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Recommended Citation

Robert Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War*, 92 Am. Hist. Rev. 45 (1987)
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To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War

ROBERT J. KACZOROWSKI

IN 1857, THE HIGHEST COURT IN THE UNITED STATES HELD THAT BLACKS in America possessed no rights, could never become citizens of the United States, and that Congress was powerless to abolish slavery.[1] In the aftermath of these pronouncements, this country fought one of the bloodiest wars in its history. Fewer than ten years after the *Dred Scott* decision, however, Congress and the Northern states accomplished precisely what the Supreme Court declared could not be done, through constitutional amendments and a civil rights statute. The Thirteenth Amendment abolished slavery everywhere in the United States. The Civil Rights Act of 1866 and the Fourteenth Amendment conferred citizenship on and secured the civil rights of all qualified, natural-born, and naturalized Americans, including former slaves and free blacks. The statute declared illegal infringements of certain civil rights made under the prextext of law or custom and authorized the removal of civil and criminal cases from the state to the federal courts whenever Americans were unable to enforce their rights in the state systems of justice. The Fourteenth Amendment also expressly prohibited the states from infringing the rights that Americans enjoyed as citizens of the United States and their rights to due process and equal protection of the law.

The meaning and scope of the Thirteenth and Fourteenth Amendments and the Civil Rights Act of 1866 have been almost as controversial among twentieth-century scholars as they were among the participants in Reconstruction. In 1947, Supreme Court Justice Hugo Black sparked a debate over the scope of a national authority to enforce civil rights when he held that the Fourteenth Amendment conferred on the national government the power to protect the Bill of Rights against state infringements.[2] Charles Fairman quickly wrote a rebuttal, in which he insisted that the congressional framers intended to secure only an equality in state law among the few rights enumerated in Section 1 of the Civil Rights Act, a view he continued to maintain. William Crosskey published a rejoinder to Fairman,

I wish to acknowledge the helpful comments of Eric Foner, Kermit Hall, Paul Murphy, William Nelson, George Rappaport, David Reiser, and the participants of the New York University School of Law Colloquium in Legal History.

[1] *Dred Scott v. Sanford*, 19 How. (60 U.S.) 393, 404 (1857).

[2] *Adamson v. California*, 322 U.S. 46, 68 (1947) (Black, J., dissenting).

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in which Crosskey asserted his view of a nation-centered federalism that delegated to Congress the authority to enforce the Bill of Rights, a view he later elaborated in his three-volume history of the U.S. Constitution.[3] The specific question whether or not the Fourteenth Amendment incorporates the Bill of Rights has been vigorously debated, most recently by Raoul Berger and Michael Curtis.[4]

Other legal scholars and historians have focused on additional aspects of a national civil rights enforcement authority. Jacobus tenBroek and Howard Jay Graham argued that the theory of the Reconstruction amendments derived from the natural rights ideology of the abolitionists, and that the amendments delegated to Congress an expansive authority to enforce fundamental rights.[5] They assumed that it was the Radicals who controlled Congress during Reconstruction and incorporated their expansive view into the Reconstruction amendments. Revisionist historians in the 1960s argued that the moderate Republicans, not the Radicals, controlled Congress and formulated Reconstruction policy.[6]

Although revisionist political historians of the 1960s agreed that even moderate Republicans were committed to securing civil rights after the Civil War, revisionist legal historians in the 1970s argued that the Reconstruction amendments did not significantly alter American federal constitutionalism. Insisting that the moderates were legal conservatives who consciously intended to avoid a revolutionary restructuring of constitutional law and to retain a federalism based on states' rights, the revisionists concluded that the Civil Rights Act and the Fourteenth Amendment preserved in the states primary authority over citizenship and civil rights. The states therefore continued to enjoy the authority to determine the status of Americans, define their rights, and provide for their protection. The framers of the legislation intended that citizens redress violations of civil rights and enforce their rights through state courts and law enforcement agencies. Conscious of the revolutionary implications for American federalism, the framers conferred on the national government merely the authority to prohibit the states from discrimi-

[3] Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," *Stanford Law Review*, 2 (1949): 5; Charles Fairman, *Reconstruction and Reunion, 1864–88* (Part One), vol. 6 of *History of the Supreme Court of the United States*, P. Freund, ed. (New York, 1971), see especially chaps. 19 and 21; William Crosskey, "Charles Fairman, 'Legislative History' and the Constitutional Limitations on State Authority," *University of Chicago Law Review*, 22 (1954): 1; see also Charles Fairman, "A Reply to Professor Crosskey," p. 144; William Crosskey, *Politics and the Constitution in the History of the United States*, 3 vols. (1953, 1980), especially chaps. 30–32.

[4] For the recent debate, see Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, Mass., 1977); Michael Curtis, "The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger," *Wake Forest Law Review*, 16 (1980): 45; Michael Curtis, "The Fourteenth Amendment and the Bill of Rights," *Connecticut Law Review*, 44 (1982): 237; Michael Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Durham, N.C., 1986); Raoul Berger, "Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat," *Ohio State Law Journal*, 42 (1981): 435; and Raoul Berger, "Incorporation of the Bill of Rights: A Reply to Michael Curtis' Response," *Ohio State Law Journal*, 44 (1983): 1.

[5] Jacobus tenBroek, *Equal under Law* (New York, 1965); Howard Jay Graham, "The Early Antislavery Backgrounds of the Fourteenth Amendment," *Wisconsin Law Review* (1950): 479; and Howard Jay Graham, "Our Declaratory Fourteenth Amendment," *Stanford Law Review*, 7 (1954): 3.

[6] See Eric McKitrick, *Andrew Johnson and Reconstruction* (Chicago, 1960); William Brock, *An American Crisis: Congress and Reconstruction, 1864–1867* (New York, 1963); and La Wanda Cox and John Cox, *Politics, Principle, and Prejudice, 1865–1866* (New York, 1963).

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nating among citizens on the basis of race in matters relating to civil rights and to punish state officers who did so.[7]

CONGRESSIONAL REPUBLICANS BELIEVED THAT THE THIRTEENTH AND FOURTEENTH AMENDMENTS and the Civil Rights Act of 1866 represented a revolutionary change in American constitutionalism.[8] A change in federalism was a prerequisite for Congress to legislate for the protection of civil rights, in light of the nineteenth-century concept of federalism. If the status and fundamental rights of citizenship were the rights that individuals enjoyed as citizens of the states, Congress would not have had the authority to legislate for their protection. These fundamental rights would be within the exclusive jurisdiction of the states. The proposal by Congress of a constitutional amendment and a statute that conferred on all Americans the precious status of citizen, enumerated some of the fundamental rights of citizenship, and extended to citizens federally enforceable guarantees for the protection of their civil rights was itself a revolutionary change in American federalism.

The radical change in American constitutionalism represented by the actions of Congress forced congressional Republicans to formulate a legal theory delegating to Congress the authority to secure the status and civil rights of Americans. Republicans explained that sovereignty resided in the national government and included the primary authority to determine the status and secure the rights of all Americans, white as well as black.[9] They interpreted the Thirteenth Amendment

[7] See Fairman, *Reconstruction and Reunion, 1864–88*, 1228–29; Berger, *Government by Judiciary*; Harold Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (New York, 1973), especially pp. 457, 460–68; Michael Les Benedict, *A Compromise of Principle: Congressional Republicans and Reconstruction* (New York, 1974), 27, 41, 48, 56–69, 122–26, 147–49, 170; Michael Les Benedict, "Preserving the Constitution: The Conservative Basis of Radical Reconstruction," *Journal of American History*, 61 (1974): 65; Phillip Paludan, *A Covenant with Death: The Constitution, Law, and Equality in the Civil War Era* (Urbana, Ill., 1975), 58, 261, 274–75; Herman Belz, *Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era* (New York, 1978), 108–40; and Herman Belz, *A New Birth of Freedom: The Republican Party and Freedmen's Rights, 1861–1866* (New York, 1976), 157–77.

[8] See Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866–1876* (New York, 1985), and "Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction," *New York University Law Review*, 61 (1986), forthcoming. The essential conceptual framework and conclusions of this study relating to the legislative history of the Fourteenth Amendment and Civil Rights Act of 1866 were originally presented in Robert J. Kaczorowski, "The Nationalization of Civil Rights: Constitutional Theory and Practice in a Racist Society, 1866–1883 (Ph.D. dissertation, University of Minnesota, 1971); "Race, Law and Politics: Congress and Civil Rights after the Civil War," paper presented at the Annual Meeting of the Southern Historical Association, November, 1973; and "Civil Rights in the Lower Federal and State Courts during Reconstruction," paper presented at the Annual Meeting of the Organization of American Historians, April, 1975. See also Harold Hyman and William Wiecek, *Equal Justice under the Law: Constitutional Development, 1835 to 1875* (New York, 1982), 386–438; Belz, *Emancipation and Equal Rights*, 108–40; and Belz, *A New Birth of Freedom*, 157–77.

[9] For example, the "father" of the Fourteenth Amendment, Cong. John A. Bingham of Ohio, in a statement that represented the views of his congressional colleagues, declared that the authority to secure the rights of citizens "belongs to every sovereign power, and is essentially a subject of national jurisdiction." *Congressional Globe*, 39th Cong., 1st sess., 1866, p. 1090. This view of national sovereignty was also expressed outside of Congress. See the letter of "Madison" published in the *New York Times* (November 15, 1866): 2. Other scholars have noted this interpretation, but they reached different conclusions concerning the scope of authority the amendment delegated to Congress. See Belz,

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as a constitutional guarantee of the status of Americans as free people and therefore as a delegation of authority to Congress to secure the fundamental rights of American citizens. Congressional Republicans reasoned that the amendment, in abolishing slavery, secured liberty and the rights of free people. They equated the status and rights of free people with the status and natural rights of citizens. Congressional Republicans understood the Thirteenth Amendment as a guarantee of the status and rights of citizenship. Applying a Hamiltonian, nationalistic interpretation of the Constitution, which attributed to Congress the authority to secure rights that are recognized or guaranteed by the Constitution, they concluded that the Thirteenth Amendment delegated to Congress the authority to prohibit slavery and, more important, the authority to secure inherent rights of all U.S. citizens against violation from any source in whatever manner Congress deemed appropriate.[10] Thus, James F. Wilson, the representative from Iowa and the House floor manager of the Civil Rights Bill, introduced it with the explanation "that the possession of these rights by the citizen raises by necessary implication the power in Congress to protect them."[11]

Republicans expressed in law their understanding of the scope of the Thirteenth Amendment when they enacted the Civil Rights Act of 1866 and the Fourteenth Amendment. Section 1 of the Civil Rights Act confers citizenship on all qualified American inhabitants and guarantees to all American citizens at least some of the rights the framers believed to be fundamental.[12] They added a similar citizenship clause to the first section of the Fourteenth Amendment in the event that a subsequent Congress repealed the Civil Rights Act. The addition of this clause was also designed to prevent courts from declaring the statute unconstitutional by

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Emancipation and Equal Rights, 108–40; Daniel Farber and John Meunch, "The Ideological Origins of the Fourteenth Amendment," *Constitutional Commentary*, 1 (1984): 235, 262–63.

[10] The framers believed that the Congress possessed plenary authority over civil rights, as established by the following: *Congressional Globe*, 39th Cong., 1st sess., 1866, pp. 41–42 (Sen. Sherman); pp. 43, 474, 476, 527–28, 573–74, 600, 1758, 1780–81 (Sen. Trumbull); pp. 503–04 (Sen. Howard); p. 570 (Sen. Morrill); pp. 602, 741 (Sen. Lane of Indiana); p. 703 (Sen. Fessendon); p. 768 (Sen. Johnson); pp. 571, 3031–32 (Sen. Henderson); p. 1225 (Sen. Wilson); pp. 1255, 1780, 3037, Appendix 101 (Sen. Yates); Appendix 96 (Sen. Williams); pp. 1033, 1088–94, 1291, 2542 (Cong. Bingham); pp. 1115, 1118–19, 1294–95 (Cong. Wilson); p. 1120 (Cong. Rogers); p. 1124 (Cong. Cook); pp. 1151–53 (Cong. Thayer); p. 1262 (Cong. Broomall); p. 1266 (Cong. Raymond); p. 1295 (Cong. Latham); and pp. 1832, 1836 (Cong. Lawrence). This understanding of a congressional civil rights enforcement authority was expressed outside of Congress as well. See the *New York Tribune* (February 3, 1866): 6; *Chicago Tribune* (February 4, 1866): 2; *New York Times* (January 16, 1866): 4; (February 8, 1866): 4; (March 31, 1866): 4; *Baltimore American* (March 23, 1866), clipping in Scrapbook on the Civil Rights Bill, Edward McPherson, ed., Edward McPherson Papers, Library of Congress, container 99, p. 4; and various undated clippings in the Scrapbook from the *New York Sun*, p. 15; *Pittsburgh Gazette*, p. 40; *Cincinnati Gazette*, pp. 40, 54; *Syracuse Journal*, p. 53; *Cleveland Herald*, p. 54; and the *Chicago Post*, p. 58, among others.

[11] *Congressional Globe*, 39th Cong., 1st sess., 1866, pp. 1118–19. I established that this was also the understanding of U.S. judges and attorneys in *Politics of Judicial Interpretation*, 1–12, 27–48.

[12] Section 1 provides that such citizens "shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding"; 14 Stat. 27 (1866).

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interpreting the Thirteenth Amendment as a mere abrogation of slavery.[13] The citizenship clause of the Fourteenth Amendment makes explicit the constitutional recognition of the status and natural rights of citizens that its framers believed was implied in the Thirteenth Amendment. The ratification of the Fourteenth Amendment in 1868 thus completed the constitutional revolution regarding citizenship and civil rights. Congressional Republicans legislated to secure the civil rights of Americans in 1866 with the understanding that, with the Thirteenth and then the Fourteenth Amendment, the Constitution of the United States gave to all Americans the fundamental rights of citizenship and delegated to Congress the authority to protect citizens in their enjoyment of these rights.[14]

A striking feature of the framers' intent in 1866 is their adoption of the most radical abolitionist theory of constitutionalism before the Civil War.[15] By 1866, not only radicals but all moderate and even some conservative Republicans supported the efforts of Congress to secure civil rights.[16] This shift reveals the extent to which the Civil War radicalized American politics. A political and constitutional position regarded as extreme and embraced by a very small minority before the Civil War had become mainstream Republicanism by 1866. The position that contemporaries regarded as radical in 1866 was securing the voting rights of blacks. As a matter of law and as a matter of political objectives, most contemporaries distinguished between civil rights and voting rights.[17] The essential reason that Radical Republicans criticized the Fourteenth Amendment as too moderate was its failure to provide the same protection for voting rights as for civil rights.[18]

The full reach of this revolution in constitutionalism could have changed the nature of American government from a federal republic with divided authority to a unitary state. Democratic opponents in Congress recognized the implications of the Republicans' theory of constitutionalism. Democrats objected to the proposed Fourteenth Amendment and Civil Rights Bill precisely because the

[13] *Congressional Globe*, 39th Cong., 1st sess., 1866, pp. 1291–92 (Cong. Bingham); and p. 2896 (Sen. Howard).

[14] Supporters of civil rights enforcement insisted that U.S. citizenship, and not state citizenship, entitled Americans to all of the fundamental rights of citizenship and the enjoyment of these rights. See the debates among Senators Van Winkle, Cowan, Trumbull, Johnson, Davis, and Clark in *Congressional Globe*, 39th Cong., 1st sess., 1866, pp. 497–500, 506, 523–30, 600, 1777–81, and Appendix 182. Opponents of congressional civil rights enforcement denied that Congress possessed the authority to determine the status and guarantee the rights of citizens within the states. *Congressional Globe*, 39th Cong., 1st sess., 1866, p. 1156 (Cong. Thornton); p. 1268 (Cong. Kerr); p. 1679 (Pres. Johnson's veto of the Civil Rights Bill); and pp. 1775–80 (Sen. Johnson). For a fuller discussion of these points, see Kaczorowski, "Revolutionary Constitutionalism."

[15] For a good analysis of antebellum abolitionist theories of constitutionalism and slavery, see William Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760–1848* (Ithaca, N.Y., 1977). See also tenBroek, *Equal under Law*; and Graham, "Antislavery Backgrounds of the Fourteenth Amendment."

[16] See Benedict, *A Compromise of Principle*; Cox and Cox, *Politics, Principle, and Prejudice*.

[17] Good discussions of the political aspects of the suffrage issue are in La Wanda Cox and John Cox, "Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography," *Journal of Social History*, 33 (1967): 303; William Gillette, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* (Baltimore, Md., 1965). For representative comments in Congress on the issue of black suffrage, see *Congressional Globe*, 39th Cong., 1st sess., 1866, pp. 476, 599 (Sen. Trumbull). For representative press commentary, see *The Nation*, 2 (April 26, 1866): 518; and the *Chicago Tribune* (February 5, 1866): 4.

[18] See *Congressional Globe*, 39th Cong., 1st sess., 1866, pp. 673, 675, 684 (Sen. Sumner); and Kaczorowski, "Nationalization of Civil Rights."

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constitutional theory that these measures encompassed could be used by Congress to destroy the civil and criminal authority of states over their citizens. If, as proponents of civil rights insisted, the Constitution guaranteed the fundamental rights of citizenship, Congress could exercise exclusive jurisdiction over civil rights. National law could supplant state law and the national government could absorb "all reserved state sovereignty and rights."[19] Senator Garret Davis, Democrat from Kentucky, was one of several opponents who objected that "the principles involved in this bill, if they are legitimate and constitutional, would authorize Congress to pass civil and criminal codes for every State of the Union."[20] These views were echoed by the House of Representatives, the White House, and the press.[21]

These positions were a continuation of a constitutional battle that had raged for many years. Before the Civil War, the states had defined the status and secured the rights of the inhabitants of the United States. They performed these functions through state legal institutions, statutes, and courts. Some antebellum legal theorists argued, however, that the primary authority to perform these functions rested with the national government.[22] The question of whether the national or state governments possessed ultimate authority to determine the status and enforce the rights of American inhabitants produced a national political and constitutional debate that centered on slavery and culminated in the South's secession in 1861. Secession, based on the constitutional theory of state sovereignty, made the legal questions of federalism and the locus of sovereignty central issues of the Civil War. The North responded with Abraham Lincoln's theory of national sovereignty, which denied the existence of any state's right to secede.[23] The Emancipation Proclamation added the other central question, namely, which government possessed the primary constitutional authority to determine the status of American inhabitants.

The antebellum constitutional questions of the nature of American federalism, the locus of sovereignty, and the primary authority over the status of Americans were thus joined as political issues in the Civil War. The causes of Unionism, national sovereignty, and emancipation were victorious on the battlefield. North-

[19] *Congressional Globe*, 39th Cong., 1st sess., 1866, Appendix 185, pp. 156–58 (Sen. Davis).

[20] *Congressional Globe*, 39th Cong., 1st sess., 1866, p. 1414.

[21] *Congressional Globe*, 39th Cong., 1st sess., 1866, pp. 1120, 1122, 2538 (Cong. Rogers); p. 1154 (Cong. Eldridge); p. 1156 (Cong. Thornton); p. 1266 (Cong. Raymond); pp. 1268, 1270–71 (Cong. Kerr); p. 1295 (Cong. Latham); pp. 1679–81 (Pres. Johnson's veto); ex-Governor William Sharkey to Mississippi Governor Benjamin Humphreys, 17 September 1866, reprinted in unidentified newspaper, clipping in Scrapbook on the Fourteenth Amendment, Edward McPherson Papers, Library of Congress, container 100, p. 23; resolution of the Texas legislature rejecting ratification of the Fourteenth Amendment, reprinted in the *New York Times* (November 4, 1866): 2; resolution of the Kansas Senate Committee on the Fourteenth Amendment, reprinted in the *Memphis Avalanche*, n.d., clipping in Scrapbook on the Fourteenth Amendment, Edward McPherson Papers, p. 55.

[22] John Hurd, *The Law of Freedom and Bondage in the United States*, 2 vols. (Boston, 1858, 1862); James Kettner, *The Development of American Citizenship, 1608–1870* (Chapel Hill, N.C., 1978); and Wiecek, *Sources of Anti-Slavery Constitutionalism.*

[23] These conflicting constitutional theories were expressed in the Southern state resolutions relating to secession and in President Lincoln's messages to Congress. "Mississippi Resolution on Secession," in *Documents in American History*, Henry Commager, ed. (Englewood Cliffs, N.J., 1973), 373; "South Carolina Declaration of Causes of Secession," p. 372; "President J. Davis, Message to Congress," p. 389; Abraham Lincoln, "Message to Congress in Special Session, July 4, 1861," p. 393.

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ern Republicans believed that the Civil War had resolved these political and constitutional questions. They soon discovered they were mistaken.[24] Former Confederates tenaciously adhered to a philosophy of state sovereignty and refused to respect national authority. They defiantly resisted the emancipation guaranteed blacks by the Thirteenth Amendment. Southern white supremacists denied the freedmen's freedom by continuing to treat them as if they were slaves. White supremacists frequently met the attempts of freed blacks to assert their constitutionally guaranteed freedom with violent repression and economic intimidation. Moreover, they treated white Unionists and federal officers with disrespect, and resorted to economic intimidation and violence toward them as well.[25]

Local officials in the South sanctioned and legitimized the defiant behavior of individuals and the racial and political customs of communities dominated by whites. In their constitutions and laws, Southern states refused to recognize that blacks were citizens possessing the natural rights of free people.[26] State officers commonly failed or refused to protect the personal safety and property of blacks. They similarly refused to extend this protection to whites who were political allies or federal agents of blacks. When Southern blacks and politically unpopular whites were the victims of crimes, they could not get sheriffs to arrest, courts to try, or juries to convict the perpetrators. When charged with crimes or sued in the civil courts, blacks seldom received impartial justice. Indeed, white Unionists and freed blacks were prosecuted and sent to prison during peacetime for aiding the U.S. forces during the war. Southern hostility persuaded Northern Republicans and Southern Unionists that secessionist and Confederate sentiments had survived the Civil War.[27] By the end of 1865, the constitutional and political process of restoring the Southern states to the Union had become the problem of preserving the principles for which the war had been fought.

[24] According to Eric McKitrick, Southern recalcitrance immediately after Appomattox was perceived by Northern Republicans as endangering the fruits of the Union victory. The refusal of many former Confederates to accept defeat necessitated the measures of Reconstruction, in the minds of Northern Republicans. McKitrick, *Andrew Johnson and Reconstruction*, 21–41.

[25] Michael Perman, *Reunion without Compromise: The South and Reconstruction, 1865–1868* (Cambridge, 1973); Leon Litwack, *Been in the Storm So Long: The Aftermath of Slavery* (New York, 1979). Congressional Republicans received reports of these conditions while they were framing the Fourteenth Amendment and the Civil Rights Act of 1866. See Grant Goodrich to Lyman Trumbull, 1 February 1866, Lyman Trumbull Papers, Library of Congress; Brigadier General J. W. Sprague to John Sherman, 4 April 1866, John Sherman Papers; George A. Custer to Zachariah Chandler, 14 January 1866, Zachariah Chandler Papers, Library of Congress. These reports were confirmed by Congress's own investigations. See Joint Committee on Reconstruction, *Report*, 39th Cong., 1st sess., 1866; *Freedmen's Affairs*, 39th Cong., 1st sess., Senate Exec. Doc. 66 (1866); and *Murder of Union Soldiers*, 39th Cong., 2d sess., H. Rept. 23 (1866).

[26] Kaczorowski, *Politics of Judicial Interpretation*, 27–44; Niemen, *To Set the Law in Motion*; James Sefton, *The United States Army and Reconstruction, 1865–1877* (Baton Rouge, La., 1967); Theodore Wilson, *The Black Codes of the South* (Tuscaloosa, Ala., 1965).

[27] The conclusion that Southerners abused white Unionists and freed blacks and that observers interpreted this abuse as hostility toward and resistance to federal authority was expressed in letters to congressional Republicans, such as those cited in note 24 above and the following: William Ware Peck to Charles Sumner, 1 January 1866, Charles Sumner Papers, Houghton Library, Harvard University; and George W. Kingsbury to Justin S. Morrill, 18 June 1866, Justin S. Morrill Papers, Library of Congress.

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THE CIVIL WAR HAD BEEN A UNIQUELY PARTISAN WAR. Republicans stood for Union and emancipation; Democrats were associated with leniency toward Confederate secessionists and slavery. When President Andrew Johnson attempted a quick restoration of the Confederate states after the war, Democrats rallied behind him. Restoration by the president presented insuperable political problems, however. It preserved the political leadership of the same individuals and groups that had led the Southern states into secession and civil war.[28] If Republicans acquiesced in Johnson's plan, their Democratic opponents would gain ascendancy by joining with the late belligerents of the South, an outcome unacceptable to Northern Republicans. It would condone "traitorism" and betray their Unionist allies in the South. But achievement of Republican political objectives in the South, which included a political power base of white Unionists and free blacks, would require a change in Southern political leadership. Political participation of the Republicans' Southern allies necessitated a federal presence to protect them from the hostility of the dominant Democratic Conservative white supremacists. As the Civil War was a partisan effort associated with and led by the Republican party, so Reconstruction was a partisan postwar readjustment controlled by and identified with Northern Republicans.

In 1866, the political context of civil rights deprivations compelled Congress to take effective measures to secure the fundamental rights of American citizens. Although Republicans shrank from providing freed blacks with economic independence through land redistribution, they did offer legal recognition of their liberty by securing important rights for their economic autonomy, such as the rights to enter into contracts and to buy and sell property. Congressional Republicans put aside racial prejudice that ordinarily would have precluded the legal enforcement of civil rights.[29] The factors motivating them included the perceived need to preserve the objectives for which so many thousands gave their lives, the obligation to make effective the freedom they had promised to Southern blacks, a sense of elemental fairness and justice, as well as political self-interest. All these objectives were served by providing for the personal safety and security of Southern political allies—civilians of both races and federal officers. The political ideology of the Republican party further diminished the effects of Northern white racism on congressional Republicans. The central ideas of the party were the theory of natural rights, a classic liberalism, and a belief in equal opportunity. The combination served as a concept of American nationalism, distinguishing Repub-

[28] G. Koerner to Lyman Trumbull, 11 January 1866, Trumbull Papers, Library of Congress; H. B. Allis to Benjamin F. Wade, 21 March 1866, Benjamin F. Wade Papers, Library of Congress; Joel Silbey, *A Respectable Minority: The Democratic Party in the Civil War Era, 1860–1868* (New York, 1977); Perman, *Reunion without Compromise*.

[29] Useful discussions of white racism and its effect on the politics of the era include George Fredrickson, *The Black Image in the White Mind: The Debate on Afro-American Character and Destiny, 1817–1914* (New York, 1963); Forrest Wood, *Black Scare: The Racist Response to Emancipation and Reconstruction* (Berkeley, Calif., 1970); V. Jacque Voegeli, *Free But Not Equal: The Midwest and the Negro during the Civil War* (Chicago, 1967); C. Vann Woodward, "Seeds of Failure in Radical Race Policy," *American Philosophical Society Proceedings*, 110 (1966): 1.

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lican notions of Unionism and American freedom from the Southern Democratic Conservative ideology of states' rights and slavery.[30]

Northern Republicans decided that the preservation of American nationhood and freedom, as they understood them, required a strong central government to combat the danger posed by Southern recalcitrance. Republican William Lawrence of Ohio invoked political necessity when he warned the House that the congressional protection of civil rights was "essential to preserve national life, and the means of national existence."[31] Withholding this protection would be tantamount to permitting the Southern states to divest citizens of their rights in the aftermath of Appomattox. The editor of the *Philadelphia American* echoed this theme in urging ratification of the Fourteenth Amendment: "If there be one lesson written in bloody letters by the [Civil] 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 States rights and nullification."[32] The governor of Wisconsin, Lucius Fairchild, transmitted a copy of the proposed Fourteenth Amendment to the state legislature and urged ratification "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 full guarantees to its future preservation."[33]

The conjunction of political ideology and political necessity resulted in congressional Republicans embracing a revolutionary theory of constitutionalism. To achieve political power in the South, to preserve their wartime objectives of Unionism and freedom for slaves, they insisted that sovereignty resided in the federal government and included primary authority to determine the status and secure the rights of all Americans, white and black. Republican supporters of the Reconstruction amendments and the civil rights statute acknowledged the revolutionary changes they had wrought in American federalism by delegating plenary authority over citizenship and civil rights to the national government.[34]

[30] For analyses of the Republican party's ideology, see Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War* (London, 1970); Yehoshua Arieli, *Individualism and Nationalism in American Ideology* (Cambridge, 1964). Examples of this Republican ideology include Sen. Lyman Trumbull's speech in the *Congressional Globe*, 39th Cong., 1st sess., 1866, p. 474; John Andrews, *Valedictory Address of his Excellency John A. Andrews to the Two Branches of the Legislature of Massachusetts, Jan. 4, 1866* (Boston, 1866); Benjamin Butler, *The Status of the Insurgent States upon Cessation of Hostilities: Speech delivered before the Pennsylvania Legislature, Apr. 11, 1866* (Washington, D.C., 1866).

[31] *Congressional Globe*, 39th Cong., 1st sess., 1866, pp. 1832, 1836. See also p. 1090 (Cong. Bingham); pp. 1262–63 (Cong. Broomall); and Appendix 99 (Sen. Yates).

[32] Clipping in Scrapbook on the Fourteenth Amendment, Edward McPherson Papers, Library of Congress, p. 41.

[33] Unidentified newspaper in Scrapbook on the Fourteenth Amendment, p. 63.

[34] See *Congressional Globe*, 39th Cong., 1st sess., 1866, pp. 1065–67 (Cong. Higby); p. 1066 (Cong. Price); p. 2442 (Sen. Howard); pp. 2534–35 (Cong. Ecklay); p. 2961 (Sen. Poland). See above, notes 9, 10, 11, and 31 for evidence that the framers' view of constitutionalism, as it was expressed in Congress and discussed in the press, held that Congress possessed plenary authority to secure civil rights. Opponents objected because they understood that Republican constitutionalism was revolutionary. See pp. 1063–64 (Cong. Hale); pp. 1083–85 (Cong. Davis); p. 2500 (Cong. Shanklin); p. 2538 (Cong. Rogers); p. 2987 (Sen. Cowan); and p. 3147 (Cong. Harding).

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Before the Civil War, the states had exercised almost exclusive jurisdiction over fundamental rights. Under the Thirteenth and Fourteenth Amendments, as Republicans understood them, Congress could conceivably supplant the states in securing civil rights. By virtue of the Constitution's supremacy clause, Congress could exercise exclusive authority over citizenship and civil rights and thereby destroy state authority as a matter of constitutional law.[35] Indeed, Congress exercised this authority when it determined by statute and constitutional amendment which people were citizens and what rights they were to enjoy. The states were deprived of their historical authority to make these decisions. Although congressional Republicans acknowledged the constitutional revolution in which they were engaged, they carefully avoided carrying this revolution to its ultimate conclusion of creating a unitary political structure. Republicans did not wish to supplant the states in providing a foundation for ordinary civil and criminal justice. On the contrary, they consciously preserved federalism by avoiding unnecessary intrusions on state authority over civil rights. Intentionally recognizing concurrent authority, Congress restricted its protection of fundamental rights to situations in which states and localities failed to protect them.

The decision of congressional Republicans to preserve state authority over ordinary civil and criminal justice has led legal historians to conclude that the Thirteenth and Fourteenth Amendments and the Civil Rights Act of 1866 were modest increases in national authority.[36] The evidence, however, supports the belief of the framers that the Thirteenth and Fourteenth Amendments and the 1866 statute would bring about revolutionary changes in federal constitutionalism. The underlying constitutional authority to enforce civil rights stemmed from the constitutional recognition of the status and rights of free people as having the status and rights of U.S. citizens. Because the civil rights inherent in citizenship were constitutionally guaranteed, the framers believed that Congress, by statute and constitutional amendment, could require the states, the traditional guardians of these rights, to secure them for all Americans. Congress conferred citizenship on all qualified persons in Section 1 of the Civil Rights Act and the Fourteenth Amendment, the framers thereby forcing the states to recognize freed blacks as citizens both of the United States and of the states of their residence. The states no longer could decide state citizenship for themselves. They were prohibited from arbitrarily excluding any qualified persons from state citizenship and from refusing to secure the civil rights to which citizenship entitled them. By defining natural rights as constitutionally recognized rights of American citizenship, Republicans acknowledged that Americans possessed these rights independent of state law. That is, if the states were to repeal their legal recognition of these rights, citizens could still claim them as constitutionally recognized and secured rights of

[35] This exclusive authority was precisely one of the consequences of Republican constitutionalism to which opponents adamantly objected. A modern example of the use of the supremacy clause is the exercise by Congress of exclusive authority over interstate commerce, known as the preemption doctrine. See *Perez v. Campbell*, 402 U.S. 637 (1971); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

[36] These historians are cited in note 7.

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American citizenship. Indeed, James F. Wilson of Iowa made this precise point in arguing that the bill was needed because the Southern states failed to recognize and secure the rights of certain Americans. Congress had to provide this protection and had the power to do so independent of the states.[37]

CERTAIN ASPECTS OF THE FRAMERS' UNDERSTANDING of civil rights enforcement were evidently vague and ambiguous. Determining from the language of the law the specific civil rights that individuals possessed as citizens was problematical. President Lincoln's attorney general, Edward Bates, in an official opinion, discussed the ambiguous definition of the rights of citizens as "generic, common, embracing whatever may be lawfully claimed."[38] The framers acknowledged the legal uncertainty, yet they were unequivocal in declaring that the natural rights to life, liberty, and property, and rights incidental to these, were the rights of U.S. citizenship that they intended to secure with the Civil Rights Act and the Fourteenth Amendment.[39] The representative from Ohio, William Lawrence, explained the Republican legal theory of civil rights enforcement and the generic nature of the rights of citizens that Republicans were attempting to guarantee: "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, such 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."[40]

This Republican theory of citizenship and congressionally enforceable civil rights led to two important legal consequences. In defining civil rights and the privileges and immunities of U.S. citizens as the natural rights of free people, the framers provided legal recognition of the civil rights of citizens independent of state law. In addition, the framers established an expansive body of nationally enforceable civil rights. Wilson explained 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."[41] The framers created the potential for a future Congress or the courts to enforce rights that were not specified in the Civil Rights Act, or that, in 1866, may not have been regarded as incident to the natural rights to life, liberty, and property encompassed within the privileges and immunities clause of the Fourteenth Amendment.

[37] *Congressional Globe*, 39th Cong., 1st sess., 1866, pp. 1117–18.

[38] E. Bates, "Citizenship," *Official Opinions of the Attorneys General*, 10 (1866): 383, 407.

[39] Cong. Shellabarger complained, "It has been found impossible to settle or define what are all the indispensable rights of American citizenship." *Congressional Globe*, 39th Cong., 1st sess., 1866, p. 1293.

[40] *Congressional Globe*, 39th Cong., 1st sess., 1866, p. 1756.

[41] *Congressional Globe*, 39th Cong., 1st sess., 1866, pp. 1118–19.

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Although the enactments of 1866 were radical, the framers' concept of a national authority to enforce civil rights was developmental and expansionary. It permitted civil rights protection beyond that provided in 1866. Congress subsequently attempted to enforce additional rights more directly. In 1870 and 1871, for instance, Congress passed laws that protected political participation and political expression by criminalizing certain conspiracies intended to prevent people from enforcing their rights of U.S. citizenship. In 1875, Congress legislated to desegregate places of public accommodations.[42] Judges reflected this developmental aspect of Republican constitutionalism in interpreting the Civil Rights Act of 1866 and the Fourteenth Amendment as securing rights not enumerated in the statute's first section. Federal judges applied the Civil Rights Act of 1866 to segregated public facilities and common carriers and held the proprietors liable under the first and second sections of the statute for infringing the rights of citizens to equal access. Courts sometimes ordered court officers to allow blacks on juries, even though the Act did not explicitly guarantee the right to serve or the defendant's right to racially integrated juries. Federal judges interpreted the privileges and immunities of citizenship secured by the Fourteenth Amendment as including the guarantees of the Bill of Rights, such as freedom of speech and freedom of assembly.[43]

The framers drafted the Civil Rights Act of 1866 to describe some of the civil rights to which U.S. citizenship entitled citizens, that is, civil rights that the framers believed incidental to the generic rights of life, liberty, and property. Section 1 declares that U.S. citizens "of every race and color . . . shall have the same right . . . as is enjoyed by white citizens."[44] This language appears to confer on citizens only a right to racial equality and not the substantive rights *per se*. In wording Section 1 as they did, however, the framers sought to secure these rights of citizenship in two ways: by requiring the states to impartially protect the personal rights and safety of all persons through systems of civil and criminal justice, and by providing a cause of action for those unable to enjoy rights as white citizens enjoyed them.

The framers permitted the states to decide for themselves the conditions under which civil rights were to be exercised and enjoyed, as long as the conditions were reasonable. Congress permitted the states to vary the enjoyment of civil rights according to age, sex, mental capacity, and alienage, since such discriminations were considered reasonable and necessary.[45] Although Republicans envisioned a

[42] 16 Stat. 140 (1870); 17 Stat. 13 (1871); 18 Stat. 335 (1875).

[43] See Scrapbook on the Civil Rights Bill, Edward McPherson Papers, Library of Congress, pp. 108–11, 119–20, 133–34, 136; and Scrapbook, John Underwood, ed., John C. Underwood Papers, Library of Congress, pp. 193, 203, 205, 207. See the *New York Times* (May 8, 1867): 1; (August 9, 1867): 4; (August 30, 1867): 5; (October 17, 1867): 1; (October 20, 1867): 1. See also *Slaughterhouse Cases*, 15 F. Cas. 649, 652–53 (C.C. La. 1870) (no. 8408); *United States v. Hall*, 26 F. Cas. 79, 81–82 (C.C. La. 1871) (no. 15,282); *United States v. Given*, 25 F. Cas. 1328, 1329 (C.C. Del. 1873) (no. 15,211). For a contrary view, see Nieman, *To Set the Law in Motion*, 139.

[44] Section 1 specifies "that 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"; 14 Stat. 27 (1866).

[45] The *New York Evening Post* commented that the Civil Rights Act declared who were citizens and what rights they had. Yet the *Post* also insisted that the statute did not "usurp the power of the local

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national uniformity in the rights that citizens possessed as citizens, they also provided for local variations in the ways in which citizens exercised these rights. The framers thus preserved a federal constitutional structure of government that distributed authority over fundamental rights to both the national and state governments but delegated ultimate authority to the national government.

Judges understood the Republican legal theory of civil rights enforcement authority that underlay the Civil Rights Act of 1866 to be a blend of concurrent authority and exclusive national authority. Although the fundamental rights of citizenship, such as those specified in the Civil Rights Act, were secured to all citizens under national law, and the states could not deny these rights to any citizen, the states were still permitted to determine the conditions under which these civil rights were to be exercised, so long as state law did not conflict with national law or until Congress exercised the authority to prescribe these conditions. In 1867, Justice Noah H. Swayne clarified the scope of this theory, deciding that the Kentucky rules of evidence violated the Civil Rights Act of 1866. These rules recognized the right of blacks to testify in Kentucky state courts, but only if no white witnesses were available. Observing that the Thirteenth Amendment "reversed and annulled the original policy of the constitution" by guaranteeing to all Americans the status and rights of free people and delegating to Congress the authority to secure the status and rights of citizenship, Justice Swayne held that the Civil Rights Act guaranteed black witnesses the right to testify under the same conditions white witnesses did.[46] On the other hand, the California Supreme Court stated in 1869 that if "title to real property of any character may be conveyed by writing not under seal, then all citizens, of every race and color, may convey property of that character in the same mode."[47] California's acceptance of this method did not compel any other state to allow similar conveyances. The California rule was tenable under national law because it was a reasonable regulation of a congressionally enforceable right of U.S. citizenship. The Civil Rights Act of 1866 and the Fourteenth Amendment thus maintained a concurrence in national and state authority over civil rights.

Even though fundamental rights of citizens were nationalized, property law, contract law, and tort law, among others, remained under state jurisdiction, as did criminal law. The deliberate perpetuation of the traditional role of the states in securing civil rights, under national scrutiny, is understandable in light of the realities that confronted Congress in 1866. Despite the vast increase in the power

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legislature to prescribe in what manner the rights of person and property shall be secured. A distinction is to be taken here which the President's Veto message overlooks. Congress does not in this bill say by what rules evidence shall be given in courts, by what tenure property shall be held, or how a citizen shall be protected in his occupation. It only says to the states, whatever laws you pass in regard to these matters, make them general; make them for the benefit of one race as well as for another." Clipping in Scrapbook on the Civil Rights Bill, Edward McPherson Papers, Library of Congress, p. 32.

[46] *United States v. Rhodes*, 27 F. Cas. 785, 794 (C.C. Ky. 1867) (no. 16,151). By 1869, the states generally recognized the right of blacks to testify as a congressionally secured right of citizenship. *Ex parte Warren*, 31 Tex. 147 (1868); *Kelley v. Arkansas*, 25 Ark. 392 (1869); *State v. Washington*, 36 Cal. 658 (1869); *State v. Underwood*, 63 N.C. 98 (1869).

[47] *State v. Washington*, 36 Cal. 666–67 (1869).

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of the national government and the heightened sense of nationalism generated by the Civil War, the states were still better suited to be the guardians of civil rights. The national government simply did not have the resources to take on this new function without the assistance of state governments. Nor was it necessary, let alone desirable, for the national government to supplant state civil and criminal codes, courts, and enforcement agencies, or to handle ordinary crimes and civil suits.[48]

Another point of debate over the framers' concept of a congressional civil rights enforcement authority concerns whether the framers merely intended to secure a racial equality in state law or whether they intended to protect rights directly. I have argued that the framers believed Congress possessed the authority to enforce civil rights directly and to redress any violations of civil rights. Whether or not Congress chose to exercise this authority to its full extent, however, is another question. The framers' understanding of the full scope of congressional authority to enforce civil rights is a separate question from that of the scope of authority the framers exercised to enforce civil rights in 1866. Whatever the framers' intent, they permitted the statute and the amendment to go forward with the revolutionary potential that a broad reading entailed.

Federal legal officers and judges certainly interpreted and applied the statute to secure more than racially impartial state law. The Civil Rights Act authorized these law enforcement officers to directly redress civil and criminal violations of civil rights. Sections 1 and 3, as they were applied by federal officers, created a private civil cause of action for the infringement of the rights that the Civil Rights Act secured.[49] Section 2 created a misdemeanor punishable in the federal courts whenever a person, acting under pretext of law, statute, ordinance, regulation, or custom, violated the civil rights secured by Section 1.[50] Section 3 authorized the federal courts to supplant state and local courts and to sit as courts of primary civil and criminal jurisdiction in specified circumstances. It provided for the removal to the federal district and circuit courts of "all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the state or locality where they may be any of the rights secured to them by the first section." If local law enforcement officers failed to arrest and hold for trial alleged criminals, the military and federal marshals were authorized to do so; if the state court then failed to try the defendants, they were to be tried in the federal court.[51]

[48] Nevertheless, the creation of the Department of Justice and the reorganization of the office of Attorney General in 1870 was a congressional recognition of the expanded jurisdiction and increased legal business of the national government. This reorganization was an attempt by Congress to increase efficiency in the handling of the nation's burgeoning legal affairs. However, Harold Hyman has noted an anti-bureaucratic bias in this period that sharply curtailed the effectiveness of governmental action in meeting the needs of Americans. Kaczorowski, *Politics of Judicial Interpretation*, 79; Hyman, *A More Perfect Union*, chaps. 17–22, 25.

[49] *In re Turner*, 24 F. Cas. 337 (C.C. Md. 1867) (no. 14,247); Kaczorowski, *Politics of Judicial Interpretation*, 27–48.

[50] Section 1 of the Civil Rights Act of 1866 refers to citizens and specifies some of the rights that citizens are to enjoy; Section 2 specifies certain infringements of these rights regardless of whether or not the victim is a citizen. 14 Stat. 27 (1866).

[51] Federal legal officers—U.S. attorneys, marshals, and Freedmen's Bureau agents—and federal judges interpreted the Civil Rights Act in this way. They were instrumental in prosecuting crimes committed by whites against blacks when, immediately after the Civil War, local law enforcement

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Section 3 also authorized removal in situations in which a state defendant, civil or criminal, could not receive impartial justice. In each of these instances, federal agencies and officers exercised primary jurisdiction and administered justice as if they were state and local agencies and officers.

OTHER ENFORCEMENT PROVISIONS OF THE CIVIL RIGHTS ACT were taken directly from the Fugitive Slave Act of 1850, which had been adopted to implement the fugitive slave clause of the Constitution.[52] The statute authorized, even required, federal judges and law officers to return runaway slaves to their owners. The Supreme Court had interpreted the fugitive slave clause as conferring on slave-owners an unqualified right of property in their slaves, a right that delegated to "the national government . . . appropriate authority and functions to enforce it" through national legislative, judicial, and executive agencies independent of the states.[53] The Fugitive Slave Act of 1850 secured a fundamental right of U.S. citizenship and formed a model for the Civil Rights Act of 1866. The framers recognized the irony of using a statute adopted to assure the rights of slaveowners as the model for legislation to secure the rights of their former slaves. Senator Lyman Trumbull of Illinois approved this connection when he admonished the Congress: "Surely we have the authority to enact a law as efficient in the interests of freedom, now that freedom prevails throughout the country, as we had in the interest of slavery when it prevailed in a portion of the country."[54] The Fugitive Slave Act of 1850 served the cause of civil rights in 1866 in two ways. It provided a blueprint for the direct enforcement of constitutional rights in national courts by national legal agencies. It also provided a precedent for congressional legislation enacted to enforce rights over which the states had previously exercised jurisdiction.

Some supporters of the bill explicitly expressed their intention to delegate to the federal courts the primary jurisdiction over civil rights. When Wilson introduced the Civil Rights Bill in the House, he declared that U.S. citizens were entitled to the great fundamental rights of life, liberty, and property that free governments are obliged to secure, and that, because the states refused to protect these rights for some citizens, "we must do our duty by supplying the protection which the states deny." The Republican senator from Indiana, Henry S. Lane, expressed the same understanding in the Senate and declared: "Neither the judge, nor the jury, nor the officer as we believe is willing to execute the law . . . We should not legislate at all if we believed the State courts could or would honestly carry out the provisions of the Thirteenth Constitutional Amendment; but because we believe they will not

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agencies would not. See Kaczorowski, *Politics of Judicial Interpretation*, 8–12, 27–48. The Supreme Court subsequently interpreted Section 3 narrowly in a technical ruling that eliminated the criminal jurisdiction over these crimes (pp. 135–43). The Supreme Court's decision is cited in *Blyew and Kennard v. United States*, 13 Wall. (80 U.S.) 581 (1872).

[52] 27 Stat. 14, sects. 4–9 (1866); 9 Stat. 462 (1850).

[53] *Prigg v. Pennsylvania*, 16 Pet. (41 U.S.) 539, 615, 623 (1842).

[54] *Congressional Globe*, 39th Cong., 1st sess., 1866, p. 475.

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do that, we give the Federal officers jurisdiction."[55] When the congressional proponents of civil rights enforcement stated that civil rights were to be secured within the states, and when congressional opponents complained that Congress was changing the relationship between citizens and the state governments, both groups were referring to this assumption of state police powers by federal officers and agencies. Federal legal officers and law enforcement agencies performed state police functions and administered civil and criminal justice when local law enforcement agents and agencies would not.[56]

Congress enacted this statute to enforce civil rights because the Republican majority believed that Congress possessed primary authority over the civil rights of American citizens. Congress would neither have conferred the jurisdiction it did on federal agencies and officers nor legislated to secure civil rights two years prior to the ratification of the Fourteenth Amendment, if a majority of members had believed that these powers were constitutionally reserved to the states, as the Supreme Court declared in 1873 and 1876.[57] The decision by Congress to confer on federal courts the jurisdiction to try criminal offenses and civil disputes supports the view that the framers believed that the Thirteenth Amendment delegated to Congress primary authority over civil rights.

The framers' interpretation of the Thirteenth Amendment as a general guarantee of the natural rights of free people led to their inclusion of white Americans within the protective guarantees of the Civil Rights Act. The framers were explicit in expressing their intention to secure the civil rights of all Americans. Senator Trumbull stated that the Civil Rights Bill "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."[58] A few years later, to combat the Ku Klux Klan, many of these same senators and representatives adopted additional legislation that defined as federal crimes certain civil rights violations and conspiracies to violate civil rights without requiring racial prejudice as an element of the offense. Also, U.S. attorneys did not charge defendants with racial discrimination to bring violations of civil rights within federal jurisdiction under these statutes. The gist of the offense was the intention to deprive U.S. citizens of their rights.[59]

[55] *Congressional Globe*, 39th Cong., 1st sess., 1866, p. 1118 (Cong. Wilson); pp. 602–03 (Sen. Lane).

[56] See Kaczorowski, *Politics of Judicial Interpretation*, 27–48, 52–53, 79–115.

[57] *Slaughterhouse Cases*, 16 Wall. (83 U.S.) 36 (1873); *United States v. Cruikshank*, 2 Otto (92 U.S.) 542 (1876).

[58] *Congressional Globe*, 39th Cong., 1st sess., 1866, p. 599. See also p. 474 (Sen. Trumbull); pp. 504–05 (Sen. Johnson); p. 595 (Sen. Davis); p. 603 (Sen. Cowan); p. 3035 (Sen. Henderson); pp. 1066–67 (Cong. Price); p. 1117 (Cong. Wilson); pp. 1120–21 (Cong. Rogers); pp. 1263, 1265 (Cong. Broomall); p. 1264 (Spencer Colfax); pp. 1291, 2542 (Cong. Bingham); p. 1853 (Cong. Lawrence). See newspaper clippings on the topic in Scrapbook on the Civil Rights Bill, Edward McPherson Papers, Library of Congress, pp. 4, 26, 32, 37, 47, 53, 58, 62, 78, 79, 132; clippings in Scrapbook on the Fourteenth Amendment, Edward McPherson Papers, pp. 17, 29, 31, 41, 53, 63, 82.

[59] 16 Stat. 140 (1870); 17 Stat. 13 (1871). U.S. District Judge Richard Busteed to Attorney General Amos T. Akerman, 22 November 1871, Source Chronological File, Northern District of Alabama, Department of Justice Records, National Archives; Charge to Grand Jury, enclosed in above letter; U.S. Attorney E. P. Jacobson to Amos Akerman, 4 and 7 August 1871, Source Chronological File, Southern District of Mississippi, Department of Justice, National Archives; Jacobson to Attorney General George Williams, 17 February 1872, *ibid.*; U.S. Attorney G. Wiley Wells to George Williams, 5 March and 2 April 1872, Source Chronological File, Northern District of Mississippi, Department of Justice,

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The recognition of Congress as having the primary constitutional authority over the personal security and civil rights of American citizens presented the danger that the national government would supplant state and local governments in their ordinary police functions. In 1866, opponents of the Civil Rights Bill loudly protested that this was precisely the bill's effect.[60] The framers confronted this difficult problem of preserving federalism when they attempted to make civil rights violations federal crimes punishable in the federal courts. The framers attempted to distinguish federal crimes from ordinary crimes by limiting federal criminal violations of civil rights to acts committed "under color of any law, statute, ordinance, regulation, or custom." Wilson explained that Congress was "not making a general criminal code for the states."[61] On the contrary, the supporters wished to preserve the state administration of ordinary criminal justice. Although the framers of the Civil Rights Acts of 1870 and 1871 expressed the same desire, under these statutes, officers of the Department of Justice and federal judges in some areas of the Southern states did replace local authorities who were overwhelmed by the Klan and administered criminal justice for them.[62]

The framers of the Civil Rights Act of 1866 also limited its scope because they intended to match federal sanctions to the specific violations of civil rights that required national intervention, just as the framers of the 1870 and 1871 statutes specified other kinds of offenses that confronted them. In other words, they shaped federal criminal sanctions to provide effective civil rights protection where and when it was needed. Black victims of racially motivated civil rights violations who were unable to redress their grievances within the state criminal justice system had the greatest need for federal protection in 1866; consequently, the Act made civil rights violations that were motivated by discriminatory intent federal crimes. Senator Trumbull explained that the words, "'under color of law' were inserted as words of limitation . . . If an offense is committed against a colored person simply because he is colored, in a state where the law affords the same protection as if he were white, this act neither has nor was intended to have anything to do with his case, because he has adequate protection in the State Courts; but if he is discriminated against under color of State law because he is colored, *then it becomes necessary to interfere for his protection*."[63] Discriminatory intent conceivably included political prejudice, since white Unionists were also to be protected. Because state

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National Archives; U.S. District Judge Robert A. Hill to Solicitor General Benjamin Bristow, 13 May 1872, Benjamin H. Bristow Papers, Library of Congress; Joint Select Committee on the Condition of Affairs in the late Insurrectionary States, *Report*, 42nd Cong., 2d sess., S. Rept. 41 (1871), vol. 12, pp. 934–87. I discuss this subject in *Politics of Judicial Interpretation*, 117–34.

[60] Sen. Willard Saulsbury of Delaware warned that the Civil Rights Bill "positively deprives the State of its police power of government." *Congressional Globe*, 39th Cong., 1st sess., 1866, p. 478. Sen. Davis identified specific areas of state jurisdiction that Democrats feared would be supplanted by the Civil Rights Bill when he espoused the state sovereignty theory of federalism and exclusive state authority over civil rights. See p. 596.

[61] *Congressional Globe*, 39th Cong., 1st sess., 1866, p. 1120.

[62] This history is recounted in Kaczorowski, *Politics of Judicial Interpretation*, 50–134.

[63] *Congressional Globe*, 39th Cong., 1st sess., 1866, p. 1758, emphasis added. Sen. Trumbull's comments were made in rebuttal to Pres. Johnson's objection that the Civil Rights Act would deprive state courts of all cases affecting persons who were discriminated against, not simply those cases involving a discrimination. See Pres. Johnson's veto message on p. 1680.

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laws and courts could be relied on to provide adequate remedies for ordinary violations of the rights to life, liberty, and property, Section 2 of the Civil Rights Act constituted an additional sanction for these violations when they were committed under a discriminatory law or custom. As Senator Trumbull described it, the framers believed a federal sanction was required because victims would be unable to secure their rights when the violations stemmed from discriminatory laws or community prejudices.

The framers of the Civil Rights Act of 1866 and the Fourteenth Amendment did not intend federal jurisdiction over civil rights to be limited to racially discriminatory state action, as the Supreme Court later held in *Slaughterhouse* and *Cruikshank*. Federal agents who removed cases from local authorities under Section 3 assumed their powers were broad. Judge Adjutant General of the Army, Joseph Holt, for instance, interpreted the statute as authorization for removal in a case in which a former Freedman's Bureau agent claimed that he was being harrassed with a false prosecution in a Louisiana court because of the official assistance he had given to blacks. When the state judge, Edmund Abell, refused to allow the case to be removed to the federal district court, federal officers arrested him and charged him with violating the Civil Rights Act.[64] In another case, the U.S. Circuit Court held that white butchers in New Orleans had a claim against a slaughter-house corporation chartered by the state, which the butchers alleged had interfered with rights they enjoyed under the Civil Rights Act, namely, the rights to labor, enter into contracts, and to equal benefit of the law for protection of person and property.[65]

THE FRAMERS NEVER QUESTIONED THE AUTHORITY OF CONGRESS to confer jurisdiction on the federal courts to try and punish civil rights violators. Congress possessed this authority, they believed, because civil rights were nationally enforceable rights of U.S. citizenship, under the Thirteenth Amendment and Section 1 of the Civil Rights Act.[66] Hence, Congress possessed the authority to prescribe criminal sanctions to secure these rights. The critical issue was whether or not Congress possessed the authority to secure civil rights at all, not whether Congress possessed the authority to provide criminal sanctions for persons who violated its statutes. Congress spent little time discussing whether it could punish private individuals who violated the Civil Rights Bill. If one conceded that Congress possessed the authority to secure civil rights, it was too obvious for discussion that it also possessed authority to punish violators of its statutes that secured civil rights. The issue the framers found troublesome in this regard was the propriety of authorizing the federal courts to punish state officers who violated civil rights when they acted under the authority of state laws. Punishing state

[64] Kaczorowski, *Politics of Judicial Interpretation*, 34, 45, n. 16.

[65] *Slaughterhouse Cases*, 15 F. Cas. 655; reversed on other grounds, *Slaughterhouse Cases*, 16 Wall. (83 U.S.) 36. See also *United States v. Hall*, 26 F. Cas. 79.

[66] The framers generally believed that the authority to secure civil rights of citizens "belongs to every sovereign power, and is essentially a subject of national jurisdiction." *Congressional Globe*, 39th Cong., 1st sess., 1866, p. 1090 (Cong. Bingham).

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officers acting in their official capacities represented a serious breach of federal comity. Confrontations between national and state authority, always sensitive matters, were especially so following the Civil War.

Opponents of the Civil Rights Act questioned the legality of prosecuting state officials for actions that were committed under the sanction of state law.[67] Debate focused on the punishment of state judges who applied racially discriminatory state statutes instead of declaring them unconstitutional. Opponents pointed out the injustice of a public policy that sought to punish a state judge who, believing the Civil Rights Act of 1866 to be unconstitutional, enforced a state statute he believed to be lawful. The criminal prosecution and punishment of state officials was far more controversial than that of ordinary citizens because it involved a direct confrontation between national and state authority. Troubled by this apparent breach in federalism, proponents of the Civil Rights Act nevertheless insisted on the need to punish anyone who violated nationally enforceable civil rights and flouted the statutes Congress enacted to secure them, even if that person were a judge. Senator Trumbull was adamant: "The right to punish individuals who violate the laws of the United States cannot be questioned, and the fact that in doing so they acted under color of law or usage in any locality affords no protection; because by the Constitution that instrument and the laws passed in pursuance thereof are the supreme law of the land, and every judge, not only of the United States, but of every State court is bound thereby."[68]

Even though the inclusion of public officials within the penal sections of the Act was extraordinary, the framers insisted that prosecuting them for civil rights offenses was imperative. Punishing political leaders for civil rights violations would be far more effective in curbing these crimes than punishing ordinary citizens would. Senator Trumbull elaborated: "When it comes to be understood in all parts of the United States that any person who shall deprive another of any right or subject him to any punishment in consequence of his color or race will expose himself to fine and imprisonment, I think such acts will cease."[69] The framers hoped the public would realize that even those thought to be beyond prosecution because they wielded governmental authority were subject to the Act's provisions.[70]

Whereas most of the discussion of Section 2 in Congress focused on state judges as the targets of the penal provisions of the Act, the debates suggest that this section was not intended to apply only to public officials. When Senator Edgar Cowan of Pennsylvania objected that these penal provisions singled out state officials for criminal prosecution, Trumbull denied this. Cowan asked, "Is there not a

[67] *Congressional Globe*, 39th Cong., 1st sess., 1866, pp. 601–02 (Sen. Hendricks); p. 1783 (Sen. Cowan); Appendix 183 (Sen. Davis); pp. 1154–55 (Cong. Eldridge); p. 1265 (Cong. Davis); p. 1267 (Cong. Raymond); and p. 1271 (Cong. Kerr).

[68] *Congressional Globe*, 39th Cong., 1st sess., 1866, p. 1759.

[69] *Congressional Globe*, 39th Cong., 1st sess., 1866, p. 475.

[70] The Department of Justice and the federal courts in some Southern states engaged in a massive effort to bring Ku Klux Klansmen to justice for terrorizing Southern blacks and their white Unionist allies. The government's policy was to select the most prominent defendants for prosecution. Kaczorowski, *Politics of Judicial Interpretation*, 79–99.

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provision by which State officials are to be punished?" Trumbull replied, "Not State officials especially, but everyone who violates the law. It is the intention to punish everybody who violates the law."[71] Trumbull repeated this construction in urging the Senate to enact the Civil Rights Act over President Johnson's veto.[72] Although the language of Section 2 can support a reading that limits its application to state officers, such a reading contradicts Senator Trumbull's explicit interpretation of its scope. In light of the framers' concept of a congressional authority to enforce civil rights that permitted Congress to punish any individual who violated the statute, not to accept the position of Senator Trumbull, the author and Senate floor manager, would be illogical and contradictory to the record, especially when virtually no one in Congress disagreed with him. That federal legal officers and judges interpreted the statute consistent with Senator Trumbull's position makes this conclusion even stronger.[73] It appears, then, that the framers of the Civil Rights Act of 1866 did not intend to apply the criminal penalties of Section 2 only to state officers. Their comments evince their intention to punish even state officials who violated the civil rights of American citizens.

Congressional supporters and opponents of the Civil Rights Act expressed the same concerns and intentions in discussing the statute's third section. This section authorizes removal of a case from the state courts when the parties seeking removal cannot enforce their civil rights or the state's legal process is violating their civil rights. Although the framers expected state agencies to handle ordinary civil and criminal cases, they understood that local officials were failing to protect the rights of many citizens and to administer civil and criminal justice in a racially and politically impartial manner.[74] To make the enforcement of nationally secured rights effective, the framers gave the federal courts the primary civil and criminal jurisdiction over civil rights when state agencies failed to secure them. It is crucial to note that federal legal officers and judges understood that it was the inability of the citizen to enforce a civil right in a state court, not the existence of racially discriminatory state laws, that permitted the individual to remove the case to a federal court.[75] The statute's congressional supporters manifested the same understanding.

The framers thus distinguished ordinary cases in which state agencies enforced and protected the rights of citizens from cases in which the federal courts would have to take jurisdiction because of state intransigence. A party could remove a case to a federal court if the state court enforced discriminatory laws, Senator Trumbull maintained, "or, if undertaking to enforce his right in a State court he was denied that right, then he could go into a Federal court; but it by no means follows that

[71] *Congressional Globe*, 39th Cong., 1st sess., 1866, p. 500.
[72] *Congressional Globe*, 39th Cong., 1st sess., 1866, p. 1758.
[73] Suits were brought against private proprietors of public facilities and public carriers who were fined for excluding blacks from their facilities. See McPherson's and Underwood's Scrapbooks cited in note 43.
[74] *Congressional Globe*, 39th Cong., 1st sess., 1866, pp. 602–03 (Sen. Lane of Indiana); pp. 600, 1760 (Sen. Trumbull); p. 1785 (Sen. Stewart); p. 2967 (Sen. Poland); p. 1119 (Cong. Wilson); p. 1293 (Cong. Bingham); pp. 1293–94 (Cong. Shellabarger); pp. 1832–36 (Cong. Lawrence).
[75] See Kaczorowski, *Politics of Judicial Interpretation*, 8–10.

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every person would have a right *in the first instance to go to the Federal court* because there was on the statute book of the State a law discriminating against him, the presumption being that the judge of the court, when he comes to act on the case, would, in the obedience to the paramount law of the United States, hold the State statute invalid."[76] The authority to remove a case, then, was triggered when a citizen alleged that the state court would not enforce a civil right.

Although the discriminatory action or inaction of the state might create a situation in which federal enforcement of civil rights was necessary, this was not the basis of federal jurisdiction. The third section of the Civil Rights Act conferred jurisdiction on the federal courts when the citizen was unable to enforce a civil right in the state courts. It was the citizen's lack of success that Senator Trumbull emphasized. He distinguished between cases in which state laws discriminated but the state court enforced the citizen's right anyway, and cases in which the laws did not discriminate, but, for some other reason, such as the racial or political prejudice of the judge or jury, the citizen was still unable to enforce the right in the state courts. Senator Trumbull asserted that Congress had authority over both: "If it be necessary in order to protect the freedman in his rights that he should have authority to go into the Federal courts in all cases where a custom prevails in a State, or where there is a Statute-law of the State discriminating against him, I think we have the authority to confer that jurisdiction."[77] Senator Trumbull was referring to invidious treatment of blacks, but protection against politically discriminatory customs was also essential to support white political allies in the South. If federal law merely prohibited racially discriminatory state laws, white Unionists would not have been afforded the protection under federal law the framers intended to provide them.[78]

The framers did not believe that federal protection was required in all cases involving discriminatory laws and customs. If they had, the Civil Rights Act would have been made applicable whenever the laws and customs of a community or a state discriminated. Senator Trumbull observed that a person was not necessarily "discriminated against because there may be a custom in the community discriminating against him, nor because the legislature may have passed a statute discriminating against him."[79] The Civil Rights Act would have invalidated the law

[76] *Congressional Globe*, 39th Cong., 1st sess., 1866, p. 1759, emphasis added.

[77] *Congressional Globe*, 39th Cong., 1st sess., 1866, p. 1759. For a contrary view, see Fairman, *Reconstruction and Reunion, 1864–88*, 1238–44.

[78] In addition to the obvious need to protect blacks and white Unionists from overt hostility, Section 3 also addresses more subtle forms, such as that described by Southern Unionists who petitioned congressional Republicans to confer jurisdiction on the federal courts to enforce their economic rights. Unionist creditors who rejected Confederate money in payment of debts risked having those debts cancelled by state statute and rendered unenforceable in state courts. They pleaded for access to the federal courts to enforce these debts and other contracts that they believed political prejudice prevented them from enforcing in the state courts. T. J. Gretlows to Lyman Trumbull, 8 and 19 January 1866, Trumbull Papers, Library of Congress; George A. Custer to Zachariah Chandler, 14 January 1866, Zachariah Chandler Papers, Library of Congress. A concern for economic rights could explain the U.S. Circuit Court's decision applying the Civil Rights Act to protect white butchers who claimed that their civil rights under the Act were violated when the state conferred monopolistic privileges on a slaughterhouse corporation. *Slaughterhouse Cases*, 15 F. Cas. 655.

[79] *Congressional Globe*, 39th Cong., 1st sess., 1866, p. 1759.

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or custom, and Trumbull presumed that a state court would so hold. Therefore, however naively, Trumbull assumed that individuals might still be able to enforce their rights in the state courts despite the presence of discriminatory laws and customs.

The framers expressly distinguished between racially discriminatory laws and the actions of individuals who violated civil rights and asserted their intention of protecting against both. Senator Trumbull stated that the Civil Rights Act conferred on the courts of the United States jurisdiction "over all persons committing offenses against the provisions of this act, and also over the cases of persons who are discriminated against by State laws or customs."[80] Senator Lane also understood the statute's scope to include the actions of individuals acting under "the power of local prejudice to override the laws of the country."[81] Both senators expected the federal military to aid the federal judicial process "whenever there is a combination of persons in any of the rebellious states so powerful that the marshals and civil officers in the ordinary course of judicial proceedings cannot execute the law."[82] This concept of federal action presaged the Enforcement Act of 1871 and the Ku Klux Klan Act of 1871, which were directed at this kind of lawlessness.

Civil rights were doubly secured under the first three sections of the Civil Rights Act of 1866. A private cause of action was created for black citizens unable to exercise civil rights under the same conditions as white citizens, and anyone who infringed a citizen's civil rights under pretext of law or custom was subject to prosecution and punishment in the federal courts. In addition, the federal courts were authorized to assume original jurisdiction of civil and criminal cases when citizens were unable to enforce their rights in the state courts. Congress thus applied national authority directly to private individuals as well as to public officials. The framers asserted that Congress possessed this authority because they assumed that civil rights were recognized by the Constitution as rights of U.S. citizens.

Federal judges and legal officers interpreted the Thirteenth Amendment, the Fourteenth Amendment, and the Civil Rights Act of 1866 as conferring a broad authority to enforce civil rights directly, irrespective of the presence of discriminatory state action and regardless of the source of the violation, because these rights were the natural rights that belonged to all free citizens of a free republic. Indeed, the notion that a national civil rights enforcement authority was merely a guarantee of racially impartial government action was not judicially recognized in the federal courts until the Supreme Court's decisions in the 1870s.[83]

The Supreme Court's decisions narrowing enforcement authority reflected the North's diminished interest in Reconstruction.[84] By the 1870s, the Republican

[80] *Congressional Globe*, 39th Cong., 1st sess., 1866, p. 475.
[81] *Congressional Globe*, 39th Cong., 1st sess., 1866, p. 603.
[82] *Congressional Globe*, 39th Cong., 1st sess., 1866, p. 605.
[83] *Slaughterhouse Cases*, 16 Wall. (83 U.S.) 36; *United States v. Cruikshank*, 2 Otto (92 U.S.) 542; Kaczorowski, *Politics of Judicial Interpretation*, 1–48, 117–97.
[84] For a contrary view, see Michael Les Benedict, "Preserving Federalism: Reconstruction and the Waite Court," *Supreme Court Review* (1978): 39.

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party, a coalition of diverse political groups, began to fragment further over the policies and corruption of Ulysses S. Grant's presidency.[85] One group split away during Grant's first administration to form a separate party, the Liberal Republicans. They turned against Grant's Southern policy and resisted congressional interference in the South. Liberal Republicans also fought to curtail the size and power of the national government and to return political authority to local government. Their objectives indicated their desire for a return to normality and their interest in increasing states' rights for the purpose of controlling monopolies and the railroads. Some of the leaders of civil rights enforcement joined this movement. Lyman Trumbull was one. Reflecting these new political pressures, he changed his views regarding a national authority to enforce civil rights. By 1871, he was insisting that the 1866 Civil Rights Act and the Fourteenth Amendment applied only to racially discriminatory state action, and that they guaranteed no more than racial equality in state-conferred rights and a prohibition against racially discriminatory state laws.[86] By July of 1873, the Grant administration also lost interest in Reconstruction and ended its policy of civil rights enforcement.[87] Except for a few minor episodes of federal involvement in Southern affairs, black and white Republicans in the South were left on their own. Insofar as the enforcement of civil rights was concerned, Reconstruction ended long before the Compromise of 1877.

AS THE REPUBLICAN FRAMERS UNDERSTOOD THEM, the Thirteenth and Fourteenth Amendments were constitutionally revolutionary. These amendments delegated to Congress the authority to render a radical change in the role of the national government in American life. Congress and the federal courts had not participated to any great extent before 1860 in guaranteeing the fundamental and personal rights of citizens. Republicans chose to protect these rights in 1866 by enacting the Civil Rights Act, which conferred on the federal courts jurisdiction over and responsibility for enforcing the personal rights of citizens directly when citizens could not do so in the traditional institutions, namely, the state and local courts.

This new role for national institutions involved radical changes in constitutional law. Fundamental rights were secured and enforced through state law before the Civil War, but, afterwards, the civil rights statutes made fundamental rights a matter of national jurisdiction. The fundamental rights of citizens were now defined as rights pertaining to U.S. citizenship and, as such, were recognized by the Constitution and laws of the United States. Although the states were expected to continue in their traditional function of securing civil rights, their authority was to be shared with Congress and the federal courts. Because federal law was supreme, Congress and the federal courts could supplant all state authority over personal rights. The framers' legal theory of citizenship and congressional authority over the rights of citizens held the potential of ending federalism and

[85] For an excellent political history of the period, see William Gillette, *Retreat from Reconstruction, 1869–1879* (Baton Rouge, La., 1979).
[86] *Congressional Globe*, 42nd Cong., 1st sess., 1871, pp. 575–76.
[87] Kaczorowski, *Politics of Judicial Interpretation*, 111.

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establishing a consolidated, unitary state. That the framers eschewed this extreme institutional arrangement should not deflect attention from the other ways in which civil rights amendments and laws of Reconstruction represented, to the framers and federal legal officers, a revolutionary constitutionalism and a new American federalism centered in national authority and national institutions.

In the 1870s, the Supreme Court rejected the revolutionary congressional Republican theory of constitutionalism and read into the Thirteenth and Fourteenth Amendments the theory of states' rights promoted by congressional Conservative Democrats. The Court explicitly rejected the broader theory of a congressional civil rights enforcement authority, precisely because it was revolutionary. The Supreme Court preserved a modified theory of state sovereignty, resurrected a theory of American federalism based on states' rights, and recognized primary authority over citizenship and civil rights as residing in the states. Although American law denied the right of secession, it adopted other important elements of the antebellum theory of constitutionalism. Congressional framers of the Fourteenth Amendment and the Civil Rights Act of 1866 may have thought they were reconstructing American government and basing it on a revolutionary constitutional foundation, but the Supreme Court decided against this revolutionary constitutionalism in a reactionary resurgence of states' rights that resulted in the virtual reenslavement of Southern black Americans.

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