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Robert J. Kaczorowski
Fordham University School of Law

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Professor of Law, Fordham University School of Law.

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POPULAR CONSTITUTIONALISM VERSUS JUSTICE IN PLAINCLOTHES: REFLECTIONS FROM HISTORY

Robert J. Kaczorowski*

INTRODUCTION

The titles of Larry Kramer's and Larry Sager's books suggest that their contents are very similar. Actually, the books present diametrically opposite theories of American constitutionalism that happen to share some commonalities. This Essay will highlight the books' essential differences and comment on their theories from my perspective as a constitutional historian.

As his title indicates, Sager presents a theory of constitutional practice. By this, I understand him to mean that he aims to explain how the Constitution has been interpreted and who should have the final authority to interpret it. As to the first question, Sager believes that the American constitutional system is directed at “bringing our political community into better conformity with fundamental requirements of political justice.” Thus, he labels his theory the "justice-seeking account" of constitutional practice. As to the second question, regarding who should have the final authority to interpret the Constitution, Sager argues that, in most cases, judges have exercised, and should exercise, the final authority to interpret the Constitution for at least three reasons.

The first reason is that judges are independent of the political partisanship inherent in the other institutions within the constitutional political system. They are therefore institutionally best suited to exercise “independent normative judgment[s]” on constitutional questions.

* Professor of Law, Fordham University School of Law.
3. Id. at 6.
4. Id.
5. See id. at 5.
6. Id.
The second reason is that "Constitutional judges are partners [with the founders] rather than agents [in constitution formation], and are expected to do much of the heavy normative lifting in the course of bringing detail to the abstract generalities of the liberty-bearing portions of the Constitution." Sager is unclear about whose expectations he refers to in the preceding quote. Also, Sager argues, judges are "partners" with, rather than "agents" of, the framers because of the impossibility of ascertaining the intent of the framers regarding substantive questions of constitutional law. It is thus implausible for judges to be agents as they cannot turn to the framers for instructions on how to decide contemporary substantive issues of constitutional law. Cut off from the framers, the "conscientious judge" must "exercise her own normative judgment" to maintain fidelity to the Constitution. Sager argues that even Larry Lessig’s theory of constitutional translation and Bruce Ackerman’s theory of constitutional amendment, which he says are predicated upon “a basal, unmitigated commitment to agency in principle,” inevitably depend upon judges to exercise “independent normative judgment to some extent” and therefore require the “normative independence” of judges in interpreting ambiguous constitutional texts.

Sager argues that the third reason judges should exercise independent normative judgment is because this most accurately describes what judges have actually been doing since the founding. Actual constitutional practice, Sager insists, “involves at its core a collaboration between the framing generations... and those who undertake to apply the precepts named in the text to concrete issues.” This collaboration entails independent normative judgment by both the framers and judges.

Sager’s theory becomes paradoxical at this point. He attributes this constitutional design to the framers themselves when he observes that they could have created a constitutional text “in gritty detail rather than moral generality.” He uses this observation to argue that the framers “depended upon the collaboration of those who would be responsible for implementing the broad values invoked in the Constitution’s text.” For Sager’s “justice-seeking account” of constitutional theory, the “transtemporal partnership at the heart of

7. Id. at 9.
8. Id. at 35.
9. Id. at 63.
10. Id. at 64-65.
11. Id. at 65.
12. Id. at 64-65.
13. Id. at 71.
14. Id. at 66.
15. Id. at 67.
16. Id.
our constitutional practice”\textsuperscript{17} must be between the framers and judges. Because “the heart of the social project of constitutional justice is the impartiality and generality of the moral perspective,”\textsuperscript{18} in his view, judges inherently have this quality, and they act on it much better than regularly elected public officials.\textsuperscript{19}

There is another paradox, which left me confused. Having argued that judges are best-suited to implement the justice-seeking Constitution, Sager then affirms the idea of “judicial underenforcement” of constitutional norms.\textsuperscript{20} He says that “the Constitution is broader than judicially articulated constitutional law, and that nonjudicial political actors have a corresponding obligation to interpret and respect the Constitution to its outermost margins.”\textsuperscript{21} I do not see in Sager’s analysis an explanation of why the Court does not, or cannot, fully enforce all constitutional norms, or why the Court is less fit than our “popular political institutions”\textsuperscript{22} to enforce norms that he says are underenforced by the Supreme Court. He simply argues that the underenforcement thesis most accurately fits current constitutional practice, and that this shows that there are certain directions the Court should have taken in expanding constitutional justice (such as in the area of social welfare), which it did not.\textsuperscript{23} But I am left wondering why the Court failed in these areas, and how one can know that the Court in fact failed.

Larry Kramer’s theory of American constitutionalism, like Sager’s, is predicated on an assumption about the necessity for continuing implementation of constitutional values and precepts.\textsuperscript{24} Kramer argues, however, that it is the people themselves, rather than judges, who are to perform this continuing adaptation and implementation of constitutional principles.\textsuperscript{25} He derives his theory from constitutional and political history, and portrays a constitutional practice that is directly contradictory to Sager’s.

Kramer argues that today’s judicial supremacists, such as Sager, are wrong when they insist that the Supreme Court has been the final authority in interpreting the Constitution, and that the Court has imposed its interpretation on the other branches of the federal government and on the states throughout most of the nation’s history.\textsuperscript{26} Kramer asserts that judicial supremacy may have surfaced as a theory of judicial review among a few Federalists at the nation’s

\begin{itemize}
\item[17.] Id. at 76.
\item[18.] Id. at 73 (internal citation omitted).
\item[19.] See id.
\item[20.] Id. at 7, 93.
\item[21.] Id. at 94.
\item[22.] Id. at 6-7.
\item[23.] Id. at 94-95.
\item[24.] See generally Kramer, supra note 1.
\item[25.] Id. at 247-48.
\item[26.] Id. at 208.
\end{itemize}
founding, but it was not widely accepted until the Supreme Court's 1958 decision in *Cooper v. Aaron*. It was during the Warren Court era that "the principle of judicial supremacy came to monopolize constitutional theory and discourse," at least in the area of constitutionally secured individual rights. The Court remained deferential to Congress in other areas of constitutional law.

Kramer argues that the judicial activism of the Rehnquist Court (which claims that the Court is the final authority in all questions of constitutional law) is anomalous, and this deeply troubles him. Whereas the activism of the Warren Court expanded constitutional protections of individual rights, which Kramer applauds, the Rehnquist Court's activism has abandoned "doctrines and principles that served after 1937 to limit the Court's authority," and has asserted final authority to interpret the whole Constitution, not just those provisions protecting individual rights. Kramer disapproves of the Rehnquist Court's decisions and rejects the judicial supremacy that Sager argues is essential to his justice-seeking constitutionalism. Kramer insists that "the people themselves" are the legitimate final authority in matters of fundamental law.

Kramer's book, among other things, is a rebuttal to the Rehnquist Court's theory and practice of judicial supremacy. This theory is predicated on the Court's understanding of original intent and judicial precedent, summarized by Kramer through Chief Justice Rehnquist's proclamation that the framers of the Constitution intended the federal judiciary's supremacy in interpreting the Constitution to be a "permanent and indispensable feature of our constitutional system." The Chief Justice acknowledged that Congress and the President "have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text." Kramer rejects Rehnquist's understanding of history and of judicial supremacy, and he presents a corrective to both.

Kramer's book is an original and important study of constitutional, political, and intellectual history. The core of Kramer's book views

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27. *Id.* at 221; *see also* *Cooper v. Aaron*, 358 U.S. 1 (1958).
29. *See id.*
30. *Id.* at 225-26.
31. *Id.* at 225.
32. *See id.* at 8.
33. *Id.* at 225 (quoting United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) (internal citation omitted)).
34. *Id.* Chief Justice Rehnquist's view that *Marbury* established judicial supremacy by proclaiming that the Supreme Court had the final authority in saying what the Constitution means was first asserted in *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958).
the Constitution as having been created by the people of the United States, and he argues that it remains "fundamentally, an act of popular will." The founders did not delegate to the judiciary the authority to enforce the Constitution against the other branches of the federal government. Rather, they reserved final authority to interpret the Constitution to the political branches of the government, subject to the people's oversight through elections and extra-legal means. Kramer observes, for example, that President James Madison, who had opposed the congressional act chartering the Bank of the United States in 1791 because he believed it was unconstitutional, refused to veto the Second National Bank bill in 1816 on constitutional grounds. Although Madison still believed that the bill was unconstitutional, he also believed that the issue of the bank's constitutionality had been established by the "repeated recognitions" of its validity by acts of the three branches of the United States government and by "the general will of the nation." Acquiescing to the people's will, Madison signed the second bank bill into law.

Kramer informs us that political parties emerged in the nineteenth century as institutions through which the people expressed their will on constitutional questions and exercised control over the government without resorting to violence or other extra-legal acts of resistance. Parties absorbed popular politics and became essential to making the Constitution work. The political will of the people even accounts for judicial review, which arose because judges were prohibited from enforcing an unconstitutional law, just as legislators were prohibited from enacting unconstitutional laws and executives were prohibited from administering unconstitutional statutes. But, when judges refused to enforce a statute on constitutional grounds, they were not performing "an act of ordinary legal interpretation." Rather, "judges were exercising the people's authority to resist, providing a supplemental remedy for ultra vires legislative acts that averted the need to mobilize popular opposition."

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36. Id. at 7.
37. See id. at 58-59.
38. Id. at 53, 59.
39. Id. at 48-49.
40. Id. (quoting President Madison). Chief Justice John Marshall, in his opinion in McCulloch v. Maryland, recognized the authority of the people and of the political branches of government to interpret the Constitution when he endorsed political practice as a method of interpreting the Constitution, recounting that this had led to Madison's acquiescence to the bank bill. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
41. See Kramer, supra note 1, at 48-49.
42. Id. at 165.
43. Id. at 162-73.
44. Id. at 60.
45. Id. at 63.
46. Id.
Consequently, Kramer argues that judicial review "was a political—perhaps we should say a 'political-legal'—act of resistance." Moreover, proponents of judicial review limited this power to statutes that were unquestionably unconstitutional. As Kramer explains, "[j]udicial review was a substitute for popular action, a device to maintain popular sovereignty without the need for civil unrest." Judges' decisions about the Constitution, like those of other officials, "were still subject to oversight and ultimate resolution by the people themselves." Departmental judicial review reflected the predominant understanding of the Court's power to interpret the Constitution up to the Civil War.

According to Kramer's account, the shift toward judicial supremacy in the Supreme Court's jurisprudence began between 1865 and 1905. A struggle ensued between advocates of judicial supremacy and those of popular constitutionalism, culminating with the latter's victory in the 1930s. Progressivism and the New Deal represented a "golden age for popular constitutionalism" in which reformers worked "to reinvigorate and restore popular control of government and the Constitution." Those reformers sought to make lawmakers and policy makers more accountable to the public and to make the people the ultimate authority over issues of social welfare and public policy.

The New Deal Court assumed the limited role of enforcing the Bill of Rights. It deferred to Congress and to the President in other matters of public policy, leaving to Congress's discretion questions relating to its enumerated powers. The Court became active in protecting individual rights and minority rights in the middle of the twentieth century. Still, the idea of judicial supremacy was not widely accepted until 1958, when the Court asserted its ultimate authority to interpret the Constitution in *Cooper v. Aaron*.

A majority of the American public today believes that the Supreme Court should have the final authority to interpret the Constitution. In light of history, Kramer argues, the current acceptance of judicial supremacy "is exceedingly anomalous." The practice of judicial

47. Id.
48. Id. at 99.
49. Id. at 98-99.
50. Id. at 114.
51. Id. at 210-13.
52. Id. at 213.
53. Id. at 220.
54. Id. at 215.
55. Id. at 215-16.
56. Id. at 219-20.
57. Id.
58. Id.
59. 358 U.S. 1 (1958); see also Kramer, supra note 1, at 221.
60. Kramer, supra note 1, at 232.
61. Id. at 233.
supremacy takes control over fundamental law away from the people and turns it over to "a judicial oligarchy." Consequently, Kramer contends that advocates of judicial supremacy are anti-democratic elites who believe "that popular politics is by nature dangerous and arbitrary; that ‘tyranny of the majority’ is a pervasive threat; that a democratic constitutional order is therefore precarious and highly vulnerable; and that substantial checks on politics are necessary lest things fall apart." Kramer sees the current debate regarding judicial supremacy as the same debate over the question of how to control an excess of democracy or popular rule that arose at the founding and again during the middle of the nineteenth century. It is a debate between democracy and aristocracy, and aristocracy is currently winning.

I. A HISTORICAL VIEW OF JUDICIAL REVIEW

Kramer and Sager present opposing views on two issues: first, whether the prevailing constitutional practice of this nation has been judicial supremacy or popular constitutionalism; and second, whether popular constitutionalism or judicial supremacy is better suited to fulfill the promise of democratic government and constitutional justice. I will offer my views on these issues from the perspective of history.

The best historical scholarship argues that the framers of the Constitution drafted a document of general principles and structures which they expected to be defined and applied to changing circumstances. Chief Justice Marshall asserted this understanding and attributed it to the nature and text of the Constitution and to the intent of the framers. In *McCulloch v. Maryland*, Marshall stated:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the proximity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of

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62. Id. at 234 (quoting Martin Van Buren, Inquiry into the Origin and Course of Political Parties in the United States 376 (1867)).
63. Id. at 243.
64. Id. at 246-48.
65. Id.
the instrument, but from the language.... In considering this question, then, we must never forget that it is a constitution we are expounding.67

Having described the special nature of a constitution as marking the "outlines" and "objects" of government, Marshall stated that the framers delegated to Congress, not to the Supreme Court, the responsibility of adapting the Constitution to changing circumstances. He said that the framers of the Constitution must have intended Congress to implement the general principles of the Constitution, because it was to Congress that the Constitution entrusts "those great powers on which the welfare of a nation essentially depends."68 Marshall maintained that Congress must possess "the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to [changing] circumstances" and thus enable the Constitution "to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."69

Marshall also suggested that, on doubtful questions of constitutionality, political practice "ought to receive a considerable impression," if not decisive weight.70 However, the Chief Justice

68. Id. at 415. Marshall's full statement, from which this account quotes, is as follows:
   It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done, by confining the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared, that the best means shall not be used, but those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.
69. Id. at 401 (emphasis added).
appears to have excepted from this method of constitutional interpretation issues involving "the great principles of liberty," applying it to those powers left to the discretion of Congress and the executive. 71 McCulloch thus extended Marshall's distinction between issues that are left to the political branches and the political process and those that are reserved to the courts, which he articulated in Marbury v. Madison. 72 There, Marshall asserted that where the executive or Congress "possesses a constitutional or legal discretion [to act], nothing can be more perfectly clear, than that their acts are only politically examinable." 73 However, a question of vested rights "is, in its nature, judicial, and must be tried by the judicial authority." 74 The Court's responsibility, furthermore, is to remedy violations of vested rights. The Chief Justice reiterated this principle, stating that "[t]he province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion." 75

Marshall posited a theory of limited judicial review under which the Court was deferential to Congress. He asserted in Marbury that the framers intended the courts to decide questions of constitutional law, even to the extent of voiding an act of Congress. As examples of such questions, Marshall cited acts that contravened plain meaning provisions of the Constitution. 76 In McCulloch, Marshall recognized that Congress possessed broad implied powers, powers implied not only from those expressly delegated to it, but powers inherent in Congress's sovereign nature. 77 Moreover, Marshall expressly asserted that the Court had the authority to void acts of Congress only if they "are prohibited by the constitution" or were adopted for purposes "not intrusted to the [federal] government." 78 Indeed, Marshall used

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73. Marbury, 5 U.S. (1 Cranch) at 166.
74. Id. at 167.
75. Id. at 170.
76. Id. at 179. Marshall referred to the Constitution's bar against state taxes on exports, bills of attainder, ex post facto laws, and the Constitution's requirements for a conviction of treason. Id.
the Tenth Amendment as another source of his theory of broad implied powers, citing it as authority for his presumption that Congress possessed the power to legislate unless the Constitution expressly prohibited Congress from acting.\(^7\)

Justice Joseph Story embellished Marshall’s theory of judicial review in \textit{Prigg v. Pennsylvania}.\(^8\) He described the Court’s power to interpret the Constitution as a duty to carry out to their fullest extent the principles and the objectives it expressed. Story asserted that “the safest rule of interpretation” was “to look to the nature and objects of the particular powers, duties and rights” expressed in the Constitution, and, with the help “of contemporary history,” to interpret the text “as may fairly secure and attain the ends proposed.”\(^9\) He expressed this point more strongly when he stated the Court had a duty to interpret the language of the Constitution “in such a manner as, consistently with the words, shall fully and completely effectuate the whole objects of it.”\(^10\)

Story asserted that the Court was obligated to interpret ambiguous constitutional provisions in a manner that would best effectuate and enforce its purposes. According to Story, “[n]o court of justice can be authorized so to construe any clause of the constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them.”\(^11\) Story enunciated these principles in \textit{Prigg}, which upheld Congress’s power to enforce a constitutional provision that did not explicitly delegate to Congress the power to enforce it.\(^12\) He also expressed these views in his treatise on the Constitution.\(^13\)

\(^7\) \textit{Id.} Relying in part on the language of the Tenth Amendment, Marshall recognized Congress’s broad implied powers and the limited scope of the Court’s power of judicial review, declaring that, “where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.” \textit{Id.}

\(^8\) 41 U.S. (16 Pet.) 539, 610-11 (1842).

\(^9\) \textit{Id.}

\(^10\) \textit{Id.} at 612.

\(^11\) \textit{Id.}

\(^12\) \textit{Id.} at 539 (upholding the constitutionality of the Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (repealed 1864), which Congress enacted to implement the Fugitive Slave Clause, U.S. Const. art. IV, § 2, cl. 3).

\(^13\) I Joseph Story, Commentaries on the Constitution of the United States 383-442 (Hilliard & Co. & Rothman & Co. eds., 1999) (1833); III \textit{id.} at 109-26. Story asserted that the intent of the framers of statutes and constitutions are binding, noting that “the universal principle of interpretation” of statutes is “that the will and intention of the legislature is to be regarded and followed,” particularly “where doubts or ambiguities arise upon the words” of a statute. \textit{Id.} at 444. Where the words “are clear and unambiguous, there seems little room for interpretation.” \textit{Id.}

He then applied this principle of statutory construction to judicial constitutional interpretation: “There does not seem any reason why, in a fundamental law or constitution of government, an equal attention should not be given to the intention of the framers.” \textit{Id.}
It seems to be clear that Marshall and Story asserted theories of constitutional construction, constitutional practice, and judicial review that are closer to Kramer's theory than to Sager's. Congress was to have the primary role in interpreting the Constitution and adapting it to changing circumstances. Congress was to exercise sovereign powers, both expressed and implied, that might be required by practical exigencies confronting the nation, limited only by the purposes, objects, and ends expressed in the Constitution. The Court's power of judicial review required the Court to defer to and enforce the will of Congress. It permitted the Court to declare unconstitutional acts of Congress in very limited circumstances, where Congress clearly exercised power that the Constitution prohibited, or for objects, purposes, or ends that the Constitution did not provide. The wisdom or advisability of particular statutes was left to the discretion of Congress, and the exercise of this discretion was part of the legislative function. The remedy for Congress's abuse of its legislative powers was the will of the people expressed through the political process. The remedy clearly did not reside in the federal judiciary or the Supreme Court. Cases involving constitutional rights were an exception to these rules. It appears that the Court had a greater role to play in ensuring that constitutional rights were secured, and not violated, by law.

Marshall's and Story's views of judicial review, which deferred to Congress on issues of constitutional interpretation, were characteristic of the Court before the Civil War. Although the Court did not refrain from passing on the constitutionality of federal statutes, it struck down only two of them in the first seventy years of its history. In both cases, the Court acted in the interest of enforcing individual rights. In *Marbury*, the Court ruled that the Executive violated the vested right of the claimant to a judicial office, but ruled unconstitutional the federal statute that would have authorized the Court to grant the remedy because Congress exercised power prohibited to it by the explicit language of the Constitution. In *Dred Scott*, the Court declared the Missouri Compromise of 1820 unconstitutional because it violated the constitutionally protected property rights of slaveholders.

86. See *supra* notes 67-68 and accompanying text.
87. See *supra* note 77 and accompanying text.
88. See *supra* note 78 and accompanying text.
89. See *supra* note 72 and accompanying text.
90. See *supra* note 72 and accompanying text.
91. See *supra* note 73 and accompanying text.
92. See *supra* notes 74-75 and accompanying text.
93. In *Marbury v. Madison*, the Court struck down section 13 of the Judiciary Act of 1789. 5 U.S. (1 Cranch) 137 (1803). In *Dred Scott v. Sandford*, the Court declared the Missouri Compromise unconstitutional, although the 1820 statute had been repealed by Congress about three years prior to the Court's decision. 60 U.S. (19 How.) 393 (1856); see Act of May 30, 1854, ch. 59, § 14, 10 Stat. 277, 282-83.
94. *Marbury*, 5 U.S. (1 Cranch) at 137.
in their slaves. With these two exceptions, the Court interpreted the Constitution as enhancing, rather than limiting, Congress's legislative powers beyond those enumerated in Article I. However, the Court exercised its power of judicial review more assertively in cases involving state law. Indeed, it held very early in its history that it was the final authority in interpreting the Constitution in cases involving state laws that raise federal questions.

Marshall's theory on Congress's role in constitutional adaptation was apparently based on constitutional practice. After all, from its inception, Congress had played the leading role in adapting the Constitution to changing circumstances. David Currie has recounted the many ways in which the early Congresses defined and adapted ambiguous constitutional provisions and played a primary role in the Constitution's formation. Perhaps the most famous example is Congress's chartering of the Bank of the United States, whose constitutionality the Marshall Court upheld in *McCulloch v. Maryland.* Less well known is the Fugitive Slave Act of 1793.

II. CONGRESSIONAL CONSTITUTIONAL PRACTICE

The Fugitive Slave Act of 1793 is notable because it was the first statute Congress enacted to enforce a constitutional right. Regrettably, the right enforced was the property right of slave holders to recover their runaway slaves. Congress conferred on slave holders three civil remedies to vindicate their constitutionally secured property right. First, Congress authorized slave holders to seize their runaway slaves and present them to a federal or state judge. On satisfying the judge that the person presented was bound to the master, the slave holders received a certificate of removal that authorized them to return the runaway slaves from whence they escaped. The other two remedies are more interesting: a civil fine of $500 was recoverable from any person who assisted the slave to flee, who harbored the fugitive slave, or who prevented his recapture; and damages were recoverable from such persons by the master in an action of tort.

97. *Id.*
100. Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (repealed 1864).
Equally significant is the fact that Congress enacted the Fugitive Slave Act of 1793 to implement the Constitution’s Fugitive Slave Clause.\(^{102}\) This provision, which the framers included in Article IV, Section 2 of the Constitution, merely prohibited a state from interfering with the slaveholder’s right to the slave’s service or labor owed to him under the laws of another state from which the fugitive slave had escaped.\(^{103}\) It also required that the fugitive be delivered up to the master.\(^{104}\)

The Fugitive Slave Clause did not expressly delegate to Congress the power to enforce it.\(^{105}\) Nevertheless, in 1842, the United States Supreme Court upheld Congress’s power to enact the Fugitive Slave Act and to redress violations of constitutional rights with tort damages and a civil fine.\(^{106}\) Writing the opinion of the Court, Justice Joseph Story found that the Court was obligated to interpret the Constitution in the manner that would most fully enforce its provisions.\(^{107}\) The Court unanimously affirmed that the prohibition against state interference with the slave owner’s right to the service or labor of the fugitive slave, that is, the constitutional prohibition against state action, constituted “a positive [and] unqualified” recognition of a property “right on the part of the owner of the slave.”\(^{108}\) The Court also unanimously held that the constitutional recognition of the slave owner’s property right delegated to Congress plenary power to “afford a complete protection and guarantee to the right.”\(^{109}\) Moreover, inasmuch as the owner of this property right held it as against other persons, Story reasoned, a proper means of enforcing this right was by civil suit “against some other person.”\(^{110}\) Story characterized this civil suit as a case or controversy arising under Article III of the Constitution.\(^{111}\) Article III therefore constituted another source of congressional power to enforce this constitutionally secured right of property.

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102. The Fugitive Slave Clause provides:
   No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.
   U.S. Const. art. IV, § 2, cl. 3.
103. Id.
104. Id.
105. Id.
107. See supra notes 80-85 and accompanying text.
109. Id. at 616.
110. Id.
111. Id.; see also U.S. Const. art. III, § 2, cl. 1.
In 1850, Congress acceded to the demands of southerners for a stronger fugitive slave act. The Fugitive Slave Act of 1850\textsuperscript{112} created additional remedies and provided a federal enforcement structure to safeguard the slaveholder’s constitutional right. It authorized federal judges to appoint United States Commissioners with the authority “to exercise and discharge all the powers and duties conferred by this act,”\textsuperscript{113} including the power to call out a posse comitatus when necessary to ensure the faithful observance of the statute.\textsuperscript{114} The 1850 Act substituted criminal penalties of a fine and imprisonment for the civil fine provided in the 1793 Act.\textsuperscript{115} It also added another tort remedy of statutory damages of $1000 for each slave who escaped, recoverable in a federal tort action from anyone who assisted the slave to get away.\textsuperscript{116} To ensure that federal legal officers faithfully executed the law, the Act imposed a fine of $1000 upon them, payable to the claimant, should they fail faithfully to execute all warrants and precepts issued under the Act.\textsuperscript{117} The Supreme Court upheld the constitutionality of the Fugitive Slave Act of 1850 before the Civil War.\textsuperscript{118}

The history of the Fugitive Slave Acts is representative of American constitutionalism prior to the Civil War. Congress assumed a primary role in interpreting its constitutional powers, and interpreted its powers broadly. It exercised its legislative powers to enforce slave owners’ constitutionally secured property right in their slaves by creating federal civil causes of action for damages recoverable from, and federal punishments imposed upon, anyone who interfered with the slave owners’ constitutional right. Reflecting Marshall’s and Story’s theory of judicial review, the Supreme Court deferred to Congress, both with respect to its primary role in constitutional interpretation and to Congress’s interpretation of its legislative powers. The Court interpreted Congress’s power to enforce the slave owner’s constitutionally recognized property right as both plenary and exclusive of the states.

The Republican-controlled Thirty-Eighth Congress repealed the Fugitive Slave Acts during the Civil War.\textsuperscript{119} It also nullified the Fugitive Slave Clause by proposing and securing the ratification of the

\textsuperscript{112} Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864) (amending the Fugitive Slave Act of 1793).

\textsuperscript{113} Id. § 1.

\textsuperscript{114} Id. § 5, 9 Stat. at 462.

\textsuperscript{115} Id. § 7, 9 Stat. at 464.

\textsuperscript{116} Id.

\textsuperscript{117} Id. § 5, 9 Stat. at 462-63.


Thirteenth Amendment,\textsuperscript{120} which abolished slavery. Like the first Congresses at the founding of the nation in the eighteenth century and the Fifty-First Congress in the middle of the nineteenth century, the Thirty-Eighth through the Forty-Second Congresses, during Reconstruction, asserted the authority to declare Congress’s powers to enforce constitutional rights, and exercised this power. David Currie’s description of the First Congress as “practically a second constitutional convention”\textsuperscript{121} accurately describes the Reconstruction Congresses because they actually revolutionized the Constitution by drafting and ratifying constitutional amendments that secured civil and political rights. The Reconstruction Congresses also radically changed the federal government’s relationship with states in their corporate capacities, state officials, United States citizens, and all of the inhabitants of the states. These Congresses assumed the primary role in interpreting the constitutional guarantees of the Reconstruction Amendments as well as what were Congress’s powers to enforce the rights secured by the Amendments through legislation.\textsuperscript{122} This is a dimension of the congressional leadership model of constitutional change that Bruce Ackerman attributes to the Reconstruction period.\textsuperscript{123}

In recognition of the ratification of the Thirteenth Amendment, Republican leaders of the Thirty-Ninth Congress declared in December 1865 that one of the primary objectives of this Congress was to implement the Thirteenth Amendment guarantee of freedom to all Americans by defining and enforcing the fundamental rights which belong to all free men.\textsuperscript{124} They insisted that now that freedom was constitutionally secured throughout the United States, Congress surely must have as much constitutional authority to enforce the fundamental liberties of all Americans as it earlier possessed to enforce slavery, which had existed in only a part of the United States.\textsuperscript{125} Using the Fugitive Slave Acts as their models, congressional Republicans enacted the Civil Rights Act of 1866 to remedy civil rights violations and create a federal enforcement structure to ensure that citizens’ civil rights were protected.\textsuperscript{126} Less than two months later, Congress adopted the Fourteenth Amendment and sent it to the

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\item \textsuperscript{120} U.S. Const. amend. XIII.
\item \textsuperscript{121} Currie, \textit{The Second Congress}, supra note 98, at 606.
\item \textsuperscript{122} I have elaborated on this interpretation of the revolutionary character of the legislative actions of the Reconstruction Congresses in Robert J. Kaczorowski, \textit{Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction}, 61 N.Y.U. L. Rev. 863 (1986).
\item \textsuperscript{123} \textit{See generally} 2 Bruce Ackerman, \textit{We the People: Transformations} (1998).
\item \textsuperscript{124} Kaczorowski, \textit{supra} note 101, at 228-29.
\item \textsuperscript{125} Id. at 212.
\item \textsuperscript{126} Except where otherwise noted, the following account is taken from Robert J. Kaczorowski, \textit{Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted}, 42 Harv. J. on Legis. (forthcoming Feb. 2005).
\end{enumerate}
states for ratification. The framers and supporters of the Fourteenth Amendment stated repeatedly that they incorporated the provisions of the Civil Rights Act into the Amendment, which they had enacted weeks earlier, in order to prevent its possible repeal by a future Congress, to incorporate its guarantees of civil rights into the Constitution, and to remove any doubts about its constitutionality. The provisions of the Civil Rights Act of 1866 evince the minimum scope of Congress's powers to enforce the rights secured by the Fourteenth Amendment and to remedy their violation, at least as understood by the framers. An examination of the statute is essential to an understanding of the Amendment.

Section 1 of the Civil Rights Act defined, for the first time in the nation's history, United States citizenship, and conferred citizenship on all native born Americans, including African-Americans.\(^\text{127}\) Congress—that is, the framers of the Fourteenth Amendment—exercised legislative authority to overturn the Supreme Court's decision in the *Dred Scott* case,\(^\text{128}\) which held that African-Americans were not and never could become United States citizens. They asserted Congress's power to interpret the Constitution, and to legislate to implement its interpretation, even over the Supreme Court's contrary interpretation.\(^\text{129}\) Congress's action tends to support Kramer's argument that judicial supremacy was not the predominant view in the mid-nineteenth century.

Section 1 of the Civil Rights Act also defined some of the rights individuals possessed as United States citizens.\(^\text{130}\) It conferred these rights in a way that preserved the states' concurrent jurisdiction over civil rights, except that it removed the states' power to regulate the enumerated civil rights on the basis of race, color, or previous condition of servitude.\(^\text{131}\) Section 1 applied the model of congressional enforcement of constitutional rights that earlier Congresses had adopted in the Fugitive Slave Acts of 1793 and 1850 to civil rights: it conferred on United States citizens the right to sue civilly anyone who

\(^{127}\) Civil Rights Act of 1866, ch. 31, 14 Stat. 27.


\(^{129}\) Most Republicans argued that the Court had gotten its facts wrong in *Dred Scott*, and thus Congress had the power to extend citizenship to African-Americans. In addition—or for some, an alternative reason—supporters argued that slavery was the disability that led the Court to disqualify African-Americans from United States citizenship. This disability no longer disqualified African-Americans after the Thirteenth Amendment abolished slavery. See Kaczorowski, *supra* note 126.

\(^{130}\) Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

\(^{131}\) Section 1 of the Civil Rights Act of 1866 declared that all citizens were to enjoy the same right to make and enforce contracts, to acquire and dispose of property, to sue and be sued, to give testimony in a court of law, and the same right to the protection of the law and legal process to secure their personal safety and that of their property as the most favored citizens enjoyed, that is, as white citizens enjoyed. It also provided that citizens shall be subject to prosecution for the same crimes and, on conviction, to the same penalties. *Id.*
infringed any of the rights it secured. Section 2 of the Civil Rights Act adapted the model of penal remedies adopted in the Fugitive Slave Act of 1850 to civil rights: it imposed criminal penalties on anyone who violated a citizen's section 1 rights while acting under color of state law or custom because of racial animus.

Section 3 of the Civil Rights Act was an overlooked jurisdictional section that included an unprecedented substitution of federal police powers for state police powers. It contained three jurisdictional provisions. The first echoed the Fugitive Slave Act of 1850 and conferred exclusive jurisdiction on federal district courts to try all causes arising under the 1866 statute. This included civil suits brought to enforce section 1 rights and criminal prosecutions brought under section 2. The third jurisdictional provision was a removal provision which authorized any federal officer, civil or military, against whom a civil suit or criminal prosecution was brought in any state court for any wrongs alleged to have been done under color of authority of the Civil Rights Act or the Freedmen's Bureau Act, or for refusing to do an act inconsistent with this statute, to remove the cause for trial in the proper federal district or circuit court. It extended the same removal right to any state official who was civilly sued or criminally prosecuted for refusing to do an act inconsistent with the Civil Rights Act.

The second jurisdictional provision is truly extraordinary. It authorized federal district and circuit courts to try civil suits and criminal prosecutions arising under state law whenever a party to the cause was unable to enforce or was denied one of the rights secured in section 1. For example, the federal district court in Kentucky tried crimes from burglary to murder committed with impunity by whites against black victims. The federal jurisdictional predicate came from the state's rules of evidence, which denied black Kentuckians the right to testify in state courts in any case in which a white person was a party, a right that was granted to white Kentuckians. The Supreme Court upheld the constitutionality of federal jurisdiction to try offenses arising under state criminal laws, but it interpreted the


133. Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. at 27.

134. Id. at § 3.

135. Id.

136. Id.

137. Id.

language of section 3 as limiting this jurisdiction only to criminal cases in which blacks were defendants.¹³⁹

Most of the remaining six sections of the Civil Rights Act were copied from the Fugitive Slave Act of 1850.¹⁴⁰ The framers adopted the enforcement structure of the 1850 statute, giving federal judges the authority to appoint United States commissioners to enforce the 1866 Act and to more effectively protect “all persons in their constitutional rights of equality before the law.”¹⁴¹ This statute was enacted before the United States Constitution contained an explicit guarantee of the right to the equal protection of the law. The Act required federal officers, at the federal government’s expense, “to institute proceedings against all and every person who shall violate the provisions of this act.”¹⁴² It imposed a duty on federal marshals and deputy marshals to execute all warrants and process issued under the statute “and to use all proper means diligently to execute the same.”¹⁴³ Should they fail to do so, they were liable for a $1000 fine payable to the person whose civil rights were violated.¹⁴⁴ The Act also authorized the President of the United States to use the land and naval forces of the United States and the state militia if necessary to enforce the Civil Rights Act or to prevent its violation.¹⁴⁵

The presidential election of 1868 was tainted by fierce violence committed by the Ku Klux Klan and similar organizations in the South.¹⁴⁶ The Klan functioned as a paramilitary wing of the Democratic Party focused on eliminating the Republican Party from the southern states and subjecting southern blacks to white social control.¹⁴⁷ It used terror as a tactic, and the terrorism of the 1860s and early 1870s was every bit as dangerous as that posed by al Qaeda today. Congress again assumed primary responsibility to adapt the Constitution to combat this terrorist threat. It responded, first, with the Fifteenth Amendment, which secured to United States citizens the right to vote in all elections without regard to race, color, or previous condition of servitude,¹⁴⁸ and, second, with legislation aimed at implementing the Fourteenth and Fifteenth Amendments.

Congress enacted sweeping statutes in 1870 and 1871 to protect southern blacks and white Republicans from Klan terrorism and to enforce their constitutional rights by imposing civil liability and

¹³⁹ Id. at 591-93; see also infra note 160 and accompanying text.
¹⁴⁰ See Civil Rights Act of 1866, ch. 31, 14 Stat. at 27.
¹⁴¹ Id.
¹⁴² Id. § 4, 14 Stat. at 28.
¹⁴³ Id. § 5.
¹⁴⁴ Id. § 6.
¹⁴⁵ Id. § 9, 14 Stat. at 29.
¹⁴⁷ See generally id.
¹⁴⁸ U.S. Const. amend. XV.
criminal penalties on anyone who violated them. The Enforcement Act of 1870\(^{149}\) was enacted primarily to enforce the Fifteenth Amendment. The statute imposed civil liability and criminal penalties against state and local election officials who interfered with or prevented voters from exercising their Fifteenth Amendment right to vote in any local, state, or federal election. It imposed similar civil liability and criminal penalties against any person who, by bribery, force, threats, or intimidation interfered with a citizen’s right to vote because of his race, color, or previous condition of servitude. It also imposed these penalties on anyone who violated a citizen’s Fifteenth Amendment right to vote by acts of economic intimidation, such as refusing to renew a labor contract or a lease for land, or merely threatening not to renew. Like the Civil Rights Act of 1866, this statute adopted the enforcement structure of the 1850 Fugitive Slave Act.

The 1870 Enforcement Act also contained provisions that were intended to enforce the Fourteenth Amendment.\(^{150}\) It re-enacted the Civil Rights Act of 1866 and extended its civil rights guarantees to immigrant aliens. The 1870 Act made it a federal felony for two or more individuals to conspire with the intention of depriving any other person from exercising or enjoying “any right or privilege granted or secured to him by the Constitution or laws of the United States.”\(^{151}\) Anyone convicted of this felony was punishable by a fine of up to $5000 or imprisonment for up to ten years, or both, at the court’s discretion, and disqualification from holding any office or place of honor, profit, or trust created by the Constitution or federal law. Another section provided for harsher penalties in cases where another felony, crime, or misdemeanor under state law was committed. In these cases, the punishment was to be the same “punishments as are attached to the said felonies, crimes, and misdemeanors by the laws of the State in which the offence may be committed.”\(^{152}\) Similar to section 3 of the Civil Rights Act of 1866, this section of the 1870 Act, in effect, conferred on federal courts the authority to try offenses against a state’s criminal code if the offense was committed in the act of violating the 1870 Act.\(^{153}\)

The 1871 “Ku Klux Klan Act”\(^{154}\) was enacted primarily to enforce the Fourteenth Amendment. It imposed civil liability against any person who, acting under color of state law or custom, deprived, or caused to be deprived, any person in the United States “of any rights,
privileges, or immunities secured by the Constitution of the United States.\footnote{155} It adapted the civil liability and criminal penalties of prior federal statutes and applied them to (1) conspiracies intended to interfere with the operation of the federal government, federal law enforcement, and judicial process; (2) conspiracies for the purpose of denying to any person or class of persons the right to the equal protection of the laws, equal privileges and immunities under the law, the right to vote, or the right to advocate the election of candidates for federal office; and (3) conspiracies to prevent state authorities from securing to any person within their jurisdiction the equal protection of the law or the due course of justice with the intent of denying to any person or class of persons the equal protection of the laws. Penalties included a fine of from $500 to $5000 and/or imprisonment for not less than six months nor more than six years, or both, as the court determined.\footnote{156} The statute authorized the victims of such conspiracies to sue the conspirators in tort to recover damages for any injuries sustained or any right denied by any act done in furtherance of the conspiracy. In an extraordinary "good Samaritan" rule, the 1871 Act imposed third party tort liability on any person who could have prevented, or could have aided in preventing, the wrongs just mentioned but "neglect[ed] or refuse[d] so to do."\footnote{157} Such persons were liable to the injured party for tort damages and, in the event of the wrongful death of the injured party, such persons were liable to the deceased's legal representatives for damages not to exceed $5000.\footnote{158}

The Reconstruction Congresses patterned the statutes they enacted to enforce the Reconstruction Amendments against terrorists on older statutes enacted to enforce constitutional rights that dated back to the founding of the nation. Federal remedies included civil damages recoverable by the injured party in federal tort actions brought against private individuals and state officials who violated the claimant's constitutional and statutory rights.\footnote{159} Reconstruction Congresses also

\footnote{155. Id.}
\footnote{156. Id.}
\footnote{157. Id.}
\footnote{158. Two other sections of this statute authorized the President to call out the military and state militia in case of insurrection, domestic violence, or obstruction of state or federal law enforcement that deprived "any portion or class of the people of such State of any rights, privileges, or immunities, or protection named in the Constitution and secured by this act," which state authorities were either unable to protect or failed or refused to protect. Id. The statute deemed such failure of the state authorities to offer protection as a denial of equal protection of the laws to which all persons in the United States were entitled. Id. § 3, 17 Stat. at 14. Another section authorized the President to suspend the writ of habeas corpus where "unlawful combinations" were so numerous and powerful as to overthrow by violence the constituted authorities of a state or where the state authorities "are in complicity with, or shall connive at the unlawful purposes of, such powerful and armed combinations." Id. § 4, 17 Stat. at 14-15.}
\footnote{159. See generally supra notes 102-17, 126-39, 149-58 and accompanying text.}
imposed federal criminal penalties on private individuals as well as state officials who violated a person’s constitutionally secured civil and political rights.

Because President Andrew Johnson openly opposed the Civil Rights Act of 1866, federal law enforcement officers were constrained from enforcing the Act during the Johnson Administration. Nevertheless, it was vigorously and extensively enforced in states such as Kentucky. In Kentucky, United States Attorney Benjamin Helm Bristow and United States District Judge Bland Ballard manifested a strong commitment to bringing to justice white racists who committed crimes against poor black victims with impunity under state law.\textsuperscript{160} Policy constraints disappeared with the election of President Ulysses S. Grant in 1868. With Attorney General Amos T. Akerman, Grant exhibited an equally strong commitment to enforce the constitutional rights of southern blacks and white Unionists against the depredations of the Ku Klux Klan and similar terrorist organizations that cropped up throughout the South.\textsuperscript{161}

Federal judges manifested an understanding of their role as implementers of congressional will, and implemented congressional understandings of the federal government’s plenary power to enforce constitutional rights. Federal attorneys followed suit. The newly created Department of Justice and lower federal court judges followed Congress’s leadership in constitutional rights enforcement by vigorously prosecuting Klansmen under the 1870 and 1871 Acts. All three branches of the federal government acted on a common understanding of the federal government’s role and constitutional power to protect the personal safety and constitutional rights of all Americans. Federal judges uniformly upheld the constitutionality of these statutes, exhibiting traditional judicial deference to Congress and its primary role in interpreting the Constitution and securing constitutional rights. Federal attorneys argued, and federal judges held, that these statutes were constitutional because they were enforcing and redressing violations to individuals’ constitutionally secured civil and political rights. Judges held that the Reconstruction Amendments delegated to Congress the constitutional authority to enact the 1870 and 1871 statutes. The Fourteenth Amendment secured substantive fundamental rights, such as the First Amendment rights of freedom of speech and assembly, the right to life itself, and the Fifteenth Amendment secured the right to vote without distinction of race, color, or previous condition of servitude.


\textsuperscript{161} Except where otherwise noted, the following account is taken from Kaczorowski, \textit{supra} note 160.
Federal authorities were so effective in prosecuting white terrorists during the first Grant administration that they destroyed the Klan and believed they were on the verge of restoring peace even in the states that had experienced the most widespread and virulent terrorism. Federal attorneys and marshals reported that the Presidential election of 1872 was extraordinary for its absence of violence. The relatively peaceful election contributed to President Grant's decision to adopt a policy of leniency toward the arrested and convicted Klansmen in return for promises from southern Democratic leaders to respect the rights of black Americans and to eschew political violence. Grant's attorney general gradually began to implement this policy just after the 1872 election, first in South Carolina and then throughout the South, against the wishes of the United States Attorneys in the southern states. The Grant administration directed federal attorneys to stop prosecuting civil rights violations during the spring and summer of 1873.

III. THE SUPREME COURT AND CONSTITUTIONAL PRACTICE

It was at this point that the Supreme Court handed down its initial interpretations of the Reconstruction Amendments. It was also at this time that the Court changed its traditional policy of deference to Congress and became more activist in its review of federal statutes and in its interpretation of the Constitution. The Court's decisions in these cases violated Justice Story's rule of judicial interpretation, which prohibited the Court from construing a clause of the Constitution in a way that defeated its "obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them." The Court diminished the scope of the Fourteenth and Fifteenth Amendments' guarantees of fundamental rights, of Congress's power to enforce the rights they secured, and of Congress's power to remedy their violation. These cases are well known and do not need to be recounted here.

More noteworthy is that, in these cases, the Chase and Waite Courts interpreted the constitutional guarantees of the Fourteenth Amendment, and Congress's power to enforce them, more narrowly than the Taney Court interpreted the constitutional guarantees of the Fugitive Slave Clause and Congress's power to enforce them. The texts of the Fugitive Slave Clause and of Section One of the Fourteenth Amendment are similar. Both constitutional provisions explicitly prohibit the states from interfering with the rights they

162. See infra note 164.
secure. The Taney Court interpreted the Fugitive Slave Clause’s prohibition against state action as an affirmative guarantee of an absolute property right of slave owners. Although the Fugitive Slave Clause did not expressly delegate enforcement power to Congress, the Taney Court held that the constitutional guarantee of this right delegated plenary power to Congress to enforce it. Section 5 of the Fourteenth Amendment did expressly delegate to Congress authority to enforce its constitutional guarantees. Yet, the Court, under Chief Justices Salmon P. Chase and Morrison R. Waite, refused to interpret the Fourteenth Amendment’s prohibitions against state action as affirmative guarantees of absolute rights. To the contrary, it eviscerated the Privileges or Immunities Clause, held that protection of fundamental rights is within the state’s exclusive police powers, and restricted Congress’s remedial powers to enforce whatever rights the Fourteenth Amendment secures to violations committed by the states.

These rulings are contradicted by the expressed intentions of the framers of the Fourteenth Amendment. They insisted that Congress possessed at least as much power to enforce the rights of free men as it had had to enforce the property right of slave owners, and they amended the Constitution to ensure that it delegated this plenary power to Congress.166 Yet, the United States Supreme Court refused to recognize that Congress had such legislative authority. Conceding that it was not giving to the language of the Fourteenth Amendment its obvious meaning, the Court undermined the justice-seeking and rights-protecting Constitution when it refused to conform to the Court’s duty to interpret the Constitution in the manner that “shall fully and completely effectuate the whole objects of it.”167 Even the Warren Court, which greatly expanded constitutional protections of individual rights, did not extend constitutional protections as far as the Reconstruction Congresses. The Court thus created a moral anomaly in the American system of constitutional law.

The Rehnquist Court recently reaffirmed the state action limitation of the Fourteenth Amendment and thus revivified this moral anomaly.168 And it expanded the Court’s earlier curtailment of federal protections of individual rights that Congress had enacted. The Court struck down the remedial provisions of the Religious Freedom Restoration Act (“RFRA”)169 and the Violence Against Women Act (“VAWA”)170 on the theory that the framers of the Fourteenth Amendment intended to withhold from Congress the power to

166. See Kaczorowski, supra note 101, at 205-30; Kaczorowski, supra note 126.
enforce substantive rights, restricting Congress's Fourteenth Amendment remedial powers to state action. Yet, the kind of civil remedies these statutes adopted are comparable to the civil remedies the Second and Fifty-First Congresses adopted to enforce slave owners' rights. The RFRA and VAWA remedies are also comparable to the remedies the framers of the Fourteenth Amendment themselves enacted to vindicate the constitutional rights of American citizens. The Rehnquist Court also concluded that the framers of the Fourteenth Amendment intended that the Supreme Court, and not Congress, should determine what rights the Fourteenth Amendment secures and what constitutes violations of these rights. But, again, when they enacted the Civil Rights Act of 1866, the framers of the Fourteenth Amendment defined some of the rights the Constitution secures to all Americans, determined what constitutes violations of these rights, and provided civil remedies against anyone who violated another's civil rights. Moreover, they expressly delegated to Congress constitutional authority to exercise these powers in Section Five of the Fourteenth Amendment.

This history demonstrates that the Supreme Court curtailed constitutional and legislative protections of constitutional rights that Reconstruction Congresses adopted and the Department of Justice and lower federal courts enforced after the Civil War. It would appear, therefore, that the popularly elected branches of the federal government were more faithful to a justice-seeking constitutionalism than was the Supreme Court. This history of constitutional practice is inconsistent with Sager's portrayal. Contrary to Sager's theory, history suggests that Congress may be more reliable in bringing about the "justice-seeking account" of constitutional practice than the Supreme Court. On the other hand, this history also shows that the Supreme Court, from its initial decisions in the 1870s, has exercised final authority in interpreting the Reconstruction Amendments. This suggests that Kramer's "popular constitutionalism" may be overstated. Nevertheless, Kramer's theory of constitutionalism is consistent with that of the Supreme Court and of the nation's constitutional practice from the founding through the Civil War. Had the Supreme Court continued to adhere to the constitutional theories of the Marshall and Taney courts as recounted in this Essay, it would have affirmed Congress's plenary power to secure fundamental rights under the Reconstruction Amendments as their Congressional framers intended and exercised it. Thus, the Court would have averted the moral anomaly it created by its judicial activism since the Civil War, as well as its judicial supremacy today.

171. See Kaczorowski, supra note 126.
172. City of Boerne, 521 U.S. at 519-22.
173. See supra notes 3-23 and accompanying text.
174. See supra note 32 and accompanying text.