the constitution of the United States to citizens thereof.

Judge Woods defined these privileges and immunities as the fundamental rights of freemen, including Bill of Rights guarantees. Other federal and state appellate judges also generally interpreted citizenship and the privileges and immunities secured by the fourteenth amendment as the status and fundamental rights of freemen.

256 27 F. Cas. 785 (C.C.D. Ky. 1867) (No. 16,151); see text accompanying notes 160-74 supra.
257 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282).
258 Id. at 81 (emphasis added).
259 See id.; see also Letters from Justice Joseph P. Bradley to Judge William B. Woods (Jan. 3, Mar. 12, 1871), collected in Joseph P. Bradley Papers (collection available at New Jersey Historical Society) (noting privileges and immunities clause of fourteenth amendment empowered Congress to protect citizens' fundamental rights not only from national government but also from action or inaction of states).
260 See, e.g., United States v. Blackburn, 24 F. Cas. 1158, 1159 (W.D. Mo. 1874) (No. 11,603) (privileges and immunities defined by fourteenth amendment are "those which belong of right to citizens of all free governments"); Slaughter-House Cases, 15 F. Cas. 649, 652-54 (C.C. La. 1870) (No. 8,408) (pursuit of lawful employment is privilege of every citizen), rev'd, 83 U.S. (16 Wall.) 36 (1873); In re Hobbs, 12 F. Cas. 262, 263-64 (C.C.N.D. Ga. 1871) (No. 6,550) (amendment guarantees equality before law and privileges and immunities of citizens);
Despite the fourteenth amendment's language, judges did not interpret it as limited to racially discriminatory state action. In addition to interpreting the citizenship clause as an affirmative guarantee of the status and rights of citizenship, judges employed natural rights legal theory and the nationalist theory of constitutional interpretation in holding that the negative prohibitions of the fourteenth amendment were affirmative guarantees of the status and fundamental rights of citizens. This legal reasoning was stated succinctly by United States District Judge Edward Bradford in United States v. Given, a fifteenth amendment case involving the infringement of black voting rights by Delaware election registrars decided just weeks before the Supreme Court issued its decision in the Slaughter-House Cases. In Given, Judge Bradford stated:

[I]t is difficult to conceive of the constitutional prohibition, on the states and general government, from denying or abridging a constitutional right, without at the same time conceding the grant of the right; for such prohibition or denial appears to be an absurdity if the grant be not admitted, for otherwise there would be no subject matter for the denial or prohibition to work upon. Congress then (the grant of right being admitted) can select any means it deems appropriate to render available and secure this constitutional right... and is not limited to such measures as may be directed to a denial or abridgement of the right by the general government or the states. If the enjoyment of the right is endangered from any other cause than a denial or abridgement...
by the general government or the several states, that danger is a proper subject matter of legislation . . . .264

Although Judge Bradford was referring to a fifteenth amendment guarantee, his reasoning was equally applicable to the thirteenth and fourteenth amendments. This was noted by Supreme Court Justice William Strong in his opinion in the same case. Justice Strong stated that the Thirteenth Amendment made the right of personal liberty a constitutional right. The fourteenth [amendment] assured the right of citizenship to all persons born or naturalized in the United States, and subject to the jurisdiction thereof. And the fifteenth . . . practically declares that citizenship, irrespective of color or race, confers a right to vote on equal terms or conditions with those that are required for voters of another race or color.265

Asserting that the "prohibition is itself an acknowledgement of the right,"266 Justice Strong concluded that the Civil War amendments were "manifestly intended to secure the right guaranteed by them against any infringement from any quarter."267 These remarks were prefaced with the nationalistic declaration, "Those amendments have left nothing to the comity of the states affecting the subjects of their provisions."268

Justice Joseph P. Bradley privately expressed this reasoning to Judge William B. Woods in advising Woods that the circuit court had jurisdiction to prosecute private individuals who were charged with depriving Alabama Republicans of their first amendment rights to freedom of speech and assembly.269 The predicate for federal jurisdiction, Bradley wrote, is that "[t]he right of the people to assemble together and discuss political questions . . . is one of the most sacred rights of [United States] citizenship" secured by the fourteenth amendment.270 Therefore, the amendment delegated to Congress authority to punish private individuals who infringe these rights because "the only appropriate legislation it [could] make," to secure these rights, in Justice Bradley's opinion, was "that which [would] operate directly on offenders and offenses and protect the rights which the Amendment secures."271

Federal judges uniformly interpreted the fourteenth amendment as a constitutional delegation of congressional authority to secure the funda-

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264 Given, 25 F. Cas. at 1328-29.
265 Id. at 1325 (No. 15,210).
266 Id.
267 Id. at 1326.
268 Id. at 1326.
269 Id. State cases reflecting this reasoning are cited in note 260 supra.
271 Id.
mental rights of citizens, and upheld the constitutionality of two acts passed under this authority: the Enforcement Act of 1870 and the Ku Klux Klan Act of 1871. These statutes criminalized infringements of civil and political rights when motivated by racial or political prejudice or by the intention to deprive citizens of these rights, deprivations committed by armed combinations of men or by men in disguise and at night, and conspiracies to deprive citizens of these rights because of racial or political prejudice. The statutes were enacted by Congress to combat Ku Klux Klan terrorism, and were worded to define as federal crimes violations of a citizen's right to life, liberty, and property, and derivative rights. The statutes sought to distinguish federal crimes from ordinary crimes that were punishable by the states as violations of the states' criminal codes.

Although Congress did not intend to supplant state criminal codes, federal judges recognized that the authority delegated to Congress by the fourteenth amendment could extend that far. For example, Richard Busteed, United States District Judge for Alabama, instructed a federal grand jury in 1871 that the fourteenth amendment authorized Congress to pass laws that would enable the federal government to prosecute and punish persons committing crimes normally prosecuted by the state government in state court. He therefore upheld federal jurisdiction over criminal prosecutions of combinations of two or more persons organized "to injure or oppress [another individual] in any matter affecting life, liberty, or the pursuit of happiness."

Thus, armed with judicially sanctioned legal authority to secure citizens' rights, Department of Justice attorneys embarked in 1870 on a heroic effort to destroy the Ku Klux Klan by punishing civil rights violations in the South. Astonishingly, they succeeded. Hundreds of Klansmen were prosecuted, convicted, and imprisoned by federal courts between 1870 and 1873 for violating citizens' rights to life and property,

272 R. Kaczorowski, supra note 1, at 13-25, 117-34.
273 Ch. 114, 16 Stat. 140.
274 Ch. 22, 17 Stat. 13.
277 Charge to Grand Jury, reprinted in Huntsville Advocate, Nov. 21, 1871, enclosed with Letter from Judge Richard Busteed to Attorney General Amos Akerman (Nov. 22, 1871) (available in National Archives Source Chronological File (N.D. Ala.)).
278 See generally R. Kaczorowski, supra note 1, at 79-134.
to freedom of speech and assembly, to keep and bear arms, to equal protection of the laws, and to vote.

The seemingly boundless scope of constitutional authority over personal rights posed troublesome jurisdictional questions for federal judges and attorneys engaged in these civil rights prosecutions. Their dilemma was to define federal criminal jurisdiction over civil rights violations without supplanting state criminal statutes or eliminating the criminal jurisdiction of state courts. 279 United States Attorneys drafting indictments under the Enforcement Act of 1870 and the Ku Klux Klan Act of 1871 appealed to the Attorney General of the United States for help.

One case involving the attempted murder of a black leader in Mississippi is illustrative. E.P. Jacobson, the United States Attorney at Jackson, Mississippi, informed Attorney General Amos T. Akerman of his difficulty in framing the indictment in language that would distinguish the federal crime of assault with intent to deprive the victim of his right to life from the state crime of assault with intent to murder. 280 Because this crime was motivated by racial and/or political prejudice, Jacobson “amended the indictment by laying intent to have been to deprive the injured person of ‘his equality of right to life’ (or liberty, as the case required) ‘secured to him by the Constitution of the United States.’” 281 Uncertain whether this qualification would solve the jurisdictional difficulty, Jacobson nevertheless added it because it introduced “a feature in the intent relieving the case from the appearance of an offense purely cognizable in the State Courts.” 282

The Attorney General was encouraging but not very instructive. 283 The administration of criminal justice in the federal courts was simply too novel for definite answers to these jurisdictional questions, he replied. Urging federal attorneys to proceed by trial and error, he suggested that “[a] few experiments will demonstrate where the dangers are.” 284

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279 See id. at 118-23.
280 See Letter from E.P. Jacobson to Attorney General Amos T. Akerman (Aug. 7, 1871) (available in National Archives Source Chronological File (S.D. Miss.)).
281 Id. (emphasis in original).
282 Id.
284 Id.; see also Letter from Judge Robert A. Hill to Amos Akerman (June 21, 1871) (available in National Archives Source Chronological File (N.D. Miss.)) (noting prosecutions under Enforcement Act and Ku Klux Klan Act involve difficult questions of determining line between national and state jurisdiction); 12 KKK Report, supra note 119, at 984-86 (Hill, J.) (prosecution was legal because federal jurisdiction need not be expanded beyond statute’s explicit terms); Letter from Judge Robert A. Hill to Solicitor General Benjamin H. Bristow (July 28, 1871) (available in National Archives Source Chronological File (N.D. Miss.)) (struggling to find line between federal and state jurisdiction); Letter from Amos Akerman to J.A. Minnis (Nov. 24, 1871) (on file at New York University Law Review) (urging prosecutor to proceed
judges and attorneys attempted to resolve these jurisdictional problems by carefully tracking the language of the 1870 and 1871 statutes and, where appropriate, by charging that racial or political prejudice was the motive for a civil rights violation. While federal civil rights enforcement confronted judges and attorneys with problems of jurisdiction, these difficulties stemmed not from having too little authority, but rather from having more authority than they knew how to apply without destroying the states' authority over the ordinary administration of criminal justice.

IX

THE CIVIL RIGHTS CONGRESS INTENDED TO SECURE

A. Ambiguity Due to the Generic Nature of Fundamental Rights

Although Congress assumed primary authority over the status and rights of citizens, there is some ambiguity concerning the specific rights the framers intended to secure. This Article has asserted that the framers understood the rights they were securing to be the natural rights of freemen. However, the concept of civil rights as the natural rights of freemen was and is ambiguous. Definitions of terms such as "civil rights," "inalienable rights," and "privileges and immunities" of citizens found in legal authorities cited by the framers reveal this ambiguity. In an official opinion of the Attorney General concerning citizenship, Ed-
ward Bates noted in 1862 that "learned lawyers and able writers" refer to the rights of citizens without explaining what they are. Bates defined these rights in the broadest terms as "generic, common, [and] embracing whatever may be lawfully claimed." A contemporaneous dictionary defined "civil rights" as "those which have no relation to the establishment, support, or management of government." Justice Bushrod Washington, in an often-cited opinion, interpreted "privileges and immunities" as those natural rights which belong to "citizens of all free states." Although he thought that an enumeration of these "fundamental rights... would perhaps be more tedious than difficult," Justice Washington did specify some of the rights he considered essential to the security of the natural rights of life, liberty, and property.

The right of a citizen of one State to pass through, or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the State; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State.

The framers also cited Chancellor Kent for his definition of the "inalienable rights" of citizens as including the right to personal security, the right to personal liberty, and the right to acquire and enjoy property.

B. Congressional Creation of an Expansive Body of Nationally Enforceable Civil Rights

Supporters of congressional civil rights enforcement explicitly expressed their intent to secure the natural rights incidental to freedom. Senator Trumbull declared:

To be a citizen of the United States carries with it some rights; and

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293 Corfield, 6 F. Cas. at 551.
294 Id.
what are they? They are those inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights enumerated in this bill, and they belong to them in all the States of the Union.296

Congressman William Lawrence of Ohio revealed the generic nature of the rights Republicans were attempting to secure when he quoted Lord Coke's statement, "[w]hen the law granteth anything to anyone that also is granted without which the thing itself cannot be,"297 and applied this principle to explain the rights he and his fellow congressmen were attempting to secure.

It is idle to say that a citizen shall have the right to life, yet to deny him the right to labor, whereby alone he can live. It is a mockery to say that a citizen may have a right to live, and yet deny him the right to make a contract to secure the privilege and the rewards of labor. . . . Every citizen, therefore, has the absolute right to live, the right of personal security, personal liberty, and the right to acquire and enjoy property. These are rights of citizenship. As necessary incidents of these absolute rights, there are others, as the right to make and enforce contracts, to purchase, hold, and enjoy property, and to share the benefit of laws for the security of person and property.298

Similarly, Congressman Wilson reasoned that

if the presence of a citizen in the witness box of a court is necessary to protect his personal liberty, his personal security, his right to property, he shall not be deprived of that protection by a State law declaring that his mouth shall be sealed and that he shall not be a witness in that court.299

Moreover, section one of the Civil Rights Act of 1866 specified rights covered by the Act. These included the right to own and enjoy property, to sue and be sued and give evidence in the courts, to make and enforce contracts, and the right to the "full and equal benefit of all laws and proceedings for the security of person and property."300 However, if the rights of United States citizenship are the natural rights to life, liberty, and property, as repeatedly stated by the framers, then the rights specified in section one of the Civil Rights Act do not comprise the entire corpus of the rights of United States citizens.

Rather, the rights specified in the Civil Rights Act were rights that its supporters generally agreed were so essential to life, liberty, and property that they were civil rights of all citizens, as incidents of the natural

297 Id. at 1833.
298 Id.
299 Id. app. at 157.
300 Ch. 31, § 1, 14 Stat. 27, 27 (1866).
rights of freemen. Moreover, by defining the privileges and immunities of United States citizens secured by the fourteenth amendment as the inalienable rights to life, liberty, and property, and rights incident thereto, Congress created the potential for the future inclusion of rights not specified in the Civil Rights Act, and which in 1866 might not have been regarded as essential to the security of these natural rights.\textsuperscript{301} Congressman Henry Wilson declared,

\begin{quote}
If citizens of the United States, as such, are entitled to possess and enjoy the great fundamental civil rights which it is the true office of Government to protect, and to equality in the exemptions of the law, we must of necessity be clothed with the power to insure to each and every citizen these things which belong to him as a constituent member of the great national family.\textsuperscript{302}
\end{quote}

The potential for expanding the scope of rights guaranteed by the national government was also contained in the equal protection clauses of the Civil Rights Act of 1866\textsuperscript{303} and the fourteenth amendment.\textsuperscript{304} Whatever rights and proceedings positive law eventually defined as essential to the protection of person and property would have to be extended to all citizens equally.\textsuperscript{305} Thus, congressional Republicans purposefully

\begin{footnotes}
\textsuperscript{301} See Cong. Globe, 39th Cong., 1st Sess. 474, 1757 (1866) (statements of Sen. Trumbull); id. at 1124 (statement of Rep. Cook); id. at 1160, 1293 (statements of Rep. Shellabarger); id. at 1262 (statement of Rep. Broomall); id. at 1291 (statement of Rep. Bingham); id. at 1832 (statement of Rep. Lawrence).

\textsuperscript{302} Id. at 1118. Wilson derived his definition of the rights the Civil Rights Act was intended to secure from Chancellor Kent. “[T]he absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and inalienable.” Id. (quoting 1 J. Kent, Commentaries on American Law (edition and date omitted in original)). Continuing, Congressman Wilson said that “there is no right enumerated in [the Constitution] by general terms or by specific designation which is not definitely embodied in one of the rights I have mentioned, or results as an incident necessary to complete defense and enjoyment of the specific right.” Id. at 1118-19. He then proclaimed, “[T]he possession of these rights by the citizen raises by necessary implication the power in Congress to protect them.” Id. at 1119. Congressman Wilson was unequivocal in explaining that these were the rights that the Civil Rights Act was intended to secure. “[W]e must do as best we can to protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men.” Id. at 1118. Thus, he suggested, “This bill may have a broader application than that which would reach the cases of persons designed to be protected by the delegation of power contained in the [thirteenth] amendment of the Constitution upon which I have commented.” Id. The Supreme Court had previously held that whether a specific right was a right of citizenship would be decided by the courts on a case by case basis. Connors v. Elliot, 59 U.S. (18 How.) 591 (1855). The framers were aware of this decision. See, e.g., Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard).

\textsuperscript{303} Ch. 31, § 1, 14 Stat. 27, 27.

\textsuperscript{304} U.S. Const. amend. XIV, § 1.

\end{footnotes}
established an expansive body of nationally enforceable civil rights.

In defining the rights of United States citizenship in such generic
terms, the framers were accused of deliberately deceiving the public
about the specific rights they intended the fourteenth amendment and
Civil Rights Act to secure.306 This ambiguity, a product of nineteenth-
century legal theory,307 left open the possibility that these civil rights
guarantees might be applied to enforce rights that were more controver-
sial than those enumerated in the Civil Rights Act of 1866. While the
rights enumerated in the statute were generally regarded as civil rights
of citizenship, other rights, including the right to vote or hold public office,
might not be regarded as civil rights.308 Jury service, access to public
schools, and use of public transportation facilities and accommodations
were among the other rights in this gray area.309

The framers' understanding of citizenship involved an important
distinction between fundamental and nonfundamental rights. They re-
lied on antebellum legal authorities that identified as nonfundamental the
rights of state citizenship.310 Some congressional Republicans disclaimed
any intent to secure voting rights and the right of blacks to public accommoda-
tions, transportation, public schools, and jury service.311 Republicans
could and did argue that the fourteenth amendment and the Civil
Rights Act did not directly secure controversial rights that were not le-
gally recognized as civil rights of citizenship. Under this view, such
rights were nonfundamental rights of state citizenship and were within
the jurisdiction of the states.

Nevertheless, these rights could still come under federal jurisdiction
by virtue of the equal protection guarantees of the fourteenth amendment
and the Civil Rights Act. Although congressional Republicans did not
acknowledge this indirect guarantee, the courts did.312 The Republicans'
understanding of the fourteenth amendment and the Civil Rights Act
thus encompassed a developmental conception of these civil rights provi-
sions. The conception permitted the future inclusion of rights within
these protective guarantees that the framers might not have intended to
protect in 1866.

A similar developmental theory of constitutional interpretation was
advocated by Professor Alexander M. Bickel. In the aftermath of the

306 See text accompanying notes 296-305, 315-17 supra and 323-27 infra.
307 See text accompanying notes 288-95 supra.
308 See text accompanying notes 70-73 supra.
309 See Frank & Munroe, supra note 11, at 145-62.
310 See text accompanying notes 83-108 supra.
311 See text accompanying notes 67-68, 70-73 supra.
312 See text accompanying notes 357-71 infra.
Supreme Court's controversial ruling in *Brown v. Board of Education*, which declared segregated public schools violative of the fourteenth amendment's equal protection clause, Bickel suggested a theory of constitutional interpretation that supported the Supreme Court's interpretation. Bickel suggested that even though the framers did not intend to apply congressional authority in 1866 to desegregate schools, they framed the fourteenth amendment “with language which . . . was sufficiently elastic to permit future advances” in the specific rights it secured.

Bickel argued that the framers had an “awareness . . . that it was a constitution they were writing, which led to a choice of language capable of growth.” They consequently “succeeded in obtaining a provision whose future effect was left to future determination.” In Bickel's view, “the record of history, properly understood, left the way open to, in fact invited, a decision based on the moral and material state of the nation in 1954, not 1866.”

Bickel argued persuasively for a developmental theory of constitutional interpretation, but his theory is flawed. It offers no principled basis for subsequently deciding what specific rights should be included in or excluded from the expanding body of rights secured by the fourteenth amendment. The Republicans' theory of citizenship and nationally enforceable civil rights of citizens remedies this flaw. By defining United States citizenship as the status of freemen and the rights of United States citizens as the rights to life, liberty, and property, and rights incident thereto, the framers adopted a theory of law and constitutional interpretation that permitted courts and Congress to add to the rights that the framers believed were essential to life, liberty, and property in 1866. Rights could be added if future Americans determined that they were essential to the enjoyment of the natural rights to life, liberty, and property and the status of freemen. Consequently, under the framers' theory, the *Brown* Court's characterization of education as “the very foundation of good citizenship,” combined with its conclusion that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education,” would provide a principled basis for bringing public education within the direct protection of the

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314 See Bickel, supra note 11.
315 Id. at 61.
316 Id. at 63 (emphasis in original).
317 Id. at 64.
318 Id. at 65.
320 *Brown*, 347 U.S. at 493.
321 Id.
fourteenth amendment. In fact, the framers’ understanding of citizenship offers a constitutional theory and principled basis for the incorporation of all rights deemed to be essential to the enjoyment of life, liberty, and property.\footnote{322}

The framers’ theory of citizenship also offers an additional, alternative basis for the \textit{Brown} decision. The framers’ understanding of the equal protection clauses of the fourteenth amendment and the Civil Rights Act of 1866 required the states to secure impartially whatever rights they extended to their citizens.\footnote{323} Although a state was not required to extend a nonfundamental right to its citizens, such as a right to education in 1866,\footnote{324} if it did extend such a right it was required to do so in an impartial manner. Thus, the Court in \textit{Brown} could have required the states to extend this state privilege in a racially nondiscriminatory fashion. Although the meaning of racial impartiality in 1866 generally permitted separate but equal facilities,\footnote{325} this obstacle could have been overcome by the Court’s finding that racially segregated school facilities were inherently unequal.

In short, the Republican theory of citizenship and privileges and immunities of United States citizenship comprehends a developmental conception of the fourteenth amendment. It offers a theory of constitutionalism that provides a principled basis for the incorporation of rights into the protective guarantees of the fourteenth amendment that an evolving American society deems essential to or incidents of the natural rights to life, liberty, and property.

\footnote{322} For example, the Supreme Court might have decided the question presented in \textit{Roe v. Wade}, 410 U.S. 113 (1973), by inquiring whether a woman’s right to an abortion was a right essential to her enjoyment of life or liberty. The framers’ theory would have provided a more principled basis for deciding the issue than the Court’s extrapolation from the first, fourth, fifth, and ninth amendments of a right of privacy that protects a woman’s right to terminate a pregnancy.

\footnote{323} See text accompanying notes 185-96, 198-202, 301-05 supra. Chief Justice Salmon P. Chase’s decision in \textit{In re Turner}, 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247), is an example of a judicial application of this theory. See note 176 supra.

\footnote{324} The right to a public education was not a fundamental right in 1866. The New York Supreme Court at Buffalo, for example, held that the right to a public school education was not one of “the substantial rights of the citizen.” Dallas v. Fosdick, 40 How. Pr. 249, 256 (N.Y. Sup. Ct. 1869); see also Ward v. Flood, 48 Cal. 36, 49-50 (1874) (privilege of attending public school at state expense is not privilege and immunity of United States citizenship and is not protected by fourteenth amendment); State ex rel. Garnes v. McCann, 21 Ohio St. 198, 210 (1871) (privilege of public school education derived from state law and not within privileges and immunities of citizenship secured by fourteenth amendment). The right to an education has still not been recognized as a fundamental right. See Papasan v. Allain, 106 S. Ct. 2932, 2944-45 (1986) (noting challenge to Mississippi’s distribution of public school land funds did not require resolution of unsettled question of fundamental right to education).

\footnote{325} See cases cited in note 364 infra.
C. The Democratic Conservatives' Objection to the Expansionary Nature of Nationally Enforceable Civil Rights

Opponents of national civil rights enforcement emphasized the expansionary feature of the Republicans' definition of the rights of United States citizens and its potentially far-reaching consequences in their criticism of the Civil Rights act and the fourteenth amendment. Congressman Henry Raymond of New York warned that "[t]he right of citizenship involves everything else. Make the colored man a citizen of the United States and he has every right which you or I have as citizens of the United States under the laws and Constitution of the United States." Senator Garrett Davis of Kentucky echoed Raymond's warning when he declared in the Senate that "if the negro is a citizen he is to be treated exactly as a white citizen . . . [H]e is entitled to every right, every privilege, and every immunity to which a white citizen is entitled under the Constitution." Congressman Columbus Delano observed that the Civil Rights Act's guarantee of the full and equal benefit of all laws and proceedings for the protection of person and property is "an enlargement or extension of specific rights enumerated in the bill." Opponents accused supporters of intending covertly to secure rights not specifically enumerated in the Act. These accusations were not merely a

327 Id. at 1266. A similar understanding of the importance of citizenship was the primary reason for Chief Justice Taney's insistence in Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857), that blacks were not citizens in 1857 and could never become citizens of the United States. See text accompanying notes 98-100 supra.
328 Cong. Globe, 39th Cong., 1st Sess. 595 (1866). The importance of the citizenship sections of the Civil Rights Act of 1866 and the fourteenth amendment has been slighted by twentieth-century scholars. Professor Fairman, for example, dismissed the question of Congress's power to admit non-whites to citizenship with the comment that the fourteenth amendment "disposed of the problem." C. Fairman, Reconstruction and Reunion, 1864-1888, at 1177 (1971). The framers, however, were very aware of the importance of these provisions. Congressman M. Russell Thayer noted, "If, then, the freedmen are now citizens, or if we have the constitutional power to make them such, they are clearly entitled to those guarantees of the Constitution of the United States which are intended for the protection of all citizens." Cong. Globe, 39th Cong., 1st Sess. 1153 (1866). The reason the citizenship clauses and power to determine the status of Americans were considered so important by the framers is that the admission of blacks to citizenship entitled them to all of the fundamental rights of citizens. Moreover, since it was the Constitution and laws of the United States which recognized and conferred this status and these rights, Congress was empowered to secure all citizens the status and fundamental rights of citizenship. Congressmen and senators understood the implication of this power and opponents vigorously denied that Congress possessed such power. See text accompanying notes 185-216, 301-32, 305, 326-27 supra.
329 Cong. Globe, 39th Cong., 1st Sess. app. at 157 (1866); see also note 193 supra (citing evidence revealing fears of opponents of thirteenth amendment that Republicans would have unlimited authority to secure civil rights).
strategem to undermine congressional and public support for the Act and the fourteenth amendment. Although the framers could not have anticipated the extent to which their handiwork would be applied in the future, they were aware that it could be applied to extend beyond the specific rights enumerated in the Civil Rights Act.

D. Rights Beyond Those Specified in the Civil Rights Act of 1866

It is not surprising, considering the analysis offered above, that participants in the congressional debates relating to the Civil Rights Act of 1866 and the fourteenth amendment stated that their proposals were intended to guarantee an indefinite body of rights. Nor is it surprising that opponents of these measures accused proponents of covertly attempting to enforce rights other than those specifically mentioned in the Civil Rights Act. Not only was this accusation correct, but by emphasizing the more controversial goals of equal rights, such as black access to schools, public facilities, jury service, and the like, opponents had a better chance of destroying the unanimity among Republicans on the civil rights goals they had articulated in more general terms. Opponents, for example, accused congressional Republicans of attempting to desegregate public schools and places of public accommodation. Even more serious, Republicans were accused of trying to strike down antimiscegenation laws.

Whatever the other implications of the Civil Rights Act and the fourteenth amendment, concern over these enactments focused primarily on their effect on voting rights. Opponents accused Republicans of trying covertly to secure the voting rights of blacks through a clause in the original version of the Civil Rights Act prohibiting discrimination in all civil rights. The clause was removed from the original bill in a polit-

330 For an excellent discussion of the ambiguity concerning the rights the framers of the Civil Rights Act and fourteenth amendment intended to secure, see Frank & Munro, supra note 11. Frank and Munro's analysis supports the analysis and conclusions of this Article. See also Farber & Muench, supra note 12, at 277 (concluding that on question of rights framers intended to protect, "history gives no clear answer").
331 See text accompanying notes 334-35 infra.
332 Cong. Globe, 39th Cong., 1st Sess. 498 (1866) (statement of Sen. Van Winkle); id. at 500 (statement of Sen. Cowan); id. app. at 183 (statement of Sen. Davis); unidentified newspaper clipping, n.d., collected in Scrapbook on the Fourteenth Amendment, supra note 82, at 84.
333 Cong. Globe, 39th Cong., 1st Sess. 505 (1866) (statement of Sen. Johnson); see also id. at 600 (Sen. Trumbull's rebuttal); id. at 1680 (President Johnson's Veto Message) (noting that if Civil Rights Act were constitutional, Congress would have power to strike down antimiscegenation laws). For a rebuttal to President Johnson's veto message, see id. at 600 (statement of Sen. Trumbull).
334 The original version conferred citizenship on all blacks and declared that "there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery." Id. at 474.
ical maneuver calculated to quiet these accusations. Interestingly, Congressman Henry Wilson did not think that the amendment materially changed the bill.

Wilson's conclusion was accurate for two reasons. First, the framers were fashioning legislation that would secure civil rights. Although some proponents regarded voting rights as essential to life, liberty, and property and, therefore, a civil right, most did not take this view. Speaking for the majority view, Congressman Wilson could accurately conclude that deleting the general guarantee of civil rights did not change the bill because voting rights were not a civil right, and were never included in the bill's provisions. Second, the equal protection clause remained, and judges were free to incorporate unenumerated rights they believed essential to the natural rights of citizenship into the guarantees of both section one of the Civil Rights Act of 1866 and section one of the fourteenth amendment. Congressional framers acknowledged that it was the judiciary's function to determine whether a specific right was incidental to the natural rights of citizens, and thus enforceable by the federal courts. The Supreme Court had so held in an 1855 decision cited by the framers. Consequently, whether voting rights would be secured by the Civil Rights Act was as uncertain under the amended version of the statute as it was under the original version.

Moreover, several framers contended that in addition to the rights

335 The amendment to the original version of the bill was proposed by Congressman John A. Bingham. See id. at 1291-92, 1294. Although Bingham was an ardent supporter of congressional civil rights enforcement, he believed that political rights were "that class of civil rights which [were] more directly exercised by the citizen in connection with the government of his country," and were therefore "embraced in the term 'civil rights.'" Id. at 1291. He insisted, therefore, that the term "civil rights" had to be deleted from the bill because it would confer upon United States citizens the right to vote and to hold office—rights that the Constitution delegated to the authority of the states. Id.

336 Congressman Wilson accepted Bingham's proposal, stating that the bill was intended to secure the civil rights of United States citizens as such, which he defined as the natural rights to life, liberty, and property. Reading Bingham's amendment to the Civil Rights Bill, Wilson said: "Now, I want to know whether these rights are any greater than the rights which are included in the general term 'life, liberty, and property.' . . . They go as far as we have gone, and assert the identical powers and principles which we have asserted." Id. at 1295. The bill was sent back to the House Judiciary Committee. When it was reported back to the full House four days later with the proposed deletion of the general civil rights enforcement clause, Wilson stated that "the amendment . . . proposes to strike out the general terms relating to civil rights. I do not think it materially changes the bill; but some gentlemen were apprehensive that the words we propose to strike out might give warrant for a latitudinarian construction not intended." Id. at 1366.

337 See text accompanying notes 67-73 supra.

338 See note 68 supra.

339 Ch. 31, § 1, 14 Stat. 27, 27; U.S. Const. amend. XIV § 1; see text accompanying notes 347-53 infra.


enumerated in the Civil Rights Act of 1866, Bill of Rights guarantees were incidental to and essential for the enjoyment of natural rights of life, liberty, and property. Chancellor Kent, whom the framers frequently cited to explain legal terms and concepts, explicitly equated the rights of personal security and personal liberty with Bill of Rights guarantees.\(^{342}\) He and John C. Hurd, another nineteenth-century legal authority, viewed Bill of Rights guarantees as within the privileges and immunities secured by the comity clause of the Constitution.\(^{343}\)

Some of the framers expressly equated Bill of Rights guarantees with those rights of United States citizens that Congress had the power to secure directly. In explaining the scope of the Civil Rights Act, Congressman Wilson referred to “the great fundamental rights embraced in the bill of rights” and insisted that “the citizen being possessed of them, is entitled to a remedy” provided by Congress when those rights were infringed.\(^{344}\) Senator Jacobus Howard, as temporary floor manager of the proposed fourteenth amendment, explained that the privileges and immunities secured by the fourteenth amendment included “the personal rights guaranteed and secured by the first eight amendments to the Constitution.”\(^{345}\) The “father” of the fourteenth amendment, Congressman John A. Bingham, declared that in framing the proposed amendment he intended to authorize the national government to enforce the Bill of Rights; moreover, he asserted that this intention was shared by his colleagues.\(^{346}\)

No legislator ever disclaimed this characterization of the rights proponents intended to secure in 1866. Indeed, Congressman Bingham expressly opposed the Civil Rights Act because it was intended to secure Bill of Rights guarantees. He believed that authority for this action required a constitutional amendment such as the one he authored.\(^{347}\) Senator Howard also believed that a constitutional amendment was needed before Congress could enforce the Bill of Rights.\(^{348}\) Both Bingham and Howard believed that the fourteenth amendment supplied the requisite authority.\(^{349}\)

\(^{342}\) See 2 J. Kent, supra note 70, at 1-13, 32-39.
\(^{343}\) See id. at 84-85; 2 J. Hurd, supra note 41, at 292.
\(^{345}\) Id. at 2765.
\(^{346}\) See id. at 1033, 1088-94, 1291.
\(^{347}\) See id. at 1291, 2980; Cong. Globe, 42d Cong., 1st Sess. 81-86 (1871).
\(^{349}\) See id.; note 249 supra. Smith Nicholas and John Norton Pomeroy, shortly after the proposed amendment was sent to the states for ratification, also expressed the belief that Congress was empowered to enforce the Bill of Rights. See 3 S. Nicholas, Conservative Essays, Legal and Political 47-52 (Philadelphia 1867); J. Pomeroy, An Introduction to the Constitutional Law of the United States 145-52 (New York 1868).
Other supporters of the fourteenth amendment and the Civil Rights Act believed that Congress possessed constitutional authority to enforce Bill of Rights guarantees without an additional constitutional amendment. They adhered to the broad nationalist legal theory of constitutional interpretation which attributed to Congress affirmative authority to secure all rights derived from or recognized by the Constitution. Congressman Wilson, for example, applied this theory of constitutional interpretation to the Bill of Rights and declared:

The possession of the rights by the citizen raises by implication the power in Congress to provide appropriate means for their protection; in other words, to supply the needed remedy. . . . The power is with us to provide the necessary protective remedies. If not, from whom shall they come? From the source interfering with the right? Not at all. They must be provided by the Government of the United States, whose duty it is to protect the citizen in return for the allegiance he owes to the Government.\(^{350}\)

Citing the Supreme Court decision in *Prigg v. Pennsylvania*\(^ {351}\) as authority, Wilson insisted, “That is the doctrine laid down by the courts. There can be no dispute about this.”\(^ {352}\) Congressman M. Russell Thayer asked, “Of what value are those guarantees if you deny all power on the part of the Congress of the United States to execute and enforce them?”\(^ {353}\) The *Cincinnati Gazette* echoed this reasoning when it editorialized:

The civil rights bill was to carry out the bill of rights to secure to the people those rights that are guaranteed in our Constitution and in every Constitutional Government. If the legislature has not the power to enforce what the Constitution declares to be the right of every man, then that instrument is merely a delusive declaration of independence—an empty Fourth of July oration.\(^ {354}\)

In fact, Bingham’s and Howard’s belief that a fourteenth constitutional amendment was necessary to give Congress authority to enforce Bill of Rights guarantees appears to have been a minority view among congressional Republicans. This does not imply, however, that a majority viewed the Bill of Rights itself as a grant of legislative authority. The majority view on this question is not known, as it was not debated. Nonetheless, a majority of Republicans could have rejected the notion that the Bill of Rights granted legislative authority and still believed that

\(^{351}\) 41 U.S. (16 Pet.) 539 (1842).
\(^{353}\) Id. at 1270.
\(^{354}\) Cincinnati Gazette, n.d., collected in Scrapbook on the Civil Rights Bill, supra note 59, at 40.
Congress could legislate to secure Bill of Rights guarantees by virtue of the thirteenth amendment. Republicans endorsed the nationalist legal theory of constitutional interpretation and understood the thirteenth amendment to secure fundamental rights. In light of the Republican theory of constitutionalism and the overwhelming support given the Civil Rights Act in both houses of Congress, the most plausible conclusion is that a majority of congressional Republicans believed that Congress possessed the authority to secure the Bill of Rights.

The framers' nationalist legal theory of constitutional interpretation helps to explain why they did not expressly refer to the Bill of Rights very frequently. A general understanding that Bill of Rights guarantees were essential to enjoyment of life, liberty, and property rendered unnecessary repeated references to the Bill of Rights guarantees as rights that Republicans intended to secure. Some things are too obvious to need explanation.

Thus, the framers' references to rights guaranteed by the Constitution were understood as implied references to the Bill of Rights. For example, Congressman Thayer stated, "If, then, the freedmen are now citizens, or if we have the constitutional power to make them such, they are clearly entitled to those guarantees of the Constitution of the United States which are intended for the protection of all citizens." Congressmen Michael C. Kerr responded to Thayer by objecting to his claim that Congress possessed affirmative authority to secure Bill of Rights guarantees.

Whether the framers of the fourteenth amendment consciously intended to incorporate Bill of Rights guarantees is a question that cannot be conclusively answered. However, the evidence supporting a conclusion that they did is so persuasive that it is more reasonable than not to conclude that the framers and supporters of the fourteenth amendment intended the amendment to secure the Bill of Rights.

The amendment's author, House and Senate floor leaders, and a number of proponents and opponents expressed the belief that it secured Bill of Rights guarantees. Not one senator or congressman denied that the amendment's framers and supporters intended to secure the Bill of Rights, or expressed an intention to exclude Bill of Rights guarantees from the rights Congress sought to secure. The framers defined the rights they were attempting to secure as generic rights to life, liberty, and property, and they clarified their intent by relying on legal authorities.

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356 Id. at 1270. For other explicit and implied congressional references to the Bill of Rights, see id. at 478 (statement of Sen. Saulsbury); id. at 2459 (statement of Sen. Stevens); id. at 1054 (statement of Rep. Higby); id. at 1064 (statement of Rep. Hale); id. at 1833, 1835-36 (statements of Rep. Lawrence); id. at 2542 (statement of Rep. Bingham).
that identified Bill of Rights guarantees with these natural rights of citizenship. Indeed, the American natural law theory of fundamental rights of citizens equated Bill of Rights guarantees with the natural rights of citizens. In light of these considerations, there is a great probability that the legislators who asserted that the fourteenth amendment and the Civil Rights Act secured Bill of Rights guarantees expressed the general understanding of the framers. At the very least, they adopted a constitutional amendment that could be read as securing Bill of Rights guarantees, a reading that was uniformly embraced by United States Attorneys General, United States Attorneys and legal officers, and federal judges prior to 1873.

X

THE JUDICIAL ADOPTION OF THE REPUBLICAN THEORY OF CITIZENSHIP AND NATIONALLY ENFORCEABLE CIVIL RIGHTS UNDER THE FOURTEENTH AMENDMENT

Federal judges uniformly adopted an expansive understanding of the fourteenth amendment and the Civil Rights Act of 1866. Judges who enforced the Civil Rights Act soon after it was enacted held that it secured rights not specifically enumerated in section one. Suits brought by black Americans under the Act, challenging their exclusion from public facilities were often successful. The United States Commissioner at Mobile, Alabama, for example, held in the summer of 1866 that the right to ride on a privately operated city railroad car was a personal right secured by the Civil Rights Act. The Commissioner ordered the railroad company president to stand trial under section two of the Act for denying a black passenger access to the railroad. Proprietors of public facilities and operators of common carriers were sometimes fined for ex-

357 See R. Kaczorowski, supra note 1, at 1-25, 117-34.
360 Ch. 31, § 2, 14 Stat. 27, 27 (1866). Section 2 criminalized the denial of any of the rights under the Act to any former slave or to any person on account of race.
cluding blacks from their establishments and common carriers, and black plaintiffs were awarded damages in civil actions challenging racial discrimination in public accommodations.361 In some instances, blacks also won the right to sit on juries even though neither that right, nor the right to racially integrated juries was explicitly guaranteed by the Civil Rights Act.362

But not all courts agreed that the Civil Rights Act secured these rights or that access to places of public accommodation was a natural right of American citizenship.363 Nor did the enforcement of the right of blacks to enjoy places of public accommodations necessarily produce integrated facilities. Courts usually accepted separate but equal facilities as satisfying the legal requirement of the equal right to public accommodations.364 Nevertheless, judicial application of the Civil Rights Act to enforce rights not specified in the statute indicates that judges understood the civil rights of United States citizenship to be a broadly defined body of rights incident to the natural rights to life, liberty, and property. Moreover, federal judges and legal officers similarly interpreted the four-

361 The District Court at Richmond, Virginia, for example, upheld a decision under the Civil Rights Act of 1866 for a black plaintiff who alleged that a railroad refused to allow his wife to sit in the first class car for ladies because she was black. The jury awarded the plaintiff $1600 in damages. Stevens v. Richmond, F. & P. R.R., reported in unidentified newspaper clippings, n.d., collected in Underwood's Scrapbook, supra note 358, at 193, 227.


364 See United States v. Buntin, 10 F. 730, 735-37 (C.C.S.D. Ohio 1882) (separate schools); Bertonneau v. Board of Directors, 3 F. Cas. 294 (C.C. La. 1878) (No. 1,361) (separate schools); Ward v. Flood, 48 Cal. 36, 49-57 (1874) (separate schools); Cory v. Carter, 48 Ind. 327, 354-57, 359, 362 (1874) (separate schools); State ex rel. Garnes v. McCann, 21 Ohio St. 198, 211 (1871) (separate schools); West Chester & P. R. R. v. Miles, 55 Pa. 209, 211-13 (1867) (separate railroad seating). The Iowa Supreme Court and, at least in one case, the Louisiana Supreme Court ruled that separate but equal facilities were unconstitutional. See Dove v. Independent School Dist., 41 Iowa 689 (1875) (separate schools); Smith v. The Directors of Indep. School Dist., 40 Iowa 518 (1875) (separate schools); Clark v. Board of Directors, 24 Iowa 266 (1868) (separate schools).

The Michigan legislature enacted a statute in 1867 granting all residents of any school district "‘an equal right to attend any school therein . . . .’” General School Law Amendment of 1867, quoted in People ex rel. Workman v. Board of Educ., 18 Mich. 400, 409 (1869). The Michigan Supreme Court, in an opinion by Thomas M. Cooley, interpreted this statute to confer upon blacks the right to attend previously all white schools in Detroit. Id. at 413. Nevertheless, equal rights to public facilities and schools seemed to have meant that blacks had merely an equal right of access to facilities and schools. Segregation in “separate but equal” facilities was apparently common practice. H. Rabinowitz, Race Relations in the Urban South, 1865-1890 (1978); Rabinowitz, From Exclusion to Segregation: Southern Race Relations, 1865-1890, 63 J. Am. Hist. 325 (1976).
teenth amendment to secure the fundamental rights to life, liberty, and property, as well as incidental rights such as the Bill of Rights guarantees. United States Attorneys in the Southern states brought hundreds of civil rights prosecutions under the Enforcement Act of 1870\textsuperscript{365} and the Ku Klux Klan Act of 1871,\textsuperscript{366} charging defendants with infringing privileges and immunities of United States citizenship.\textsuperscript{367} Federal judges uniformly upheld the constitutionality of these prosecutions.\textsuperscript{368} Future Supreme Court Justice William B. Woods, acting as United States Circuit Court Judge, upheld the prosecution of terrorists for violating the first amendment rights of Alabama Republicans on the theory 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.\textsuperscript{369}

This opinion was taken in large part from views privately expressed by Supreme Court Justice Joseph P. Bradley.\textsuperscript{370} Other judges reached the same conclusion.\textsuperscript{371}

The Republican theory of citizenship and privileges and immunities of United States citizenship was, of course, rejected by the Supreme Court in 1873 by a 5 to 4 majority in the \textit{Slaughter-House Cases}.\textsuperscript{372} The Court interpreted the fourteenth amendment's citizenship and privileges and immunities clauses as retaining primary citizenship in the states. The predicate for the Court's interpretation of citizenship was its erroneous assumption that the status and fundamental rights of freemen before the Civil War were defined by state citizenship rather than national citizenship.\textsuperscript{373} The Court reasoned that had Congress intended such a revolutionary change in citizenship, it would have stated explicitly its intent to shift primary authority over citizens from the state to the national government. The Court concluded, therefore, that Congress intended to retain primary citizenship in the states.\textsuperscript{374} Rather than the fundamental rights to life, liberty, and property, the Court held that the rights secured

\begin{itemize}
  \item \textsuperscript{365} Ch. 114, 16 Stat. 140.
  \item \textsuperscript{366} Ch. 22, 17 Stat. 13.
  \item \textsuperscript{367} See R. Kaczorowski, supra note 1, at 79-134.
  \item \textsuperscript{368} See id. at 117-34.
  \item \textsuperscript{369} United States v. Hall, 26 F. Cas. 79, 82 (C.C.S.D. Ala. 1871) (No. 15,282).
  \item \textsuperscript{370} See Letters from Justice Joseph P. Bradley to Judge William B. Woods, supra note 259.
  \item \textsuperscript{371} See United States v. Given, 25 F. Cas. 1328, 1329 (C.C.D. Del. 1873) (No. 15,211); Slaughter-House Cases, 15 F. Cas. 649, 652-53 (C.C.D. La. 1870) (No. 8,408), rev'd, 83 U.S. (16 Wall.) 36 (1873); In re Hobbs, 12 F. Cas. 262, 263-64 (C.C.N.D. Ga. 1871) (No. 6,550).
  \item \textsuperscript{372} 83 U.S. (16 Wall.) 36 (1873).
  \item \textsuperscript{373} See id. at 72-73.
  \item \textsuperscript{374} Id. at 74-75.
\end{itemize}
under the privileges and immunities clause included only those rights specifically enumerated in the Constitution, or incidental to them. 375 The natural rights to life, liberty, and property, and rights incident thereto, were secured by the states to their citizens. 376 State governments, rather than the national government, possessed primary authority over the civil rights of United States citizens. The Court’s interpretation of the fourteenth amendment revivified states’ rights by reading into the Constitution the Democratic Conservative ideology of states’ rights. 377

The Supreme Court thus emasculated the fourteenth amendment’s citizenship and privileges and immunities clauses, diminished the amendment’s scope, and destroyed the national government’s authority to secure directly citizens’ fundamental rights. The Court’s Slaughter-House decision rejected the legal theory under which the Department of Justice and the federal courts had acted to secure citizens’ fundamental rights in the 1870s. 378 The Court thus precluded the national government from protecting citizens in the South during the 1874 revival of political terrorism, 379 and from preventing the establishment of a pattern of domination by Southern Conservative Democrats and white supremacists over Southern blacks and white Republicans. The end result of this decision, as reflected in public policy, was the reduction of Southern blacks to peonage, the creation of Jim Crow, and the demise of the Republican Party in the South.

CONCLUSION

Evidence and analysis presented in this Article support the conclusion that the framers and contemporaries of the Reconstruction civil rights amendments and statutes interpreted them expansively. These amendments and statutes were adopted and enforced in a historical context that explains why Republicans were committed to enforcing civil rights and chose to express that commitment by amending and interpreting the Constitution to confer upon Congress and the federal courts primary authority to enforce civil rights. In acting both to preserve the goals of the Civil War—national sovereignty and emancipation—and to enforce individual civil rights in the postbellum era, Republicans served

375 These rights included: the right to use the ports and navigable waterways of the United States; the right to interstate travel and transaction of business, the right to the protection of the United States government when on the high seas or in foreign lands, the right to peaceably assemble and petition Congress for redress of grievances; the right to the writ of habeas corpus, and the right to settle in and become a citizen of a state on the same basis as other citizens. Id. at 79-80.

376 Id. at 77.

377 See text accompanying notes 184-96 supra.

378 See text accompanying notes 257-86 supra.

379 See R. Kaczorowski, supra note 1, at 173-98.
their own political and ideological self-interest. Thus, the adoption of the thirteenth and fourteenth amendments and the civil rights statutes was dictated by pragmatic necessity as well as commitment to moral principle.

The legislators who framed the Reconstruction civil rights amendments and statutes and the legal officers and federal judges who implemented and enforced them prior to the *Slaughter-House* decision of 1873 shared a common understanding of their meaning and scope. They believed that ultimate sovereignty over citizens was located in the national government, and that Congress and the federal courts possessed primary authority to protect citizens' fundamental rights. Legislators, Department of Justice attorneys, and federal judges viewed the thirteenth and fourteenth amendments as delegating plenary authority over civil rights to the national government. They understood the thirteenth amendment as a congressionally enforceable guarantee of the status and rights of freemen, and thought that this guarantee had been incorporated into the fourteenth amendment. They interpreted references in the fourteenth amendment to United States citizenship and the privileges and immunities of United States citizens as guarantees of the status and natural rights of freemen. Because they believed that the thirteenth and fourteenth amendments directly secured the civil rights of United States citizens, federal legislators, judges, and attorneys understood that these amendments conclusively established that the national government possessed both primary authority over civil rights and ultimate responsibility for safeguarding citizens' civil rights.

Despite this view, Republican legislators retained dual sovereignty and eschewed restructuring the United States into a unitary state. Under the congressional Republican and the pre-*Slaughter-House* judicial theory of United States citizenship and civil rights, the states were expected to safeguard citizens' rights. But the national government was committed to protecting and enforcing citizens' rights as the need arose. This concept of federalism was radically different from the states' rights-centered theory espoused by Southerners and conservative Democrats, and ultimately adopted by the Supreme Court in the *Slaughter-House* decision.

Civil rights were made doubly secure. States were expected to continue to protect civil rights, while federal agencies were authorized to assume original jurisdiction in cases in which state agencies failed to enforce citizens' rights. This federal jurisdiction was not contingent upon a state's denial of civil rights through discriminatory laws or customs. Federal enforcement power was applicable against private individuals as well as public officials, both of whom were subject to prosecution and punishment for violating citizens' rights. Federal civil rights enforce-
ment authority was intended not merely to protect against discriminatory laws and customs, but to secure affirmatively civil rights through the auspices of federal agencies. The national government was understood to have this power because the Constitution and laws of the United States recognized civil rights to be the rights of individuals as citizens of the United States.

When the framers of the fourteenth amendment defined United States citizenship and declared that the states could not infringe upon the privileges and immunities granted to United States citizens nor deny any persons due process and equal protection of the laws, they did not intend to limit federal authority over civil rights to state action. Nor were the framers simply conferring upon United States citizens an equality in rights granted by the states, or the right to racially equal laws and impartial judicial procedure. The framers were imposing upon the states the same obligation to recognize and protect the fundamental rights of all citizens they believed had been imposed upon the national government by nationalizing citizenship and the natural rights of freemen. As Supreme Court Justice Noah H. Swayne commented in 1867, the system established to protect civil rights was one which "renders the protection which Congress has given as effectual as it can well be made by legislation. It is one system, all the parts looking to the same end."\(^{380}\) This new system was founded upon the old one. But, in developing it, Congress knowingly and purposely acted to revolutionize the structure of the federal union.

\(^{380}\) United States v. Rhodes, 27 F. Cas. 785, 788 (C.C.D. Ky. 1867) (No. 16,151).