

ARTICLE

CONGRESS'S POWER TO ENFORCE FOURTEENTH AMENDMENT RIGHTS: LESSONS FROM FEDERAL REMEDIES THE FRAMERS ENACTED

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Professor Robert Kaczorowski argues for an expansive originalist interpretation of Congressional power under the Fourteenth Amendment. Before the Civil War, Congress actually exercised, and the Supreme Court repeatedly upheld, plenary Congressional power to enforce the constitutional rights of slaveholders. After the Civil War, the framers of the Fourteenth Amendment copied the antebellum statutes and exercised plenary power to enforce the constitutional rights of all American citizens when they enacted the Civil Rights Act of 1866 and then incorporated the Act into the Fourteenth Amendment. The framers of the Fourteenth Amendment thereby exercised the plenary power the Rehnquist Court claims the framers intended to exclude from Congress. The framers also adopted the remedies to redress violations of substantive constitutional rights the Court says the framers intended to reserve exclusively to the states. The Rehnquist Court's Fourteenth Amendment jurisprudence, contradicted by this history, is thus ripe for reevaluation.

If, indeed, the Constitution guarantees the right . . . the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it. The fundamental principle, applicable to all cases of this sort, would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted The remark of Mr. Madison, in the Federalist, [sic] (No. 43,) would seem in such cases to apply with peculiar force. "A right (says he) implies a remedy; and where else would the remedy be deposited, than where it is deposited by the Constitution?" meaning, as the context shows, in the government of the United States.¹

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¹ Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 615–16 (1842).

INTRODUCTION

A forgotten but profoundly important fact of the nation's constitutional history is that the U.S. Congress exercised plenary power to enforce a constitutionally recognized property right as early as 1793.² Congress enacted civil remedies to redress violations of a slaveholder's constitutionally secured property right to recapture his runaway slaves.³ The statute imposed a civil fine and tort damages on anyone who interfered with the slaveholder's constitutional right.⁴ In 1842, the U.S. Supreme Court unanimously affirmed Congress's plenary remedial power as a "fundamental principle" of constitutional law in *Prigg v. Pennsylvania*.⁵ Justice Story's cited authority for this fundamental principle was *McCulloch v. Maryland*, an opinion written by perhaps the greatest jurist to serve as Chief Justice, John Marshall.⁶ Chief Justice Marshall, in turn, derived this "fundamental principle" from James Madison, whose *Federalist 44* Marshall paraphrased, albeit without attribution.⁷ Justice Story also relied on Madison in recognizing Congress's plenary remedial powers when he quoted Madison's *Federalist 43* as authority for the "fundamental principle" that rights secured by the Constitution delegate to Congress plenary power to enforce them.⁸ Chief Justice Roger B. Taney concurred fully in these views.⁹

According to the Supreme Court today, however, Congress's power to remedy the violation of constitutional rights is anything but plenary. In *City of Boerne v. Flores*,¹⁰ the Rehnquist Court struck down the Religious Freedom Restoration Act¹¹ (RFRA) and held that Congress's power to enforce the rights secured by the Fourteenth Amendment is limited to remedying state violations.¹² According to the Court, the Fourteenth Amendment does not delegate to Congress the power to define the rights the Fourteenth Amendment secures, to enforce the rights themselves, or even to determine what constitutes a state violation of Fourteenth Amendment rights.¹³ Subsequently, in a later case, the Rehnquist Court struck down

² See Act of Feb. 12, 1793, ch. 7, §§ 3–4, 1 Stat. 302–05 (repealed 1864).

³ See *id.*

⁴ See *id.*

⁵ *Prigg*, 41 U.S. (16 Pet.) at 615.

⁶ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

⁷ THE FEDERALIST NO. 44, at 285 (James Madison) (Clinton Rossiter ed., 1961). Explaining the national government's implied powers, Madison wrote: "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included." *Id.* at 285.

⁸ See THE FEDERALIST NO. 43 (James Madison) (Clinton Rossiter ed., 1961).

⁹ See *Prigg*, 41 U.S. (16 Pet.) at 626 (Taney, C.J., concurring in part and dissenting in part).

¹⁰ 521 U.S. 507 (1997).

¹¹ 42 U.S.C. § 2000bb (1994).

¹² *Boerne*, 521 U.S. at 519.

¹³ See *id.* at 519–20.

a provision of the Violence Against Women Act¹⁴ (VAWA) that imposed civil liability on anyone who committed an act of physical violence against a woman because of gender animus.¹⁵ Citing *Boerne*, the Court reasoned that Congress's remedial powers under the Fourteenth Amendment, limited as they are to correcting state violations of constitutional rights, do not authorize Congress to create civil remedies and impose civil liability against a private individual who violates another individual's constitutional rights.¹⁶

The Rehnquist Court based its recent interpretations of Congress's Fourteenth Amendment remedial powers on its conception of the intent of the Amendment's framers. In striking down the RFRA in *Boerne*, the Court, speaking through Justice Anthony Kennedy, held that the framers of the Fourteenth Amendment intentionally limited Congress's powers under the Amendment to remedying state violations of the rights it secured.¹⁷ According to the Court, the framers intentionally refused to give Congress plenary remedial powers, such as the authority to define Fourteenth Amendment rights, to determine what constitutes a violation of these rights, and to redress violations of Fourteenth Amendment rights committed by private individuals.¹⁸ The framers refused to give such plenary power to Congress, Justice Kennedy opined, because to do so would have given Congress "too much legislative power at the expense of the existing constitutional structure . . . [and also would have given] Congress a power to intrude into traditional areas of state responsibility, a power inconsistent with the federal design central to the Constitution."¹⁹

It is clear that the Rehnquist Court has forgotten the Madisonian first principles of American constitutionalism, as articulated by Chief Justices Marshall and Taney and Justice Story, which recognized plenary congressional power to enforce constitutional rights and to remedy their violation.²⁰ The Rehnquist Court also seems unaware of the congressional and

¹⁴ 42 U.S.C. § 13981 (1994).

¹⁵ See *United States v. Morrison*, 529 U.S. 598 (2000).

¹⁶ *Id.*

¹⁷ See *Boerne*, 521 U.S. at 522.

¹⁸ See *id.*

¹⁹ *Id.* at 520–21.

²⁰ Contrast Chief Justice Rehnquist's statement of Madisonian first principles in *United States v. Lopez*, in which he prefaced his analysis of Congress's enumerated powers under the Commerce Clause with a statement of "first principles" of constitutional federalism and separation of powers:

We start with first principles. The Constitution creates a Federal Government of enumerated powers. As James Madison wrote: The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. This constitutionally mandated division of authority was adopted by the Framers to ensure protection of our fundamental liberties. Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between

judicial enforcement of slaveholders' constitutionally secured property rights from the nation's founding through the Civil War. This oversight is likely attributable to the constitutional right Congress enforced. For Americans today, the ownership of another human being is morally repugnant and inconceivable as a constitutionally secured right. Nevertheless, the Founders secured this property right when they incorporated the Fugitive Slave Clause in the Constitution.²¹ The founding generation enforced it when the Second Congress, comprising many of the political leaders who drafted and ratified the Constitution, enacted a statute in 1793 which conferred on slave owners civil remedies comparable to the civil remedies that the Rehnquist Court held Congress was not authorized to enact for the enforcement of Fourteenth Amendment rights.²² In 1850, Congress again legislated to enforce slaveholders' constitutionally secured property right in their slaves, adopting additional remedies and an elaborate federal enforcement structure that required federal officials to enforce the statute on penalty of a civil fine payable to the owners of the fugitive slaves, and imposed civil damages and criminal penalties on any party who interfered with the recapture or aided the escape of runaway slaves.²³ The United States Supreme Court, every lower federal court, and, with only one exception, every state appellate court presented with the issue upheld the constitutionality of these statutes and Congress's plenary power to enact them.²⁴

the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

514 U.S. 549, 552 (1995) (citations and internal quotations omitted). The Court held that even Congress's expressly delegated powers, such as its power to regulate interstate commerce, are not plenary and that Congress must exercise all of its powers, both enumerated and implied, subject to "judicially enforceable outer limits" because "it was the Judiciary's duty 'to say what the law is.'" *Id.* at 566 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The Court thus subordinated Congress to the Supreme Court and established that Congress must exercise its legislative powers subject to the Supreme Court's supervision. In *Boerne*, Justice Kennedy repeated Chief Justice Rehnquist's theory of separation of powers and constitutional federalism and attributed this "federal design central to the Constitution" to the framers of the Fourteenth Amendment, stating: "Under our Constitution, the Federal Government is one of enumerated powers . . . judicial authority to determine the constitutionality of laws . . . is based on the premise that the 'powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.'" *Boerne*, 521 U.S. at 516 (quoting *Marbury*, 5 U.S. (1 Cranch) at 176).

²¹ See U.S. CONST. art. IV, § 2, cl. 3.

²² *Compare* Act of Feb. 12, 1793, ch. 7, §§ 3–4, 1 Stat. 302–05 (repealed 1864) with *Boerne*, 521 U.S. at 515.

²³ See Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850) (repealed 1864).

²⁴ See Robert J. Kaczorowski, *Fidelity Through History And To It: An Impossible Dream?* 65 *FORDHAM L. REV.* 1663, 1677–78 n.64 (1997). The Wisconsin Supreme Court was the only court to deny the constitutionality of the Fugitive Slave Act of 1850. See *In re Booth*, 3 Wis. 49 (1854); *Booth and Rycraft, In re* 3 Wis. 179 (1855). However, the United States Supreme Court forcefully upheld the Act's constitutionality and ordered the Wisconsin court's compliance with its decision. *United States v. Booth*, 59 U.S. (18 How.) 477, 478 (1855); *Ableman v. Booth*, 62 U.S. (21 How.) 506, 526 (1858).

The history of the federal government's enforcement of slaveholders' constitutionally secured property rights was too recent and too traumatic for the framers of the Civil Rights Act of 1866²⁵ and the Fourteenth Amendment to have overlooked it. Indeed, history presented them with a disturbing moral question of fundamental importance: if the Constitution delegated to Congress plenary power to protect the property rights of slave owners, how can it not have delegated to Congress the same plenary power to protect the fundamental rights of all freemen? The framers answered this question by insisting that Congress had to possess comparable power to enforce the constitutional rights of all Americans.

I. THE HISTORICAL BACKGROUND OF FEDERAL CONSTITUTIONAL RIGHTS ENFORCEMENT IN 1866

When the Senators and Representatives of the Thirty-Ninth Congress legislated to secure the rights of American citizens in 1866, they did so within the context of a seventy-five-year history of federal constitutional rights enforcement, in which Congress exercised plenary power to remedy violations of a constitutionally secured property right.²⁶

A. *The Fugitive Slave Clause*

The first constitutionally secured personal right that the U.S. Congress legislated to enforce was the property right of slave owners to recapture their runaway slaves, a right that was guaranteed by the Fugitive Slave Clause.²⁷ In 1793, the Second Congress enacted a statute that conferred on slave owners three civil remedies to redress violations of this right.²⁸ The first civil remedy enabled the owner to go into federal or state court and secure a certificate authorizing him to return the fugitive slave to the place from which she fled.²⁹ The second and third civil remedies were a civil fine of \$500 and tort damages, respectively, recoverable from anyone who obstructed a slave's recapture or aided her escape.³⁰

The text of the Fugitive Slave Clause was analogous to that of the Fourteenth Amendment because both prohibited the states from infringing certain constitutional rights. The Fugitive Slave Clause³¹ consisted of

²⁵ Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2000)) [hereinafter Civil Rights Act of 1866].

²⁶ See generally Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 *FORDHAM L. REV.* 153 (2004).

²⁷ U.S. CONST. art. IV, § 2, cl. 3.

²⁸ See Act of Feb. 12, 1793, ch. 7, §§ 3–4, 1 Stat. 302–05 (repealed 1864).

²⁹ See *id.* § 3.

³⁰ See *id.* § 4.

³¹ The Fugitive Slave Clause provides:

No person held to Service or Labour in one State, under the Laws thereof, escap-

two provisions. On its face, the first clause prohibited any state into which a fugitive slave escaped from enacting or enforcing any law or regulation that would interfere with the slave owner's right to the service or labor of the runaway slave.³² The second provision required that the fugitive slave be delivered to the person to whom the service or labor was owed.³³ However, the clause did not identify whose duty it was to deliver the fugitive slave to the claimant.

In *Prigg v. Pennsylvania*, decided in 1842, the United States Supreme Court upheld Congress's plenary power to enact the 1793 Fugitive Slave Act and the civil remedies it provided.³⁴ In his opinion for the Court, Justice Joseph Story delineated the Court's duty in interpreting the Constitution, namely, to interpret it "in such a manner, as, consistently with the words, shall fully and completely effectuate the whole objects of it."³⁵ From this duty Story defined the Court's obligation to interpret the Constitution so as to "secure and attain the ends proposed."³⁶ He thus interpreted the prohibition against state interference with the slaveowner's right to the service or labor of the fugitive slave, that is, a prohibition against state action, as an affirmative guarantee of "a positive, unqualified right on the part of the owner of the slave."³⁷ The Fugitive Slave Clause therefore secured "all the incidents to that right" and "[put] the right to the service or labor upon the same ground, and to the same extent, in every other state as in the state from which the slave escaped."³⁸ The Fugitive Slave Clause also required that the fugitive slave "be delivered up on Claim of the Party to whom such Service or Labour may be due,"³⁹ and the Court held that the constitutional guarantee of this right delegated to Congress the plenary power to enforce it.⁴⁰ Story explained, "If, indeed, the constitution guarantees the right, and if it requires the delivery upon the claim of the owner (as cannot well be doubted), the natural inference certainly is,

ing 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.

³² *Id.*

³³ *Id.*

³⁴ 41 U.S. (16 Pet.) 539, 539 (1842).

³⁵ *Id.* at 612. Today, originalism, as a theory of constitutional interpretation, is generally invoked by constitutional and political conservatives to limit the constitutional powers of the federal government and to restrict the scope of constitutionally protected rights. Compare *United States v. Lopez*, 514 U.S. 549, 549 (1995), *City of Boerne v. Flores*, 521 U.S. 507, 507 (1997), and *United States v. Morrison*, 529 U.S. 598, 598 (2000), with *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 539 (1842).

³⁶ *Prigg*, 41 U.S. (16 Pet.) at 611.

³⁷ *Id.* at 612.

³⁸ *Id.* at 613.

³⁹ U.S. CONST. art. IV, § 2, cl. 3.

⁴⁰ *Prigg*, 41 U.S. (16 Pet.) at 615.

that the national government is clothed with the appropriate authority and functions to enforce it.”⁴¹

In explaining Congress’s plenary remedial powers to enforce constitutionally secured rights, Story implicitly relied upon Chief Justice Marshall’s opinion in *McCulloch v. Maryland* and on James Madison’s *Federalist* 44 and 43. Story proclaimed *McCulloch*’s general principle of constitutional delegation of Congress’s legislative power: “The fundamental principle, applicable to all cases of this sort . . . that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist, on the part of the functionaries to whom it is intrusted.”⁴² Chief Justice Marshall, in turn, had taken this principle from James Madison’s *Federalist* 44.⁴³ Story elaborated how Madison’s and Marshall’s ends/means principle explained Congress’s power to enforce constitutionally secured rights. He asserted that the constitutional recognition of rights, even when the recognition is in the nature of a prohibition on the states from infringing the rights, makes Congressional enforcement of those rights an end and object of the federal government, and thus implies the constitutional authority and duty to enforce the rights and to provide effective remedies to prevent and redress their violation.⁴⁴ Story buttressed this principle of Congress’s remedial power by quoting Madison’s *Federalist* 43 as authority for the proposition that a right recognized in the Constitution is a personal right enforceable against any one who may violate it, and that the constitutional right implies a delegation to Congress of remedial power to secure and protect it.⁴⁵

Story advanced another theory, based on the “Arising Under” Clause of Article III,⁴⁶ in explaining Congress’s plenary power to enforce the property right secured by the Fugitive Slave Clause. He described this constitutional right as a personal property right enforceable by the slave’s owner against another private party, constituting a case or controversy arising under the Constitution.⁴⁷ The Supreme Court was unanimous in these conclusions.⁴⁸ Indeed, the Taney Court twice affirmed its *Prigg* decision

⁴¹ *Id.*

⁴² *Id.*

⁴³ See *McCulloch*, 17 U.S. (4 Wheat.) 316, 316 (1819); *supra* note 7.

⁴⁴ See *Prigg*, 41 U.S. (16 Pet.) at 619.

⁴⁵ See *id.* at 616; THE FEDERALIST NO. 44, at 285 (James Madison) (Clinton Rossiter ed., 1961). Supporters of the Civil Rights Act of 1866 quoted this passage from *Prigg* in arguing that Congress possessed the constitutional authority to protect the civil rights of U.S. citizens. See *infra* notes 97–99 and related commentary. Contrast Chief Justice Rehnquist’s articulation of Madisonian first principles in *United States v. Lopez*, 514 U.S. 549, 552 (1995); *supra* note 20.

⁴⁶ Article III, section 2 provides that: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority” U.S. CONST. art. III, § 2, cl. 1.

⁴⁷ See *Prigg*, 41 U.S. (16 Pet.) at 616 (quoting U.S. CONST. art. III, § 2, cl. 1).

⁴⁸ Although it was unanimous in Justice Story’s interpretation of the Fugitive Slave Clause and its delegation to Congress of plenary power to enact the Fugitive Slave Act of 1793, the Court divided six to three on the questions of whether Congress’s power to en-

and upheld the constitutionality of the Fugitive Slave Acts of 1793 and 1850.⁴⁹ The Arising Under Clause consequently empowered Congress to provide complete protection of the right.⁵⁰

In an opinion concurring in part and dissenting in part, Chief Justice Taney agreed with the Court's discussion regarding the right of the slaveholder.⁵¹ He declared, "This right of the master being given by the constitution of the United States, neither congress nor a state legislature can, by any law or regulation, impair it or restrict it."⁵² Taney also concurred with the opinion's holdings regarding the power of Congress to protect the rights of citizens in slaveholding states to exercise this right, "to provide by law an effectual remedy to enforce it," and inflict penalties on violators.⁵³ However, the Chief Justice dissented from the Court's holding that the power to enforce this constitutional right and to remedy its violation was "vested exclusively in congress."⁵⁴ Taney insisted that the states had concurrent power to enforce property rights secured by the Fugitive Slave Clause.⁵⁵

Taney's defense of the states' constitutional power to enforce the slaveholders' constitutional right actually strengthened Story's theory of congressional delegation as Taney's opinion broadened this theory to include the states. Indeed, the Chief Justice characterized as a well-settled rule of construction the Court's interpretation that the Constitution's prohibition on the states from interfering with a constitutional right implied the power to enforce.⁵⁶ In disagreeing with the Court's conclusion that this remedial power was delegated exclusively to Congress, Taney insisted that the words of the Fugitive Slave Clause required "the people of the several states, to pass laws to carry [it] into execution."⁵⁷ Taney reasoned that "[t]he Constitution is the law of every state in the Union; and is the paramount law. The right of the master, therefore, . . . is the law of each state; and no state has the power to abrogate or alter it."⁵⁸

Taney reinforced his textual construction with examples of other constitutionally secured rights that the states enforced even though the Consti-

force the Fugitive Slave Clause was exclusive and whether state and local courts were obligated to exercise the jurisdiction that section 3 of the Act conferred on them to enforce the federal right. *See id.* at 621–25; *id.* at 627 (Taney, C.J., concurring in part and dissenting in part); *id.* at 635–36 (Thompson, J., concurring in part and dissenting in part); *id.* at 636 (Baldwin, J., concurring in part and dissenting in part); *id.* at 648–49 (Wayne, J., concurring in part and dissenting in part); *id.* at 650 (Daniel, J., concurring in part and dissenting in part); *id.* at 673 (McClellan, J., concurring in part and dissenting in part).

⁴⁹ *See Jones v. Van Zandt*, 46 U.S. (5 How.) 215, 229 (1847); *Ableman v. Booth*, 62 U.S. (21 How.) 506, 508 (1859).

⁵⁰ *See Prigg* at 616.

⁵¹ *Prigg*, 41 U.S. (16 Pet.) at 626 (Taney, C.J., concurring in part and dissenting in part).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *See id.* at 627 (Taney, C.J., concurring in part and dissenting in part).

⁵⁵ *Id.*

⁵⁶ *See id.* at 627–28.

⁵⁷ *Id.* at 628.

⁵⁸ *Id.*

tution placed the rights “under the protection of the general government.”⁵⁹ The constitutional clauses the Chief Justice had in mind were the Contract Clause⁶⁰ and the Privileges and Immunities Clause.⁶¹

Analogizing to the right to contract, Taney then acknowledged that Congress had the power to enforce the right to contract and referenced the remedy that Congress enacted to enforce it.⁶² He referred to the Judiciary Act of 1789 and stated that “in order to secure [the right to contract], congress have passed a law authorizing a writ of error to the Supreme Court.” Nevertheless, Taney insisted that the federal enforcement of the right to contract did not deprive the states of concurrent jurisdiction, noting that “no one has ever doubted, that a state may pass laws to enforce the obligation of a contract, and may give to the individual the full benefit of the right so guaranteed to him by the Constitution.” Taney wanted to know why the states may not, in the same way, enforce the “individual right now under consideration.”

Using the same reasoning, Taney argued that the states may protect and enforce the rights guaranteed by the Privileges and Immunities Clause even though the Constitution places those rights under the protection of the federal government.⁶³ Taney thus interpreted the Contract Clause and the Privileges and Immunities Clause, in addition to the Fugitive Slave Clause, as delegating to the national government plenary power to enforce the rights they secured, while the clauses also preserved the states’ concurrent power over these rights.

Although the Taney Court differed on the question of whether the power of enforcement was exclusive to the government, it embraced the theory of plenary congressional power, and expressly rejected the states’ rights, strict construction theory that Pennsylvania advanced to argue that Congress lacked constitutional authority to enforce constitutional rights and duties “unless the power to enforce these rights, or to execute these duties can be found among the express powers of legislation enumerated in the Constitution.”⁶⁴ According to this argument, constitutional rights and duties, such as those expressed in the Fugitive Slave Clause, that did not explicitly delegate the power to enforce and perform them were self-executing. The Taney Court rejected this interpretation, using the same theory of constitutional delegation that the Marshall Court affirmed in *McCulloch* when it rejected a similar argument.⁶⁵ Story wrote that Penn-

⁵⁹ *Id.* at 629.

⁶⁰ U.S. CONST. art. 1, § 10, cl. 1 provides that “[n]o State shall . . . pass any . . . law impairing the Obligation of Contracts.”

⁶¹ U.S. CONST. art. IV, § 2, cl. 1 provides that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”

⁶² Except as otherwise noted, the following discussion is taken from *Prigg*, 41 U.S. (16 Pet.) at 629 (Taney, C.J., concurring in part and dissenting in part).

⁶³ *Id.*

⁶⁴ *Id.* at 618.

⁶⁵ *See* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

sylvania's strict construction interpretation would effectively nullify constitutional rights and prevent Congress from achieving many of the ends the Constitution delegated to the federal government.⁶⁶

Story noted that "[s]uch a limited construction of the constitution has never yet been adopted as correct, either in theory or practice." To the contrary, Congress "has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given, and duties expressly enjoined thereby."⁶⁷ The crucial point here is that the Taney Court unanimously held that a constitutional prohibition upon the states from infringing a right establishes a constitutional guarantee of the right, and that the constitutional recognition of the right makes its enforcement one of the ends of the federal government, thereby implicitly delegating to Congress plenary power to enforce the right and to remedy all its violations.

B. *The Fugitive Slave Acts*

The *Prigg* decision gave rise to the need for the 1850 Fugitive Slave Act, as the Court had held that the states were not empowered to enforce the Fugitive Slave Clause and the Fugitive Slave Act of 1793. *Prigg* thus permitted the free states to withdraw their courts and local law enforcement officials from assisting slaveholders and their agents to recapture fugitive slaves. This was one of the reasons Chief Justice Taney insisted that the Constitution delegated such power to the states and imposed on them the duty to enforce the Fugitive Slave Clause and the legislation that Congress enacted to implement it. He objected that "the remedy provided by congress" in the 1793 Fugitive Slave Act would be "ineffectual and delusive . . . if state authority is forbidden to come to its aid."⁶⁸ It was simply too dangerous and too expensive to rely on federal courts alone to enforce slaveholders' rights, due to the scarcity and remoteness of federal courts. Taney predicted that, if local authorities were unable to act under state law to assist in the recapture of fugitive slaves, "the territory of [a free] state must soon become an open pathway for the fugitives escaping from [slave] states."⁶⁹

In 1850, Congress strengthened the enforcement of the slaveholders' constitutional right that was weakened by *Prigg* when it enacted the Fugitive Slave Act of 1850, which created a federal enforcement structure, adopted an additional tort remedy, and imposed criminal penalties on anyone who violated it.⁷⁰ In doing so, Congress exercised its plenary power to define the scope of the slave owner's constitutional right, to determine

⁶⁶ See *Prigg*, 41 U.S. (16 Pet.) at 618.

⁶⁷ See *id.* at 618–19.

⁶⁸ *Id.* at 631 (Taney, C.J., concurring in part and dissenting in part).

⁶⁹ *Id.* at 632.

⁷⁰ Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850) (repealed 1864).

what constituted a violation of this right, and to provide civil and criminal remedies for the violation of this right. The 1850 statute was more sweeping than the Fugitive Slave Act of 1793 not only because it provided additional remedies, but also because it obligated federal legal officers to enforce it and provided a structure that enabled the federal government to play a prominent role in its enforcement.⁷¹

The 1850 Fugitive Slave Act contained several important remedial and enforcement provisions. The statute established a federal structure to enforce the slave owners' right that has been analogized to a federal bureaucratic agency.⁷² It authorized federal judges to appoint U.S. commissioners with the power "to exercise and discharge all the powers and duties conferred by this act," including the power to authorize the seizure and return of fugitive slaves to the places from which they may have escaped.⁷³ It imposed on federal marshals and deputy marshals the duty to execute "all warrants and precepts issued under the provisions of this act, when to them directed" under penalty of a \$1,000 fine payable to the claimant.⁷⁴ Should the fugitive slave escape while in custody of a federal or deputy marshal, the marshal was made liable to the claimant for the full value of the slave. To assist these federal officers, the statute authorized federal commissioners to summon a *posse comitatus* when they deemed necessary, and commanded citizens to assist when their services were required. On a mere affidavit by the claimant or his agent stating that he had reason to believe that a rescue would be attempted by force before he could return the slave to the state from which she fled, the federal officer who made the initial arrest was required to retain as many persons as necessary to overcome such force and to return the slave to the state from which she escaped.⁷⁵ The fees and costs incurred in this process were to be paid out of the U.S. Treasury. Congress thus provided for the removal of fugitive slaves by federal force at federal expense whenever the return of fugitive slaves was met with local resistance in a free state.

The 1850 Fugitive Slave Act provided additional and presumably more effective remedies to redress violations of slave owners' constitutional rights than the 1793 Act. Firstly, the 1850 Act substituted the civil penalty of the 1793 Act with criminal penalties.⁷⁶ The practical effect of making

⁷¹ *See id.*

⁷² *See* Allen Johnson, *The Constitutionality of the Fugitive Slave Acts*, 31 *YALE L.J.* 161, 181–82 (1921).

⁷³ Fugitive Slave Act of 1850 §§ 1, 4.

⁷⁴ Except as otherwise noted, the following account is taken from *id.* § 5 at 9 Stat. 462–63.

⁷⁵ *Id.* § 9 at 9 Stat. 465.

⁷⁶ *Id.* § 7 at 9 Stat. 464. The 1850 statute imposed criminal sanctions on any one who knowingly and willingly hindered the claimant from seizing the fugitive slave, who rescued or attempted to rescue the fugitive slave, who aided, abetted or assisted the fugitive slave to escape, or who harbored or concealed the fugitive slave. *See id.* On conviction, the defendant was subject to a fine of up to \$1,000 and imprisonment for up to six months. *See id.*

the infringement of the slaveholder's property right a federal crime was to shift the initiative and costs of enforcing the right to the federal government. Nevertheless, the 1850 statute preserved the tort remedy authorized by the 1793 statute and added an additional tort remedy, such that violators were liable for "civil damages" in the amount of \$1,000 for each fugitive slave who was lost.⁷⁷ These damages were recoverable in an action of debt in a federal district court.⁷⁸ The \$1,000 fine was double the amount of the civil penalty recoverable in an action of debt under the 1793 Fugitive Slave Act.⁷⁹ As a damage remedy for the loss of slaves, the statutory amount of \$1,000 was greater than the damages generally awarded for lost slaves in tort actions under the 1793 Fugitive Slave Act.⁸⁰ Additionally, the 1793 and 1850 Fugitive Slave Acts offered the slaveholder alternative federal damage remedies, depending upon whether the slaves escaped or were recovered.⁸¹ In *Ableman v. Booth*, the United States Supreme Court upheld the constitutionality of the Fugitive Slave Act of 1850 in a strong, nationalistic opinion written by Chief Justice Taney.⁸²

⁷⁷ See *id.*

⁷⁸ See *id.* Section 7 provided that persons who prevented or hindered the arrest of a fugitive slave, or who rescued or attempted to rescue a fugitive slave, or who aided a fugitive slave in escaping, or who harbored or concealed a fugitive slave, would "forfeit and pay, by way of civil damages to the party injured by such illegal conduct," in addition to the criminal penalties it imposed. See *id.*

⁷⁹ See Act of Feb. 12, 1793, ch. 7, §§ 3–4, 1 Stat. 302–05 (repealed 1864).

⁸⁰ See, e.g., *Oliver v. Weakley*, 18 F. Cas. 678, 679 (C.C.E.D. Pa. 1853) (No. 10,502) (awarding damages of \$2,800 for twelve escaped slaves, two husbands, two wives and eight children); *Ray v. Donnell*, 20 F. Cas. 325 (C.C.D. Ind. 1849) (No. 11,590) (awarding damages of \$1,500 for one adult woman slave and her four children); *Driskell v. Parish*, 7 F. Cas. 1095, 1100 (C.C.D. Ohio 1849) (No. 4,088) (fixing value of two escaped slaves at \$500); *Giltner v. Gorham*, 10 F. Cas. 424, 427 (C.C.D. Mich. 1848) (No. 5,453) (fixing value of six escaped slaves at \$2,752); *Jones v. Van Zandt*, 13 F. Cas. 1040 (C.C.D. Ohio 1843) (No. 7,505) (fixing value of escaped slave at \$600).

⁸¹ See Act of Feb. 12, 1793, ch. 7, §§ 3–4, 1 Stat. 302–05 (repealed 1864). Justice Grier, as circuit Justice, ruled that the 1850 Fugitive Slave Act did not repeal the tort action of compensatory damages under the 1793 Fugitive Slave Act and declared that:

In case of a rescue of a captured fugitive, or of an illegal interference to hinder such recapture, when the master had it in his power to effect it, the defendant would be liable, not only to the penalty, but also to pay the full value of the slave thus rescued, and even punitive or exemplary damages, as in other actions for a tort.

Oliver v. Kauffman, 18 F. Cas. 657, 660 (C.C.E.D. Pa. 1850) (No. 10,497).

⁸² *Ableman v. Booth*, 62 U.S. (21 How.) 506, 526 (1858) (declaring that the Fugitive Slave Act of 1850 was constitutional "in all of its provisions" and that it was "fully authorized by the Constitution of the United States"). The Court had earlier enforced the 1850 statute in a case in which its constitutionality was not at issue. See *Norris v. Crocker*, 54 U.S. (13 How.) 429, 439–40 (1851) (holding that the "civil damages" of \$1,000 provided in section 7 repealed the civil penalty of \$500 provided in the Fugitive Slave Act of 1793, but that the damages applied only if the slave was lost. For injuries other than loss of the slave, the slave owner retained his tort action under the 1793 Act.).

C. The Thirteenth Amendment and the Civil Rights Act of 1866

The Court's *Ableman* decision was handed down just three years before the outbreak of the Civil War. During the Civil War, Congress repealed the 1793 and 1850 Fugitive Slave Acts⁸³ and adopted and sent to the states for ratification the Thirteenth Amendment, which abolished slavery.⁸⁴ When the nation ratified the Thirteenth Amendment in 1865, it negated the Fugitive Slave Clause and the other provisions of the Constitution recognizing slavery.⁸⁵ This amendment produced a revolutionary change in the United States Constitution in transforming the document from a fundamental guarantee of slavery to a universal guarantee of liberty.

Republicans, who dominated the Thirty-Ninth Congress, overwhelmingly interpreted the Thirteenth Amendment as a universal guarantee of liberty. The Speaker of the House of Representatives, Schuyler Colfax, proclaimed that one of the principal objectives of the Thirty-Ninth Congress was to make the Constitution's guarantees of freedom and fundamental rights a practical reality.⁸⁶ Republicans achieved this objective by

⁸³ Congress repealed the Fugitive Slave Acts on June 28, 1864. See 3 HENRY WILSON, HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA 395–402 (1872); STANLEY CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850–1860, at 194–95 (1968); THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780–1861, at 218 (1974).

⁸⁴ U.S. CONST. amend. XIII.

⁸⁵ Sections 1 and 2 of the Thirteenth Amendment state:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII, §§ 1–2.

⁸⁶ Colfax first announced this objective in a speech he delivered in Washington, D.C., on November 18, 1865, shortly before the organization of the Thirty-Ninth Congress. He declared that

The Declaration of Independence must be recognized as the law of the land, and everyman, alien and native, white and black, protected in the inalienable and God-given rights of life, liberty and the pursuit of happiness. Mr. Lincoln, in that Emancipation Proclamation which is the proudest wreath in his chaplet of fame, not only gave freedom to the slave, but declared that the Government would maintain that freedom. We cannot abandon them and leave them defenseless at the mercy of their former owners. They must be protected in their rights of person and property. These free men must have the right to sue in courts of justice for all just claims, and to testify also, so as to have security against outrage and wrong. I call them free men, not freed men. The last phrase might have answered before their freedom was fully secured, but they should be regarded now as free men of the Republic.

O. J. HOLLISTER, LIFE OF SCHUYLER COLFAX 271 (1886). See also *id.* at 269–70; A. Y. MOORE, THE LIFE OF SCHUYLER COLFAX 284 (1868). Hollister reported the public's reaction to Colfax's speech, much of which was approving. HOLLISTER, *supra* at 272–73. For

enacting the Civil Rights Act of 1866⁸⁷ in April and adopting the Fourteenth Amendment and sending it to the states for ratification in June 1866. The framers made it clear that they modeled the Civil Rights Act's civil and criminal remedies and enforcement structure on the Fugitive Slave Acts, especially the Fugitive Slave Act of 1850.⁸⁸ Indeed, they incorporated the enforcement structure of the 1850 Fugitive Slave Act into the Civil Rights Act.⁸⁹

The Republican leaders and supporters of the Civil Rights Act of 1866 insisted that Congress possessed as much constitutional authority to protect and enforce human rights and equality as it had exercised to protect and enforce the property right in slaves. Thus, Senator Lyman Trumbull interpreted section 1 of the Thirteenth Amendment as a delegation of plenary power to Congress to define and secure the civil liberties of all Americans, not only the civil rights of the former slaves. Trumbull believed that in prohibiting slavery, the Constitution secures freedom to all Americans. "That amendment declared that all persons in the United States should be free," Trumbull emphasized, and he declared: "[t]his [civil rights] measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom."⁹⁰ He admonished that Congress had the same plenary power to enforce the civil rights that inhere in a state of freedom as it had to enforce the constitutional rights of slave owners. Trumbull insisted that

example, the *Chicago Republican* editorialized that the speech was Colfax's most accurate assessment of the sentiment of the people; the *Indianapolis Journal* described it as "the sentiments of ninety-nine out of every hundred of [the Republican] party, both in and out of Congress;" and *The New York Times* acknowledged that Colfax made this speech to announce "the probable course of Congress this coming session. We most heartily endorse all its positions." See *id.* Colfax repeated these themes on being elected Speaker of the House. See CONG. GLOBE, 39th Cong., 1st Sess. 5 (1865). The Congressional Globe is now available online at <http://memory.loc.gov/ammem/amlaw/lwgc.html>.

⁸⁷ Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2000)).

⁸⁸ See Kaczorowski, *supra* note 26, at 205–06.

⁸⁹ For example, Senator Lyman Trumbull, the principal author of the Civil Rights Act of 1866 and the bill's Senate floor manager, proclaimed:

Most of [the Civil Rights Bill's provisions] are copied from the late fugitive slave act, adopted in 1850 for the purpose of returning fugitives from slavery into slavery again. The act that was passed at that time for the purpose of punishing persons who should aid negroes [sic] escape to freedom is now applied by the provisions of this bill to the punishment of those who shall undertake to keep them in slavery.

CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866). Trumbull was only one of numerous Senators and Representatives who acknowledged that the Civil Rights Act incorporated the remedies and enforcement structure of the Fugitive Slave Act of 1850. See Kaczorowski, *supra* note 26, at 205–06.

⁹⁰ CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

under the constitutional amendment which we have now adopted, and which declares that slavery shall no longer exist, and which authorizes Congress by appropriate legislation to carry this provision into effect, I hold that we have a right to pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view, secure freedom to all people in the United States.⁹¹

Republican leaders justified Congress's plenary power to protect the civil rights of all Americans by asserting the Marshall Court's theories of broad implied powers and constitutional delegation in *McCulloch v. Maryland* and the Taney Court's application of *McCulloch's* theories in *Prigg*. For example, the Civil Rights Bill's House Floor Manager, James Wilson, interpreted the Thirteenth Amendment's prohibition against slavery as a positive guarantee of freedom and proclaimed: "[h]ere, certainly, is an express delegation of power" to enact the Civil Rights Bill.⁹² Asking rhetorically, "[h]ow shall it be exercised? Who shall select the means?" Wilson answered: "[h]appily, sir, we are not without light on these questions from the Supreme Court." He quoted from *McCulloch v. Maryland* where Chief Justice Marshall stated that, although the powers of the federal government are limited, the Constitution nevertheless allows the legislature the discretion to exercise the powers it confers "'to perform the high duties assigned to it in the manner most beneficial to the people.'"⁹³ Then Wilson asserted Chief Justice Marshall's famous principle of implied powers, which Wilson quoted: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist [sic] with the letter and spirit of the Constitution, are constitutional."⁹⁴ Applying Marshall's interpretation of constitutional delegation to interpret the Thirteenth Amendment, which the *Prigg* Court applied to interpret the Fugitive Slave Clause, Wilson asserted that no one can question that the Civil Rights Bill is an appropriate "enforcement of the power delegated to Congress" by the Thirteenth Amendment. "The end is legitimate," he proclaimed, "because it is defined by the Constitution itself. The end is the maintenance of freedom to the citizen."⁹⁵

Representative Wilson also offered a detailed explanation of Congress's plenary power to enforce the rights guaranteed in the Bill of Rights, which he grounded in Justice Story's opinion in *Prigg*.⁹⁶ "In the case of *Prigg v. Commonwealth of Pennsylvania*—and this it will be remembered was

⁹¹ *Id.*

⁹² CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866).

⁹³ *Id.* (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819)).

⁹⁴ *Id.* (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 420).

⁹⁵ See Kaczorowski, *supra* note 26, at 212–13.

⁹⁶ *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

uttered in behalf of slavery—I find this doctrine, and it is perfectly applicable to this case.” Wilson read from Story’s opinion in *Prigg*, where Story paraphrased Chief Justice Marshall’s opinion in *McCulloch*:

the fundamental principle applicable in all cases of this sort would seem to be that where the end is required the means are given; and where the duty is enjoined the ability to perform it is contemplated to exist on the part of the functionaries to whom it is intrusted,

which is to say, on the federal government.⁹⁷ Wilson then quoted Justice Story quoting Madison’s assertion that the remedies for constitutional rights violations must be provided by the federal government: “‘A right,’ says he, ‘implies a remedy: and where else would the remedy be deposited than where it is deposited by the Constitution?’ meaning, as the context shows, in the Government of the United States.” Wilson also quoted Story’s understanding of *Federalist 43*, stating that the natural conclusion is that the government must carry into effect the rights and duties of the Constitution, barring any provisions to the contrary.⁹⁸ Wilson applied Madison’s and Story’s understanding of Congress’s constitutional powers to the Bill of Rights and proclaimed:

Now, sir, in relation to the great fundamental rights embraced in the bill of rights, the citizen being possessed of them is entitled to a remedy. That is the doctrine as laid down by the courts. There can be no dispute about this. The possession of the rights by the citizen raises by implication the power in Congress to provide appropriate means for their protection; in other words, to supply the needed remedy. The citizen is entitled to the right [sic] of life, liberty, and property The power is with us to provide the necessary protective remedies.⁹⁹

Wilson concluded the point with a statement of the social contract: these protective remedies, he said, “must be provided by the Government of the United States, whose duty it is to protect the citizen in return for the allegiance he owes to the government.” The framers of the Civil Rights Act and the Fourteenth Amendment thus affirmed the theories of the Marshall and Taney Courts that attributed to Congress the plenary power and the constitutional duty to enforce the rights secured by the Constitu-

⁹⁷ Except where otherwise noted, the following account is taken from CONG. GLOBE, 39th Cong., 1st Sess. 1294 (Mar. 9, 1866) (quoting *Prigg*, 41 U.S. (16 Pet.) at 615).

⁹⁸ *Id.* (quoting *Prigg*, 41 U.S. (16 Pet.) at 616).

⁹⁹ *Id.*

tion, theories which also considered the duty to enforce constitutional rights to be one of the ends for which the federal government was established.

The framers' theory of plenary constitutional delegation was also premised on their assumption that equality and the natural rights of life, liberty, and property and rights incident thereto proclaimed in the Declaration of Independence constituted the fundamental rights of all Americans.¹⁰⁰ The framers and supporters insisted that the Constitution recognizes and secures these rights in various provisions, primarily the Thirteenth Amendment, but also in others such as the Privileges and Immunities Clause of Article IV, the Bill of Rights, and the Fifth Amendment's explicit guarantee of life, liberty, and property.¹⁰¹ They applied to these constitutional provisions the *McCulloch* and *Prigg* theories of broad constitutional delegation of implied congressional power and insisted that these provisions delegated to Congress plenary power to enforce and protect the fundamental rights of all Americans, and that they authorized Congress to enact civil and criminal remedies and a federal enforcement structure to ensure that all Americans are secure in their civil rights. The framers also argued that the principles of the Declaration of Independence, and the social contract that these principles betokened, were incorporated into the Constitution through these provisions and that the Declaration of Independence and the Constitution imposed a duty on Congress to enforce the fundamental rights they recognized and secured as rights of United States citizens.¹⁰²

¹⁰⁰ See Kaczorowski, *supra* note 26, at 223–24.

¹⁰¹ *Id.* at 57–65.

¹⁰² Representative Wilson introduced the Civil Rights Bill in the House with the following statement of Congress's authority to enact it:

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

CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866). Wilson elaborated, explaining that Congress's power to enact a bill to enforce and protect the rights of its citizens "depends on no express delegation," that "this power permeates our whole system," because it is a power inherent in the sovereign nature of the federal government. *Id.* at 1119. Congress therefore "possess[es] the power to do those things which Governments are organized to do," such as protect its citizens' rights, and it has the same latitude in selecting the means "through which to exercise this [inherent] power that belongs to us when a power rests upon express delegation." *Id.* Wilson further maintained that Congress's power to enact the Civil Rights Bill emanated from the fact that the rights the bill protected were the natural rights of U.S. citizenship and from the federal government's duty to protect the rights of its citizens—an obligation imposed upon it by the social contract. See *id.* at 1119. Senator Trumbull insisted that Congress had an obligation, not simply the power, to enforce civil rights, an obligation under the social contract proclaimed in the Declaration of Independence, which he maintained was incorporated into the Constitution. See *id.* at 474–75, 573. For additional discussion, see Kaczorowski, *supra* note 26, at 216–24.

II. THE CIVIL RIGHTS ACT OF 1866

Armed with this broad understanding of citizens' rights and of Congress's constitutional power to enforce them, the Thirty-Ninth Congress enacted the Civil Rights Act of 1866.¹⁰³ To eliminate opponents' claims that the statute was unconstitutional, the framers of the Fourteenth Amendment incorporated the Civil Rights Act into section 1 of the Amendment.¹⁰⁴ Thus, the scope of Congress's remedial powers to enforce the rights secured by the Fourteenth Amendment are at least as broad as the remedial powers Congress exercised in adopting the Civil Rights Act of 1866. In addition, the framers intended the Fourteenth Amendment to constitutionalize their interpretation of the other provisions of the Constitution, which, they argued, secured the rights of all Americans and thus delegated plenary power to Congress to enforce and protect them.

Because the provisions of the Civil Rights Act of 1866 are central to the meaning and scope of the Fourteenth Amendment, it is necessary to examine the statute's provisions. In brief, the Civil Rights Act of 1866 conferred U.S. citizenship on all Americans.¹⁰⁵ It defined and conferred some of the rights that U.S. citizens, as such, enjoy, and, like the Fugitive Slave Act of 1850, it authorized the lower federal courts to provide civil and criminal remedies to redress violations of these rights.¹⁰⁶ It criminalized only certain violations of citizens' rights.¹⁰⁷ However, it conferred jurisdiction on the federal courts to dispense ordinary civil and criminal justice, traditionally administered by the states, whenever individuals were unable to enforce or were denied their civil rights in the states' systems of justice.¹⁰⁸ To ensure the statute's effective enforcement, it established a federal enforcement structure patterned on the Fugitive Slave Act of 1850.¹⁰⁹

On its face, the Civil Rights Act of 1866 contradicts the Rehnquist Court's interpretation of the intention of the framers of the Fourteenth Amendment regarding the scope of the remedial powers they intended to delegate to Congress. The Rehnquist Court held that the framers of the Fourteenth Amendment intentionally refused to intrude into traditional areas of state responsibility and therefore refused to give to Congress the power to define constitutional rights, particularly the rights secured by the Fourteenth Amendment, and the power to enact civil remedies to redress violations of Fourteenth Amendment rights committed by private

¹⁰³ Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2000)).

¹⁰⁴ See *infra* notes 397–426 and accompanying text.

¹⁰⁵ Civil Rights Act of 1866, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2000)).

¹⁰⁶ *Id.* § 3.

¹⁰⁷ Civil Rights Act of 1866, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2000)); Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850) (repealed 1864).

¹⁰⁸ *Id.* §§ 2–3.

¹⁰⁹ *Id.* §§ 4–7.

actors.¹¹⁰ Unquestionably, the framers sought to preserve traditional state jurisdiction over individual rights. However, the Rehnquist Court overlooked the fact that the Constitution, as amended by Republicans in 1865, intruded upon traditional state jurisdiction and assumed traditional state powers, because the Thirteenth Amendment abolished state laws and institutions that recognized, defined, and enforced the status of African Americans as slaves, abolished the property right of slave owners in their slaves, and eliminated the master/slave relationship.¹¹¹ More importantly, the framers of the Fourteenth Amendment asserted that the Thirteenth Amendment determined that the status of all Americans, not only that of the former slaves, is that of freemen, which they equated with the status of United States citizenship.¹¹² The framers of that Amendment also asserted that the Amendment delegated to Congress the power to protect the rights to which Americans are entitled as freemen, that is, the power to define and enforce the rights of United States citizenship.¹¹³

The framers of the Fourteenth Amendment, many of whom drafted and voted for the Thirteenth Amendment, again intruded into traditional areas of state jurisdiction and exercised plenary power to define and enforce the rights of United States citizens when they enacted the Civil Rights Act of 1866. The framers expressly stated that they intended the Civil Rights Act to make the Thirteenth Amendment a practical reality. The Civil Rights Act therefore defined the constitutionally secured status of all Americans as U.S. citizens, specified some of the constitutionally secured rights that Americans were to enjoy as U.S. citizens, provided civil remedies and criminal penalties to redress violations of these civil rights, and provided a federal enforcement structure to protect and enforce the status and rights of U.S. citizens.¹¹⁴ Part III of the Article discusses how, within two months of enacting the Civil Rights Act of 1866, the framers adopted the Fourteenth Amendment, in part, to ensure the statute's constitutionality by incorporating it into section 1 of the Fourteenth Amendment. It is to the provisions of the Civil Rights Act and the debate relating to Congress's power to enact them that we now turn.

A. Section 1: Congress Confers United States Citizenship and Some of the Rights of United States Citizens on All Natural Born Americans

As adopted, section 1 of the Civil Rights Act intruded into traditional areas of state responsibility. Indeed, it supplanted the states' police pow-

¹¹⁰ See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997); *United States v. Morrison*, 529 U.S. 598, 598 (2000). See also *supra* notes 10–16 and accompanying text.

¹¹¹ U.S. CONST. amend. XIII.

¹¹² See *supra* note 86 and accompanying text.

¹¹³ See Kaczorowski, *supra* note 26, at 212–13.

¹¹⁴ Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2000)).

ers relating to citizenship in three ways. First, section 1 of the Civil Rights Act defined the status of “all [native-born] persons” who met specified minimal qualifications as United States citizens and conferred citizenship on such persons in every state and territory of the United States.”¹¹⁵ This was the first time in the nation’s history that Congress defined United States citizenship.¹¹⁶ Second, section 1 defined some of the civil rights Americans were to enjoy as U.S. citizens.¹¹⁷ Third, section 1 guaranteed that all U.S. citizens were to enjoy these civil rights on the same bases as the most favored class of citizens enjoyed them.¹¹⁸ These provisions secured the status and civil rights of U.S. citizens, state laws to the contrary notwithstanding.

The framers of the Civil Rights Act understood the Citizenship Clause as a definition of the status that the Thirteenth Amendment already secured for all Americans.¹¹⁹ However, they added the Citizenship Clause to section 1 of the Act for two practical reasons. First, they wanted to ensure that black Americans enjoyed the same civil rights that white citizens enjoyed. Senator Trumbull explained that the Citizenship Clause was necessary because the former slaveholding states denied the civil rights of American blacks on the grounds that they were not citizens and therefore not entitled to all of the civil rights that white citizens enjoyed.¹²⁰ The framers intended the Civil Rights Act to define and secure the rights of all Americans, but it was to make doubly certain that it would secure the civil rights of black Americans that the framers added language to section 1 that declared that United States citizens “of every race and color” are entitled to every substantive right enumerated in section 1 on the same basis

¹¹⁵ See *id.* § 1. To qualify for United States citizenship, individuals need only be born in the U.S. and not be subject to a foreign power. Indians who were not obligated to pay taxes were presumed to be subject to a foreign power, their tribes. See *id.* § 1.

¹¹⁶ See CONG. GLOBE, 39th Cong., 1st Sess. 527 (1866) (statement of Sen. Hendricks); *id.* at 504 (statement of Sen. Johnson); *id.* at 2764–67 (statement of Sen. Howard); *id.* at 2768–69 (statement of Sen. Wade); *id.* at 1295–96 (statement of Rep. Latham); Edward Bates, *Citizenship*, 10 OP. ATT’Y GEN. 382 (1866); 2 JAMES G. BLAINE, TWENTY YEARS IN CONGRESS 189 (1866); JAMES KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP 341 (1978).

¹¹⁷ Civil Rights Act of 1866 § 1.

¹¹⁸ *Id.*

¹¹⁹ CONG. GLOBE, 39th Cong., 1st Sess. 475, 527, 574, 600, 1756 (1866) (statements of Sen. Trumbull); *id.* at 504 (statement of Sen. Johnson); *id.* at 523, 576, 595 (statements of Sen. Davis); *id.* at 570 (statement of Sen. Morrill); *id.* at 571 (statement of Sen. Henderson); *id.* at 602 (statement of Sen. Lane of Indiana); *id.* at 1780 (statement of Sen. Yates); *id.* at 1152 (statement of Rep. Thayer); *id.* at 1157 (statement of Rep. Thornton); *id.* at 1266 (statement of Rep. Raymond); *id.* at 1291 (statement of Rep. Bingham); *id.* app. at 156 (statement of Rep. Delano).

¹²⁰ *Id.* at 475. Some senators and representatives also denied that black Americans were entitled to enjoy the rights of citizens for the same reason. See, e.g., *id.* at 42, 476, 477 (statements of Sen. Saulsbury); *id.* at 499 (statement of Sen. Cowan); *id.* at 576 (statement of Sen. Davis); *id.* at 600–01 (statement of Sen. Guthrie); *id.* at 1123 (statement of Rep. Rogers).

“as is enjoyed by white citizens.”¹²¹ As shall be seen, the framers did not intend to limit the Civil Rights Act to a guarantee of racial equality by including such guarantees in the Act. In conferring citizenship on all Americans, Congress exercised a plenary power of a sovereign nation and overrode the states’ prior determinations of the status of their inhabitants.¹²²

The second pragmatic reason motivating the framers to insert the Citizenship Clause in section 1 is that they believed it provided an additional source of congressional power to enforce civil rights. The bill’s floor manager in the House of Representatives, James Wilson of Iowa, made this clear when he introduced the amendment to the Civil Rights Bill that added the Citizenship Clause.¹²³ Section 1 initially applied to all of the “inhabitants” of the United States, but Wilson’s amendment restricted the civil rights guarantees of section 1 to U.S. citizens. He stated that the amendment was intended to limit the bill only to citizens rather than all inhabitants of the United States, as there was doubt whether Congress had the power to extend this protection to non-citizens.¹²⁴ He explained why Congress necessarily possessed the power to enforce the civil rights of American citizens: “If citizens of the United States, as such, are entitled to possess and enjoy the great fundamental civil rights which it is the true office of Government to protect,” then Congress “must of necessity be clothed with the power to insure to each and every citizen these things which belong to him as a constituent member of the great national family.”¹²⁵ Senator Trumbull asserted the same position. He insisted that “it is competent for Congress to declare, under the Constitution of the United States, who are citizens.”¹²⁶ He argued that “certain fundamental rights belong to every American citizen, and among those are the rights to enjoy life and liberty and to acquire property We would protect a citizen in a foreign nation in those rights. Certainly, then, the Government has power to protect them within its own jurisdiction.”¹²⁷

That Republicans understood that the guarantee of citizenship and civil rights of section 1 applied to and protected the civil rights of all U.S.

¹²¹ *Id.* at 573. *See also infra* notes 137–141 and accompanying text.

¹²² *See* CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866) (statement of Rep. Lawrence); *see also infra* note 136 and accompanying text.

¹²³ *See* CONG. GLOBE, 39th Cong., 1st Sess. 1115 (1866).

¹²⁴ *Id.*

¹²⁵ *Id.* at 1118.

¹²⁶ *Id.* at 475.

¹²⁷ *Id.* at 1781. The Supreme Court also acknowledged the government’s power to protect citizens in foreign lands, but it refused to recognize the government’s power to protect them within its own jurisdiction. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 80 (1873). Conservative Republican Representative Henry J. Raymond, who voted against the Civil Rights Bill but nevertheless proclaimed his support for the federal enforcement of civil rights, acknowledged that Congress had the power to enforce civil rights because these are rights Americans enjoy as U.S. citizens. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1266 (1866) (arguing that the Civil Rights Act entitles “citizens of the United States . . . to all the rights, privileges, and immunities of citizenship”).

citizens is reflected in two proposals introduced in the House to exclude former confederates from its protective guarantees. Representative Ralph Hill of Indiana proposed an amendment to the Citizenship Clause of the Civil Rights Bill that would have excluded “those who have voluntarily borne arms against the Government of the United States or given aid and comfort to the enemies thereof.”¹²⁸ He explained that, if these persons “are not now entitled to the full rights of citizenship, it at least leaves them without giving them those rights by this bill.”¹²⁹ Representative Ebenezer Dumont, also of Indiana, offered a similar, but more explicit amendment which stated that nothing in section 1

shall be construed as re-extending the rights of citizenship to any one who has renounced the same, or acknowledged allegiance to any government or pretended government in hostility to the United States, or held office under the same, nor to any one who voluntarily has borne arms against the United States in the late rebellion, or who has been guilty of any act whatever which by the laws of nations makes a forfeiture of citizenship.¹³⁰

The extensive congressional debate over the question of citizenship evinces the considerable importance congressional legislators attached to citizenship in assessing Congress’s power to enforce civil rights. Both supporters and opponents stated that the constitutional authority to define and confer citizenship encompassed the power to define and enforce the rights of citizens. For example, Senator Trumbull maintained that native-born African Americans are citizens of the United States, just as are white Americans.¹³¹ Trumbull further explained that it was necessary to declare native-born Americans, especially black Americans, to be United States citizens, because it is by virtue of their United States citizenship that they were entitled to the Thirteenth Amendment’s guarantee of the natural rights of freemen throughout the United States.¹³² Trumbull maintained that, if there were any doubt whether black Americans were U.S. citizens and thus entitled to the natural rights of U.S. citizenship, all doubts would be resolved “by passage of a law declaring all persons born in the United States to be citizens thereof. That this bill proposes to do. Then they will be entitled to the rights of citizens.”¹³³ Trumbull expressly defined the civil rights of U.S. citizens as the natural rights of freemen, and stated that “they belong to them in all the States of the Union.”¹³⁴ Senator

¹²⁸ *Id.* at 1154.

¹²⁹ *Id.* at 1154.

¹³⁰ *Id.* at 1156.

¹³¹ *Id.* at 475.

¹³² *Id.*

¹³³ *Id. Accord, id.* at 1151–53 (statement of Rep. Thayer).

¹³⁴ *Id.* at 1757 (statement of Sen. Trumbull); *see also id.* at 572 (statement of Sen. Wil-

Trumbull restated this natural rights theory of U.S. citizenship in rebutting President Johnson's veto of the Civil Rights Bill.¹³⁵ Representative William Lawrence of Ohio, a member of the House Judiciary Committee and the only Representative to speak on the President's veto of the Civil Rights Bill, also asserted this principle in rebuttal to the President's veto message. Lawrence proclaimed that the power to confer citizenship "is an exercise of authority which belongs to every sovereign Power, and is essentially a subject of national jurisdiction. The whole power over citizenship is intrusted to the national Government."¹³⁶

Supporters of the Civil Rights Act therefore amended section 1 by including the clause that defined and conferred United States citizenship on all Americans for the specific purpose of ensuring that all Americans would be entitled to federal protection in their civil rights as citizens.¹³⁷ These were the views of the House and Senate floor leaders of the Civil Rights Bill. Other legislators expressed this same understanding. For example, conservative Republican Representative Henry J. Raymond, who was also a founder and editor of *The New York Times*, asserted this view¹³⁸ even though he voted to sustain the President's veto of the Civil Rights Act.¹³⁹ Raymond proclaimed his desire to raise African Americans to equal status with other persons by giving them the right of citizenship and securing all rights resulting from citizenship.¹⁴⁰ He reasoned that all other rights flow from citizenship and making African Americans citizens would guarantee them the same rights as any other U.S. citizen.¹⁴¹

liams) (declaring that the Civil Rights Bill "confer[s] upon all the inhabitants of every State and Territory all the civil rights that belong to a citizen").

¹³⁵ *Id.* at 1756.

¹³⁶ *Id.* at 1832.

¹³⁷ Courts and scholars have failed to appreciate that the framers of the Civil Rights Act and the Fourteenth Amendment understood the Citizenship Clause of the Civil Rights Act as an exercise of Congress's plenary power to define and protect citizens' rights. They have also failed to understand that the framers believed that in conferring citizenship and defining the rights of U.S. citizens, Congress was entitled to exercise plenary power to protect citizens' rights. Thus, according to the framers' understanding, the Citizenship Clause of the Fourteenth Amendment, in itself, constituted a delegation of plenary congressional authority to define and protect the rights of United States citizens. See Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 912-13 (1986).

¹³⁸ CONG. GLOBE, 39th Cong., 1st Sess. 1266 (1866).

¹³⁹ CONG. GLOBE, 39th Cong., 1st Sess. 1861 (1866).

¹⁴⁰ CONG. GLOBE, 39th Cong., 1st Sess. 1266 (1866). See also *infra* note 256.

¹⁴¹ CONG. GLOBE, 39th Cong., 1st Sess. 1266 (1866). During the Fourteenth Amendment debates, Wilson referred to Raymond's comments and agreed that:

after declaring all persons born in the United States citizens and entitled to all the rights and privileges of citizens, it would be competent for the Government of the United States to enforce and protect the rights thus conferred, or thus declared That being conceded, the power to protect those rights must necessarily follow . . . as was laid down in the well-known case of [*Prigg*] vs. The Commonwealth of Pennsylvania, where the Supreme Court declared that the possession of the right carries with it the power to provide a remedy.

Senator Garrett Davis of Kentucky, although an ardent opponent of the Civil Rights Act, nevertheless agreed that if African Americans were given citizenship, they would be entitled to the same treatment as white citizens barring any differences authorized “by the express language of the Constitution.”¹⁴² However, Davis restricted Congress’s power over citizens “to such matters as concern the citizens of different States.” The reason, Davis explained, was that the Comity Clause¹⁴³ was the sole source of Congress’s power to enforce the rights of United States citizens, and it applied only when citizens of one state traveled into another state. The problem with the Civil Rights Bill, according to Davis, was that it protected the civil rights of all U.S. citizens within the states in which they resided. It is significant that Senator Davis, a Democrat with states’ rights sympathies, thought Congress possessed the power to enforce the rights secured by the Comity Clause. He proposed a bill to enforce the Comity Clause, which would protect the rights of citizens when in a state other than the state of their residence.

It is the framers’ theory of U.S. citizenship and Congress’s power to enforce the rights of United States citizens encompassed in the Civil Rights Bill that caused conservative Republican Representative Columbus Delano to oppose its enactment.¹⁴⁴ He feared that the statute would completely supplant state jurisdiction over citizens’ rights. Delano accepted the Republicans’ principle that United States citizens, as such, are entitled to all of the privileges and rights of citizenship, acknowledging that the Thirteenth Amendment made the former slaves citizens of the United States and therefore entitled to all of the rights and privileges of citizenship.¹⁴⁵ Consequently, he believed no law was needed to give emancipated slaves citizenship.¹⁴⁶ However, Delano was troubled that:

[I]f we adopt the principle of this bill we declare in effect that Congress has authority to go into the States and manage and legislate with regard to all the personal rights of the citizen—rights of life, liberty, and property. You render this Government no longer a Government of limited powers; you concentrate and consolidate here an extent of authority which will swallow up all or nearly all of the rights of the States with respect to the property, the liberties, and the lives of its citizens.¹⁴⁷

Id. at 2512.

¹⁴² Except where otherwise noted, the following account is taken from *id.* at 597 (statement of Sen. Davis).

¹⁴³ U.S. CONST. art. IV, § 2, cl. 1.

¹⁴⁴ See CONG. GLOBE, 39th Cong., 1st Sess. app. at 156–59 (1866).

¹⁴⁵ See *id.* app. at 156.

¹⁴⁶ See *id.*

¹⁴⁷ See *id.* app. at 158.

He insisted that the Constitution “was never designed to take away from the States the right of controlling their own citizens in respect to property, liberty, and life.”¹⁴⁸ Yet, he proclaimed his desire to see the provisions of the law enforced upon the South.¹⁴⁹

Delano reconciled these two apparently contradictory positions by proposing a constitutional amendment that would require the States to enforce the fundamental rights of life, liberty, and property and also authorize Congress to enforce these rights if the states failed to do so.¹⁵⁰ Delano explained that he wanted Congress to exercise no more power over the states than necessary and “would not allow it to go in the first instance to secure these rights, but allow it to go only when the States refuse to apply and give such security under the fundamental law of the nation.”¹⁵¹

Thus, Delano did not object to Congress exercising the requisite power to enforce the substantive civil rights of United States citizens. To the contrary, he proposed to give Congress this power. Rather, he sought to preserve concurrent state jurisdiction and state police powers over citizens’ civil rights by authorizing the federal government to assume jurisdiction over and enforce civil rights only if the states failed to do so.

It is notable that Delano objected to the Civil Rights Act because it enforced civil rights directly, without the need for any state violation or denial of civil rights. It is also noteworthy that his proposed amendment, which sought to give Congress civil rights enforcement authority only “where the States withheld it,”¹⁵² nevertheless delegated to Congress the power to supplant the states and to enforce citizens’ substantive rights. In other words, Delano’s conception of Congress’s remedial power was not limited to or exclusively directed at remedying a state’s denial of a citizen’s civil rights; rather, it was directed at enforcing and protecting substantive civil rights, albeit limited to situations in which a state failed to provide this protection itself. Though more moderate and more respectful of states’ rights than the remedies Congress adopted in the Civil Rights Act, Delano’s conception of Congress’s power to enforce civil rights was

¹⁴⁸ *See id.*

¹⁴⁹ *See id.* app. at 156.

¹⁵⁰ *See id.* app. at 158–59.

¹⁵¹ *See id.* Representative Delano recommended that Congress adopt Representative John A. Bingham’s proposed constitutional amendment, modified to require the states to enforce citizens’ fundamental rights and empowering Congress to enforce these rights should the states fail to do so.

I am still of the opinion . . . that if we do anything upon this subject at all, we had better do it by taking up the amendment to the Constitution offered by my colleague. [Mr. Bingham] (sic) now postponed till April, modifying it in the form I have suggested, and making it the fundamental law, and then proceeding to secure the rights of these persons in a way in which we shall not be trampling down or endangering the fundamental law of the land.

Id. app. at 159.

¹⁵² *Id.* app. at 159.

substantive and not “remedial” as the Rehnquist Court defined Congress’s power to enforce Fourteenth Amendment rights. Significantly, supporters of the Civil Rights Act rejected Delano’s proposal to condition Congress’s power to enforce substantive civil rights upon a state’s failure to enforce citizens’ rights. They chose to enforce substantive civil rights directly.

The debate over citizenship suggests that the Civil Rights Act supplanted state authority over citizens’ rights in a second way. The Civil Rights Act overrode any inconsistent state laws and defined some of the rights that Americans possess as U.S. citizens “in every State and Territory in the United States.”¹⁵³ Senator Trumbull insisted that United States citizenship conferred fundamental rights on all Americans, and he described these rights by paraphrasing Justice Washington’s opinion in *Corfield v. Coryell*:¹⁵⁴ “They are those inherent, fundamental rights which belong to all free citizens or free men in all countries, such as the rights enumerated in this bill, and they belong to them in all the States of the Union.”¹⁵⁵ Senator Trumbull thus declared that U.S. citizens possessed these civil rights independent of state law: “[T]he federal government has authority to make every inhabitant . . . a citizen, and clothe him with the authority to inherit and buy real estate, and the State[s] . . . cannot help it.”¹⁵⁶ Just what these rights are had never been determined with any specificity, however. The framers of the Civil Rights Act described the essential rights of free men and citizens in broad, generic terms as the rights to life, liberty, and property.¹⁵⁷ There was some question whether the rights to life, liberty, and property included political rights, such as voting and holding public office, and what the era considered to be social rights, such as nondiscriminatory access to public accommodations and schools. Most of the framers and supporters asserted the view that political and social rights are not among the civil rights and privileges and immunities of citizenship,¹⁵⁸ and so those were not included among the rights specified in section 1.

To avoid uncertainty and ambiguity regarding the rights secured by the Civil Rights Act, the framers explicitly specified in section 1 some of the rights they found essential to U.S. citizenship because those rights were essential to political and economic freedom and individual autonomy in the context of 1866.¹⁵⁹ Section 1 declared that

¹⁵³ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2000)).

¹⁵⁴ *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823).

¹⁵⁵ CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull).

¹⁵⁶ *Id.* at 500.

¹⁵⁷ See Kaczorowski, *supra* note 137, at 922–26; see also *infra* sources cited in notes 301–305.

¹⁵⁸ See Kaczorowski, *supra* note 137, at 881–84, 922–26.

¹⁵⁹ See Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary*, 98 YALE L.J. 565, 570 (1989).

such citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to the 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 punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.¹⁶⁰

These rights are essentially economic rights and the means of enforcing them in the courts, the right to the protection of the law for the safety of one's person and property, and the right to equal punishments for legal infractions. Thus, Congress exercised the plenary power of a sovereign government by defining and conferring some of the rights that individuals possess as U.S. citizens, "any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."¹⁶¹ Section 3 of the Civil Rights Act conferred exclusive jurisdiction on the federal courts to try any civil actions brought by citizens to redress violations of these civil rights, whether attributable to the actions of public officials or private individuals acting in their private capacities.¹⁶²

The United States Supreme Court has asserted this view of the framers' intent in enacting the Civil Rights Act of 1866. As early as 1883, in

¹⁶⁰ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2000)).

¹⁶¹ Civil Rights Act of 1866 § 1. Scholars disagree over whether the framers understood section 1 as a guarantee of the rights there enumerated as equal rights under state law or as substantive rights of U.S. citizenship. *See, e.g.*, WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 7–10, 110–23 (1988) (arguing that the framers and supporters were divided in their views and that this question was left unresolved until the United States Supreme Court decided the issue); EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869*, at 66–67 (1990) (arguing that the framers "clearly limited the scope of the [Civil Rights] bill to matters of racial discrimination," leaving the states to determine what rights should be granted to citizens, which created "a potential danger" that "the states could deny the enumerated rights to all citizens, thus defeating the basic purpose of the bill"); John Harrison, *Reconstructing The Privileges or Immunities Clause*, 101 *YALE L.J.* 1385, 1387–97, 1402–04 (1992) (arguing that the framers intended to secure equality in state-conferred rights); Kaczorowski, *supra* note 159, at 572–74; Kaczorowski, *supra* note 137, at 912–13 (arguing that the framers intended to secure section 1 rights as the substantive rights of U.S. citizenship, but preserving concurrent state jurisdiction over these rights). However, as the Supreme Court's decisions in *The Civil Rights Cases*, 109 U.S. 3 (1883), *Jones v. Alfred G. Mayer Co.*, 392 U.S. 409 (1968), and *Runyon v. McCrary*, 427 U.S. 160 (1976) show, the question whether section 1 conferred equal rights or substantive rights does not have to be resolved for the purposes of this Article. *See infra* notes 163–168 and accompanying text.

¹⁶² *See* Civil Rights Act of 1866 § 1. This provision also conferred exclusive jurisdiction on federal courts to try all criminal prosecutions as provided in section 2 of the Fourteenth Amendment.

The Civil Rights Cases,¹⁶³ the Court acknowledged that Congress undertook to enforce the Thirteenth Amendment by

secur[ing] to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property, as is enjoyed by white citizens.¹⁶⁴

The Court recounted the framers' understanding of the Thirteenth Amendment, stating that the framers equated "those fundamental rights which are the essence of civil freedom" to "those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery."¹⁶⁵ However, unlike the framers, who emphasized Congress's power under the Thirteenth Amendment to enforce the rights of U.S. citizens, the Court in *The Civil Rights Cases* emphasized Congress's Thirteenth Amendment powers to enforce those rights the denial of which constitutes an incident or badge of servitude.¹⁶⁶ Nevertheless, the Court held that federal legislation enacted pursuant to the Thirteenth Amendment "may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not."¹⁶⁷ The Court affirmed this view in 1968 when it held that section 1 of the Civil Rights Act of 1866 secured to black and white citizens alike the right to property and the right to make and enforce contracts throughout the United States against violations from any source, "whether governmental or private."¹⁶⁸

¹⁶³ 109 U.S. 3 (1883).

¹⁶⁴ *Id.* at 22. *Accord* *United States v. Rhodes*, 27 F. Cas. 785, 789 (C.C.D. Ky. 1866) (No. 16,151) (upholding the constitutionality of the Civil Rights Act of 1866 and Congress's power to enforce the civil rights of U.S. citizens on the grounds that the Thirteenth Amendment made the former slaves United States citizens and secured the personal liberty of "every one, of every race, color, and condition" within the United States); *United States v. Given*, 25 F. Cas. 1324, 1325 (C.C.D. Del. 1873) (declaring that the "thirteenth, fourteenth, and fifteenth amendments of the constitution have confessedly extended civil and political rights, and . . . have enlarged the powers of [C]ongress" to enforce these rights).

¹⁶⁵ *The Civil Rights Cases*, 109 U.S. at 22.

¹⁶⁶ *Id.* at 20–21.

¹⁶⁷ *Id.* at 23.

¹⁶⁸ *Alfred H. Mayer Co.*, 392 U.S. at 423–24 (holding that "when Congress provided [in] . . . the Civil Rights Act that the right to purchase and lease property was to be enjoyed equally throughout the United States by Negro and white citizens alike, it plainly meant to secure that right against interference from any source whatever, whether governmental or private"). In considering the constitutionality of the present codification of this property right, the Court quoted the *Civil Rights Cases* and reasserted the constitutionality of the right to property originally secured by the Civil Rights Act, declaring that the fact that it

operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem. If Congress has power under the

It is because opponents understood that the power Congress exercised in enacting the Civil Rights Act was the plenary power of defining and enforcing the civil rights of all citizens against any violation that opponents objected so vehemently, arguing that Congress usurped the states' police power to determine and regulate the rights of their citizens and thus consolidated the states' police power in the federal government.¹⁶⁹

Thirteenth Amendment to eradicate conditions that prevent Negroes from buying and renting property because of their race or color, then no federal statute calculated to achieve that objective can be thought to exceed the constitutional power of Congress simply because it reaches beyond state action to regulate the conduct of private individuals.

The Court later interpreted guarantees in section 1 of the right to contract in the same way. *See Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), *Runyon*, 427 U.S. 160, 170–71 (1976).

¹⁶⁹ For example, Democratic Senator Willard Saulsbury of Delaware objected that the Civil Rights Act was “one of the most dangerous that was ever introduced into the Senate of the United States,” insisting that the Constitution “does not of itself declare, and human ingenuity cannot torture it into meaning that the Congress of the United States shall invade the States and attempt to regulate property and personal rights within the States.” *CONG. GLOBE*, 39th Cong., 1st Sess. 476 (1866). Saulsbury explicitly stated that the Civil Rights Act “assumes jurisdiction over subject-matters of which Congress has no jurisdiction” and “positively deprives the State of its police power of government” by determining who shall hold property within the states, “who shall sue and be sued, and who shall give evidence in its courts” by assuming the function of “securing to the citizen the possession of his person and property within the limits of a State” and the “authority over the judicial tribunals in administration of law in the States;” which, Saulsbury complained, was “a denial to the States of their police power of regulation.” *Id.* at 478. Senator Cowan agreed and admonished that, if “we have the right to pass such a law as this” under the authority of the Thirteenth Amendment, then “we have a right to overturn the states themselves completely.” *Id.* at 499. He later clarified that the bill intervened in the states and determined the relationships of inhabitants to one another and to the government. *Id.* at 604. Senator Davis declared that the Civil Rights Act violated “the theory and principle of our Government,” because it purported to “interfere with the local concerns of any state [regarding] all of the rights, privileges, and immunities its citizens shall enjoy and their regulation,” observing that it conferred the rights enumerated in section 1 “upon all the inhabitants of the United States, of every race and color;” that it interposed federal jurisdiction over the administration of justice, usurping “the reserve [sic] rights of the States, . . . their power to legislate for their own domestic concerns, in relation to their own people, the punishment of their own people, the property and estates and transactions and contracts of their own people.” *Id.* at 595–98. Passage of the Civil Rights Act would “utterly subvert our Government,” Davis warned, because it was “wholly incompatible with its principles, with its provisions, or with its spirit.” *Id.* Should it become law, the Civil Rights Act would produce a perfect and despotic central consolidated Government.” *Id.* “Congress by this bill are presuming precisely the power,” Davis admonished, “to establish a civil and penal code for all the states of the Union,” concluding that section 1 “is a great stride towards the consolidation of all power by Congress than has ever before been taken or conceived.” *Id.* at 1414, 1415. Senator McDougall endorsed the views expressed by Senators Cowan and Guthrie. *Id.* at 604.

Opponents in the House of Representatives expressed similar views. Representative Rogers, for example, objected that the Civil Rights Act was intended to extend to black Americans “all the rights to life, liberty, and property . . . [and] every privilege that ought to be guaranteed to any man in the United States for the protection of his life, his liberty, and his property;” but he denied that Congress had the authority “to enter in the domain of a State and interfere [in this way] with internal police, statutes, and domestic regulations.” *Id.* at 1120. Rogers claimed that the Civil Rights Act “would destroy the foundations of the Government as they were laid and established by our fathers.” *Id.* Representative Eldridge

However, the framers of the Civil Rights Act chose not to displace the states completely.

The third way section 1 of the Civil Rights Act supplanted state authority over citizens' rights was by providing that all U.S. citizens shall enjoy and exercise the enumerated civil rights as the most favored class of citizens (white citizens) enjoyed and exercised them. Because it conferred the enumerated civil rights on the same bases "as whites enjoy" them, section 1 expressly prohibited the infringement or denial of citizens'

characterized the Civil Rights Act as "one of the most insidious and dangerous" measures directed against the American people and said it was "designed to take away the essential rights of the States" by proposing "to enter the States and regulate their police and municipal affairs," and concluded that "[t]here is no doubt it is a measure designed to accumulate and centralize power in the Federal Government." *Id.* at 1154. Representative Thornton argued that "it has uniformly been held that each State has the exclusive right to determine the status of its inhabitants," and he denied the necessity of conferring on freedmen "all the rights necessarily included in the term civil rights and immunities" to protect their freedom. *Id.* at 1566. In doing so, the Civil Rights Bill was "trench[ing] upon the rights of the States, and [was] assuming power which has always belonged to the States of the Union," namely, "the right to determine and fix the legal status of [their inhabitants], the local powers of self government, the power to regulate all the relations . . . between husband and wife, parent and child . . . all the fireside and home rights which are nearer and dearer to us than all the others." *Id.* at 1566–67. Thornton predicted that the Civil Rights Bill was "but a stepping-stone to a centralization of the Government and the overthrow of the local powers of the States. Whenever that is consummated, . . . [t]here will be nothing left but absolute, despotic, central power." *Id.* at 1567. Representative Delano pointedly stated:

[I]f we adopt the principle of this bill we declare in effect that Congress has the authority to go into the States and manage and legislate with regard to all the personal rights of the citizen—the rights of life, liberty, and property. You render this Government no longer a Government of limited powers, you concentrate and consolidate here an extent of authority which will swallow up all or nearly all of the rights of the States with respect to the property, the liberties, and the lives of its citizens.

Id. app. at 158. Representative Kerr emphasized the outer reach of the power Congress was exercising in enacting the Civil Rights Act. He proclaimed, "This bill rests upon the theory that Congress has the right to declare who shall be citizens of the United States, and then to provide that *such* citizens shall enjoy in the *States* all the privileges and immunities allowed therein to the most favored class of citizens." *Id.* at 1268. (Emphasis in original). Kerr denied that Congress possesses this "right" and warned: "If it exists at all, it exists without limit on its exercise, except the will of Congress." *Id.* at 1268, 1270. Representative Latham accused the Republican supporters of the Civil Rights Act of "interfer[ing] with the internal policy of the several States so as to define and regulate the 'civil rights or immunities among the inhabitants' therein." *Id.* at 1296. The bill would transform American federalism by completely centralizing power in the federal government, it "would change not only the entire policy, but the very form of our Government, by a complete centralization of all power in the national Government," which he believed would be "most dangerous to the liberties of the people and the reserved rights of the States." *Id.* President Johnson voiced the same views in explaining his veto of the Civil Rights Bill. He denied that Congress had the constitutional authority to "abrogate all State laws of discrimination between the two races in the matter of real estate, of suits, and of contracts generally." *Id.* at 1680. All of these subjects had hitherto "been considered as exclusively belonging to the States. They all relate to the internal policy and economy of the respective States. They are matters which in each State concern the domestic condition of its people." *Id.*

rights because of racial and other improper animus.¹⁷⁰ The Civil Rights Act again supplanted state law by prohibiting the states from discriminating unreasonably among citizens in their civil rights, especially, but not only, on the basis of race.¹⁷¹ In addition to defining and conferring the civil

¹⁷⁰ Civil Rights Act of 1866 § 1. Conservative Republican from Pennsylvania, Senator Edgar Cowan, for example, complained that “[t]his is a proposition to repeal by act of Congress all State laws, all state legislation, which in any way create distinctions between black men and white men in so far as their civil rights and immunities extend.” CONG. GLOBE, 39th Cong., 1st Sess. 603 (1866); *see also id.* at 474 (statement of Sen. Trumbull) (stating that a purpose of the Civil Rights Bill is to “destroy all these discriminations” in state law, which the Thirteenth Amendment voided); *id.* at 504 (statement of Sen. Howard) (stating that the civil rights bill only contemplates “that in respect to all civil rights . . . there is to be hereafter no distinction between the white race and the black race”); *id.* at 505–06 (statement of Sen. Johnson) (declaring that “[t]he first section of this bill says that there is to be no discrimination” between whites and blacks, and that it prohibits antimiscegenation laws because “[w]hite and black are considered together, put in a mass, and the one is entitled to enter into every contract that the other is entitled to enter into”); *id.* at 599, 1757 (Sen. Trumbull) (stating that “the very object of the bill is to break down all discrimination between black men and white men . . . it is simply intended to carry out a constitutional provision, and guaranty to every person of every color the same civil rights,” by declaring “that there shall be no distinction in civil rights between any other race or color and the white race”); *id.* at 601 (statement of Sen. Hendricks) (stating that the Civil Rights Bill provides “that the civil rights of all men, without regard to color, shall be equal”); *id.* at 602 (statement of Sen. Lane of Indiana) (declaring that the objectives of the Civil Rights Bill are to secure to the freedmen “the rights, privileges, and immunities of freemen,” and to “give effect to [these objectives] by doing away with the slave codes of their respective States where slavery was lately tolerated,” codes that the Thirteenth Amendment nullified); *id.* at 603 (statement of Sen. Wilson) (justifying the need for the Civil Rights Bill to secure “the new-born civil rights we are now about to pass” for the freedmen from “laws . . . so atrocious . . . and so persistently . . . carried into effect by the local authorities, that [Union generals] have issued positive orders forbidding the execution of the black laws that have just been passed”); *id.* at app. 182, 183 (statement of Sen. Davis) (arguing that the Civil Rights Bill proscribed all discriminations against black Americans in favor of white persons); *id.* at 1118 (statement of Rep. Wilson) (declaring that section 1 of the Civil Rights Bill prohibits discrimination in civil rights or immunities among United States citizens and guarantees the same specified rights to “such citizens of every race and color . . . as is enjoyed by white citizens”); *id.* at 1158 (statement of Rep. Windom) (stating that the Civil Rights Bill “declares that hereafter there shall be no discrimination in civil rights or immunities among the citizens of any State or Territory of the United States on account of race, color, or previous condition of slavery, and that every person . . . shall have the same [enumerated] right[s]”); *id.* at 1293 (statement of Rep. Shellabarger) (stating that the bill prohibits the states from discriminating “on account of race color, or former condition of slavery”).

¹⁷¹ *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866). Political animus was a major problem that Congress sought to address in protecting southern white unionists, federal officials, and military personnel in the South. *See infra* notes 292–310 and accompanying text. Xenophobia and anti-Catholicism were other problems Republicans sought to address. Representative Lawrence explicitly stated that the Bill was intended to “protect every citizen, including the millions of people of foreign birth who will flock to our shores to become citizens and to find here a land of liberty and law.” CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866). Other participants in the Civil Rights Bill debates stated that the bill was intended to prevent prejudice based on country of national origin and religion. *See, e.g., id.* at 1294 (statement of Rep. Shellabarger) (arguing that the Civil Rights Bill would prohibit the state of Ohio from passing a law forbidding U.S. citizens of German extraction from owning property, inheriting property, living in Ohio, or coming to work in Ohio); *id.* at 1415 (statement of Sen. Davis) (objecting that the Civil Rights Bill would authorize Congress “to go into [New Hampshire] and to abrogate” a statute that prohibited Roman Catholics from holding state offices, thus prohibiting “that distinction among her citizens”).

rights and immunities of United States citizens, therefore, the Civil Rights Act overrode state laws that discriminated on the bases of race, color, or condition of servitude, and probably on the bases of religion, country of origin, and political affiliation, and it imposed on state officials a federal duty to recognize and enforce the civil rights of all citizens in the same manner that the officials recognized and enforced the civil rights of white citizens.

Not simply a guarantee of racial equality in citizens' rights or of an equality in state-conferred rights, the Civil Rights Act defined a national citizenship consisting of a body of fundamental rights that proponents and opponents understood its framers and supporters expressly intended to secure to all citizens of the United States, white as well as black, native-born as well as the foreign-born.¹⁷² Thus, Representative Wilson proclaimed that the Civil Rights Act was intended "to protect [all] our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men."¹⁷³ Senator Reverdy Johnson, a leader of the Democratic opposition who was regarded as the foremost authority on the Constitution, confirmed this view, stating that the Civil Rights Act "professes to define what citizenship is, [and] it gives the rights of citizenship to all persons without distinction of color, and of course embraces Africans or descendants of Africans."¹⁷⁴ Consequently, although black Americans were the intended primary beneficiaries of civil rights protection, drafters and supporters of the Civil Rights Act expressed their intention of protecting white citizens as well.¹⁷⁵ This was also the understanding of observers outside of Con-

¹⁷² See, e.g., *id.* at 41 (statement of Sen. Sherman); *id.* at 474, 599, 1757 (statements of Sen. Trumbull); *id.* at 504–05 (statement of Sen. Johnson); *id.* at 595, 598 (statements of Sen. Davis); *id.* at 603 (statement of Sen. Cowan); *id.* at 3035 (statement of Sen. Henderson); *id.* at 1066–67 (statement of Rep. Price); *id.* at 1117 (statement of Rep. Wilson); *id.* at 1120–21 (statement of Rep. Rogers); *id.* at 1263–65 (statement of Rep. Broomall); *id.* at 1264 (statement of Speaker Colfax); *id.* at 1291, 1292 (1866), 2542 (statement of Rep. Bingham); *id.* at 1833–35 (statement of Rep. Lawrence).

¹⁷³ *Id.* at 1118.

¹⁷⁴ *Id.* at 505 (statement of Sen. Johnson).

¹⁷⁵ The Supreme Court has held that the framers intended the Civil Rights Act to secure the rights of whites as well as blacks and the Court has applied it to protect the civil rights of whites. See, e.g., *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). The Court also asserted this view shortly after the statute's enactment. Although it noted that it was primarily intended to protect black Americans from racial prejudice and discrimination, the Court declared that the Civil Rights Act "extends to both races the same rights, and the same means of vindicating them." *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 593 (1872). The congressional debates offer abundant evidence supporting the Supreme Court's holding. See CONG. GLOBE, 39th Cong., 1st Sess. 475–76, 599, 1760 (statements of Sen. Trumbull) (proclaiming that "this bill applies to white men as well as black men" because the bill "declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness," and further noting that "[it] protects a white man just as much as a black man"); *id.* at 505 (statement of Sen. Johnson) (stating that "the white as well as the black is included in this first section"); *id.*

gress.¹⁷⁶ The framers obviously intended to protect civil rights against violations beyond those motivated by racial discrimination.

Even the Supreme Court, as early as 1883, recognized that the framers of the Civil Rights Act understood Congress had the power, and that it intended to use this power to intrude upon and supplant traditional state authority over the civil rights of all Americans. The Court observed that the framers undertook to enforce the Thirteenth Amendment by “secur[ing] to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom,”¹⁷⁷ and that they equated these rights to “those fundamental rights which appertain to the essence of citizenship.”¹⁷⁸ Indeed, the Court affirmed that legislation enacted pursuant to the Thirteenth Amendment “may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not.”¹⁷⁹

at 595, 598, 1415, app. at 184 (statement of Sen. Davis) (complaining that the Civil Rights Bill applies “to a free negro or a white local resident citizen of” any state and that the Civil Rights Bill “was a flagrant, reckless, and enormous usurpation of power by the majority of the two Houses” because it extended the Thirteenth Amendment to protect the civil rights of whites and free blacks); *id.* at 1803 (statement of Sen. Lane of Kansas) (stating that the Civil Rights Bill “secured equal rights to all”); *id.* at 1115 (statement of Rep. Wilson) (reporting the Civil Rights Bill as a bill “to protect all persons in the United States in their civil rights, and to furnish the means for their vindication”); *id.* at 1153 (statement of Rep. Thayer) (claiming “The [Civil Rights] bill . . . extend[s] these fundamental immunities of citizenship to all classes of people in the United States, [and] provides means for the enforcement of these rights or immunities.”); *id.* at 1158 (statement of Rep. Windom) (admonishing that “the negro question . . . never will rest until this nation does justice to the negro and every other citizen in it”); *id.* at 1262, 1264 (statement of Rep. Broomall) (exhorting that the Federal Government was duty-bound “to guard the rights of those who in the midst of the rebellion periled their lives and fortunes for its honor, of whatsoever caste or lineage they be,” and “that no system of reconstruction ought to be considered unless it shall effectually guaranty the rights of the Union men of the South,” insisting that “it is the solemn obligation of this Government to protect the property and the person of every loyal man”); *id.* at 1264 (statement of Speaker of the House Colfax) (stating that the Civil Rights Bill is “very wide in its range, proposing to protect all persons in the United States in their civil rights and furnishing the means of their vindication”); *id.* at 1291 (statement of Rep. Bingham) (characterizing the Civil Rights Bill as “legislation in favor of the rights of all before the law”); *id.* at 1294 (statement of Rep. Shellabarger); *id.* at 1833 (statement of Rep. Lawrence). *See also infra* notes 285–299 and accompanying text.

¹⁷⁶ PHILADELPHIA EVENING BULL., Mar. 30, 1866, collected in Scrapbook on the Civil Rights Bill 47 (E. McPherson ed., n.d.), in Edward McPherson Papers container 99 (collection available in Library of Congress). *See also* PHILADELPHIA AM. & GAZETTE, Apr. 7, 1866, *id.* at 79; PHILADELPHIA N. AM., Apr. 7, 1866, *id.* at 78; N.Y. EVENING POST, Apr. 2, 1866, *id.* at 61–62; N.Y. EVENING POST, Mar. 28, 1866, *id.* at 32; BALTIMORE AM., Mar. 23, 1866, *id.* at 4; PHILADELPHIA PRESS, n.d., 1866, *id.* at 25–26; ROCHESTER DEMOCRAT, n.d., *id.* at 37; YONKERS STATESMAN, n.d., *id.* at 53.

¹⁷⁷ The Civil Rights Cases, 109 U.S. 3, 22 (1883).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 23. The Court’s view of the scope of the rights Congress could enforce under the Thirteenth Amendment may have been narrower than that of the framers of the Civil Rights Act of 1866. The Court can be read as limiting Congress’s rights-enforcement power under the Thirteenth Amendment to those rights the denial of which would constitute a badge of slavery. It is sufficient to recognize that, even on this narrower view of Congress’s Thirteenth Amendment power, the Court acknowledged Congress’s plenary power to define and

The framers' theory of U.S. citizenship and of constitutional delegation assumed plenary congressional power to enforce the rights of U.S. citizens and to supplant the states' authority over the rights of U.S. citizens; they rejected any intention of displacing the states completely in performing the essential governmental function of enforcing citizens' rights. To the contrary, they wanted to preserve state authority over citizens' rights and therefore drafted the Civil Rights Act in such a way as to preserve concurrent state police powers.¹⁸⁰ They expressed the desire to supplant the states and enforce citizens' rights only to the extent necessary under the circumstances they confronted in 1866.¹⁸¹ For example, while they could have conferred unconditionally on all U.S. citizens the rights enumerated in section 1, they chose not to do so.

The framers and supporters of the Civil Rights Act gave two reasons for avoiding an outright grant of civil rights to every U.S. citizen. One reason is that an unconditional grant of civil rights would have entitled all citizens to these rights on the same basis as every other citizen. However, the framers did not believe that all citizens are entitled to the same civil rights or to exercise civil rights on the same basis as others. There were, and there continue to be, legitimate and reasonable discriminations among different classes of citizens regarding citizens' rights. For example, minors and the insane do not enjoy the same rights as rational adults.¹⁸² In 1866, married women did not enjoy the same rights as unmarried women or as men, whether married or unmarried.¹⁸³

The framers sought to preserve these distinctions in state law, which they considered to be legitimate discriminations, as they sought to abolish other kinds of discriminations, such as those based on race and political animus. Thus, Representative Wilson explained that

[T]he words ["as is enjoyed by whites"] were not in the original bill, but were placed there by an amendment offered by myself. And the reason for offering it was this: it was thought by some persons that unless these qualifying words were incorporated in the bill, those rights might be extended to all citizens, whether male or female, majors or minors.¹⁸⁴

Representative Lawrence repeated this explanation when he observed that "distinctions created by nature of sex, age, insanity, &c., are recognized

enforce those civil rights that are essential to individual liberty.

¹⁸⁰ See *infra* notes 198–213 and accompanying text.

¹⁸¹ See *id.*

¹⁸² See *infra* notes 184–185 and accompanying text.

¹⁸³ See *id.*

¹⁸⁴ CONG. GLOBE, 39th Cong., 1st Sess. app. at 157 (1866).

as modifying conditions and privileges," and may therefore be permitted, "but mere race or color, as among citizens, never can."¹⁸⁵

The second reason the drafters of the Civil Rights Bill avoided an outright grant of civil rights is that they sought to preserve state jurisdiction over citizens' rights.¹⁸⁶ Preserving state jurisdiction over citizens' rights highlights a significant difference between the rights secured by the Civil Rights Act of 1866 and the Fugitive Slave Act of 1850. The Supreme Court had held that the Constitution created the slave owners' property rights secured by the Fugitive Slave Clause and that the Constitution did not delegate to the states the authority to enforce these rights. Consequently, the power to enforce the slave owners' right of interstate recapture was delegated exclusively to Congress, and Congress could provide for the enforcement of this federal right only in the federal courts.¹⁸⁷

The power to enforce the personal rights and liberties of citizens was a different matter altogether. Historically, the enforcement and protection of these rights and the administration of civil and criminal justice were core areas of the states' traditional police powers. Except as they affected fugitive slaves, the states had exercised these powers virtually without the federal government's oversight. The framers of the Civil Rights Act sought to preserve the states' concurrent jurisdiction over the personal rights of U.S. citizens and the common law and statutory regulations which determined the manner in which individuals exercised and enjoyed these rights.¹⁸⁸ They thereby avoided the burden of legislating detailed federal codes relating to the various areas of civil law and criminal law.

One must keep in mind, however, that the Fugitive Slave Acts of 1793 and 1850 had supplanted the states' police power to protect and enforce the personal liberties of their inhabitants, regardless of race, in cases involving fugitive slaves. These statutes provided for the enforcement of slave owners' constitutional rights over fugitive slaves through federal tribunals.¹⁸⁹ Following this precedent, congressional Republican leaders proclaimed that

¹⁸⁵ *Id.* at 1835. *See also id.* at 572, 573 (statement of Sen. Henderson) (arguing that a U.S. citizen takes citizenship rights subject to state regulations, such as contract law prohibiting "lunatic[s]" from making enforceable contracts and drinking laws which "forbid the selling of intoxicating liquors to minors under twenty-one years of age"); *id.* at 1293 (statement of Rep. Shellabarger) (arguing that the Civil Rights Bill leaves undisturbed the state's power to regulate the rights of married women and minors). Nevertheless, Senator Cowan continued to insist that section 1 conferred the same right to contract and property on married women and minors regardless of state law. *Id.* at 1792. In addition, the framers refused to undertake the onerous and complicated task of legislating federal civil and criminal codes to replace those of the states that an unconditional grant of civil rights would have necessitated. *See, e.g., infra* notes 236–238 and accompanying text.

¹⁸⁶ *See infra* notes 236–238 and accompanying text.

¹⁸⁷ *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 622–24 (1842). The Court held that state legislatures could prohibit state and local judges from enforcing the Fugitive Slave Act. *See id.* at 622. *See also supra* notes 48 and 54 and accompanying text.

¹⁸⁸ *See infra* notes 236–238 and accompanying text.

¹⁸⁹ *See Act of Feb. 12, 1793, ch. 7, §§ 3–4, 1 Stat. 302–05* (repealed 1864); *See Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462* (1850) (repealed 1864).

citizens of the United States were entitled to the federal protection of their constitutional rights, and they proclaimed their intention of providing that protection by the federal government through the Civil Rights Act. For example, Representative Wilson declared: “citizens of the United States . . . are entitled to certain rights; and . . . I affirm that being entitled to those rights it is the duty of the Government to protect citizens in the perfect enjoyment of them. The citizen is entitled to life, liberty, and the right to property.”¹⁹⁰

The Civil Rights Act posed a problem of constitutional federalism. Asserting that the federal government possessed the constitutional power, and the duty, “to protect citizens in the perfect enjoyment of . . . life, liberty, and the right to property” it threatened to supplant the states’ traditional jurisdiction over and constitutional power to administer ordinary civil and criminal justice.¹⁹¹ Indeed, in conferring the status and rights of citizenship on all Americans and providing remedies to redress their violation, Congress could have completely supplanted the states’ jurisdiction over citizenship and citizens’ rights.

Opponents of the Civil Rights Act insisted that it did precisely that. For example, Senator Saulsbury accused Republicans of “invas[ing] the States and attempt[ing] to regulate property and personal rights within the States.”¹⁹² Saulsbury complained that the states

find themselves by the bill invaded and defrauded of the right of determining who shall hold property and who shall not within its limits, who shall sue and be sued, and who shall give evidence in its courts. All these things are taken out of the control of the States by the paramount authority of this bill, if it be a constitutional bill, and the power is given to the Federal Congress to determine these things, the will of a State to the contrary notwithstanding.”¹⁹³

¹⁹⁰ CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866). *See also id.* at 474–76 (statement of Sen. Trumbull) (arguing that U.S. citizens are entitled to the inalienable rights to life, liberty, and property proclaimed in the Declaration of Independence, and the Civil Rights Act was intended to secure and enforce these rights); *id.* at 1151–53 (statement of Rep. Thayer) (arguing that the Civil Rights Bill merely declared that all native born Americans shall enjoy the fundamental rights of citizenship, which secure life, liberty, and property and equal protection of the law).

¹⁹¹ CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866). *See also infra* notes 192–196 and accompanying text.

¹⁹² CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866).

¹⁹³ *Id.* at 478; *id.* at 602 (statement of Sen. Cowan) (objecting that the Civil Rights Bill intervened in the states and determined the relationships of inhabitants to one another and to the state governments and proclaiming that the Civil Rights Bill was unconstitutional under the original theory of federalism, where “the people of the several States in their domestic and civil and political relations are to be regulated [exclusively] by the States”); *id.* at 1778 (statement of Sen. Johnson) (asserting that “[t]he first section usurps, as I think, what has heretofore been considered as the exclusive authority of the States”); *id.* at 1121 (statement of Rep. Rogers) (insisting that the Civil Rights Bill gives Congress the right “to

He maintained, correctly, that if the Civil Rights Act was constitutional, then Congress could supplant the states' police powers completely. Quoting the *Federalist Papers*, Saulsbury insisted that "all these powers embraced in your bill are reserved to the States and to the States exclusively, because certainly they concern the lives, liberties, and properties of the people," and therefore the internal affairs of the states.¹⁹⁴

Representative Michael Kerr, a Democrat from Indiana, expressed the same objection in the House, arguing that the theory underlying the Civil Rights Act authorized the federal government to displace the states in regulating citizens' substantive rights. Maintaining that the states possessed the exclusive power to define and regulate citizens' civil rights, Kerr objected that the bill "rests upon a theory . . . [that] asserts the right of Congress to regulate the laws which shall govern in the acquisition and ownership of property in the States, and to determine who may go there and purchase and hold property, and to protect such persons in the enjoyment of it."¹⁹⁵ He warned that this theory denied "the right of the

enter the sovereign domain of a State and interfere with [state] statutes and local regulations," undermines "those solid bulwarks of constitutional liberty erected by our fathers," consolidates power in the Federal Government, and "destroy[s] the foundations of the Government as they were laid and established by our fathers"); *id.* app. at 158 (statement of Rep. Delano) (quoting Madison's *Federalist 45*, which stated that the reserved rights of the states "extended to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State," insisting that the Constitution established the Federal Government as "a Government with limited powers, powers restricted to the necessary objects of its existence and the proper discharge of the great duties devolving upon it" and that it "was never designed to take away from the States the right of controlling their own citizens in respect to property, liberty, and life"). See also *supra* note 169.

¹⁹⁴ CONG. GLOBE, 39th Cong., 1st Sess. 478 (1866). Saulsbury did not identify the specific *Federalist* Paper he was quoting. See also *id.* at 596, 1414–15 (statement of Sen. Davis) (stating that Congress's powers "are particularly defined in the eighth section of the first article of the Constitution," and that Congress cannot "interfere with the local concerns of any state, such as all of the rights, privileges, and immunities its citizens shall enjoy and their regulation," reasoning that judicial authority holds "the States are sovereign, 'especially in regard to the administration of justice, and in the regulation of property and estates, the laws of marriage and divorce, and the protection of the persons of those who live under their jurisdiction'" and that "this authority expressly lays it down that all these subjects are the distinctive and exclusive subjects of State legislation; that over them the authority, the jurisdiction of the respective States is as though the States were foreign countries") (quoting *Abbott v. Bayley*, 6 Pick. (23 Mass.) 89, 92 (1827)); *id.* at 601 (statement of Sen. Guthrie) (stating that "[t]he first section of this bill attempts to repeal all the state laws and to enact new laws for them, the enforcement of which is put into new hands" and complaining that "under the pretense of giving effect to the freedom of the slave" Congress had "originated a system that is constantly interfering with the laws of the States, and constantly interfering with the citizens of the States, bringing them before your tribunals and questioning them whenever they attempt to enforce a State law against a black man"); *id.* at 1270 (statement of Rep. Kerr) (stating that the Civil Rights Bill authorized Federal executive officers and Federal courts "to usurp the functions of the State government" in securing citizens' fundamental rights, including Bill of Rights guarantees). See also *supra* note 169.

¹⁹⁵ Except where otherwise noted, the following account is taken from CONG. GLOBE, 39th Cong., 1st Sess. 1270 (statement of Rep. Kerr).

State to regulate its own internal and domestic affairs, to select its own local policy, and make and administer its own laws for the protection and welfare of its own citizens.” Kerr concluded with a warning that the Civil Rights Act tended toward the usurpation of the states’ police power that its underlying theory portended: “Congress, in short, may erect a great centralized, consolidated despotism in this capital. And such is the rapid tendency of such legislation as this bill proposes.”¹⁹⁶

Senate opponents also warned that the principles underlying the Civil Rights Act authorized Congress to replace the states’ civil and criminal laws with federal laws. For example, Senator Garrett Davis maintained that “[t]he principles involved in this bill, if they are legitimate and constitutional, would authorize Congress to pass a civil and criminal code for every State in the Union.”¹⁹⁷ He reasoned that if Congress had the power to require the states to adopt racially uniform laws relating to civil rights and criminal penalties, then it had “the power to occupy the whole domain of local and State legislation.”¹⁹⁸ The power Congress attempted to exercise in enacting the Civil Rights Act went much further, Davis warned: “If this congressional power exists to the extent that it is attempted to be exercised in this bill, it is without limit except by congressional discretion and forbearance.”¹⁹⁹ Expressing the same view, President Andrew Johnson vetoed the Civil Rights Bill, among other reasons, because its provisions

interfere with the municipal legislation of the States, with the relations existing exclusively between a State and its citizens, or between inhabitants of the same State—an absorption and assumption of power by the General Government which, if acquiesced in must sap and destroy our federative system of limited powers, and break down the barriers which preserve the rights of the States. It is another step, or rather stride, toward centraliza-

¹⁹⁶ Kerr supported his contention that the states possessed the exclusive power to define and regulate the rights of citizens with judicial opinions recognizing this power under the Comity Clause. He maintained that the states’ power in this respect was exclusive. *Id.* at 1269–70.

¹⁹⁷ *Id.* at 1414 (statement of Sen. Davis). *See also id.* at 597 (statement of Sen. Davis) (arguing that principles justifying the Civil Rights Bill invested Congress “with the power to establish a civil and penal code for all the States of the Union”); *id.* app. at 158 (Rep. Delano) (warning that, “[I]f we now go on to a system of legislation based upon the assumption that Congress possesses the right of supreme control in [respect to property, liberty, and life],” that “whether we are not assisting to build up a consolidated Government in view of the powers of which we may well tremble . . . the authority assumed as the warrant for this bill would enable Congress to exercise almost any power over a State”); *id.* at 1271 (statement of Rep. Kerr).

¹⁹⁸ *Id.* at 1415 (statement of Sen. Davis). Davis later commented that the Civil Rights Bill would have been named more appropriately “‘An act to consolidate all the reserved sovereignty and powers of the several State into the Congress and Government of the United States.’” *Id.* at 182.

¹⁹⁹ *Id.* at 1415.

tion and the concentration of all legislative power in the national Government.²⁰⁰

Opponents thus acknowledged that the theory of constitutional authority proponents argued to support the constitutionality of the Civil Rights Act was a recognition of Congress's plenary power to define, confer, enforce, and protect citizens' civil rights. They therefore argued that the statute usurped the states' sovereign powers reserved to them by the Tenth Amendment.²⁰¹

Significantly, not a single supporter of the Civil Rights Act denied opponents' warnings that its proponents' understanding of Congress's powers to protect citizens' civil rights gave Congress the power to supplant the states in the administration of justice. Nevertheless, supporters did expressly deny that they intended to exercise Congress's plenary power to enforce citizens' rights to the complete annihilation of the states' police power. To the contrary, they expressly stated that they intended to preserve the states' police powers. "The declaration of citizenship does not confer any right the exercise of which on their part cannot be restrained by a State Legislature so as to protect the general peace and welfare of the States. I am sure of that."²⁰²

This view was echoed outside of Congress. Thus, the New York *Evening Post* responded to President Johnson's veto of the Civil Rights Bill in an editorial stating that Congress did not "usurp the power of the local legislature to prescribe in what manner the rights of person and property shall be secured."²⁰³ Elaborating, the editor explained that Congress did not declare "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." Rather, Congress "only says to the states," whatever laws they enact regulating the enjoyment of civil rights, they should "make them

²⁰⁰ *Id.* at 1681 (President Johnson's veto message). Senator Johnson defended the President's veto with the same argument. *Id.* at 1777 (reciting the rights secured in section 1 and arguing that, "If Congress can legislate in relation to these rights . . . the States are abolished;" because "the further provision in this bill follows . . . that Congress has the authority to constitute its own tribunals for the purpose of granting relief for the enforcement of these rights, then the State courts may be closed up." If Congress's authority to enact section 1 exists, "nothing can be plainer" than that, with respect to these civil rights, "this Government is a consolidated Government . . . it is still more obvious that the result is an entire annihilation of the power of the States").

²⁰¹ U.S. CONST. amend. X.

²⁰² CONG. GLOBE, 39th Cong., 1st Sess. 574 (statement of Sen. Henderson). *See also id.* at 600, 605 (statement of Sen. Trumbull) (arguing that the Civil Rights Act would not operate in a state that performs its constitutional obligation to protect and enforce citizens' rights); *id.* at 1785 (statement of Sen. Stewart) (arguing that the Civil Rights Act's penal section only imposes federal penalties against individuals in states that have discriminatory laws or customs).

²⁰³ The following account is taken from the N.Y. EVENING POST (n.d., n.p.), collected in Scrapbook on the Civil Rights Bill 32 (E. McPherson ed., n.d.), in Edward McPherson Papers container 99 (collection available in Library of Congress).

general; make them for the benefit of one race as well as another.” The framers thus drafted the Civil Rights Act to confer and secure civil rights subject to state regulations, which were themselves subject to Congress’s power to modify and supplant them as Congress did in the provisions of the Act. They expressly rejected the burden of enacting federal codes regulating areas of private law, such as contract law, property law, and criminal law.²⁰⁴

Pragmatism alone would have been a sufficient reason for preserving state police powers over civil rights. The federal government was simply not equipped or prepared to assume completely the administration of civil and criminal justice.²⁰⁵ In addition, Civil Rights Act proponents were committed to constitutional federalism, a federalism that preserved state police powers but recognized the national government’s ultimate responsibility for and power to enforce citizens’ civil rights.

Although they expressed their desire to supplant the states’ police powers to the extent necessary to secure the civil rights of American citizens, not a single proponent of the Civil Rights Act expressed a desire to prohibit the states from performing these most essential state functions. To the contrary, they clearly expressed their wish that the states exercise concurrent jurisdiction over the rights of U.S. citizens and enforce each citizen’s rights impartially.²⁰⁶ For example, Senator Stewart agreed with opponents that it would be more desirable that the states should “secure to the freedmen personal liberty” but believed that, since they had not, Congress unquestionably possessed the power to do so.²⁰⁷ It “was the intention of those who amended the Constitution . . . to give the power to the General Government to pass any necessary law to secure to the freedmen personal liberty,” Stewart argued. “I believe that was the intention. I believe that is within the legitimate scope of legislation.” Stewart insisted that Congress “ought and must exercise it if the States will not do justice to the freedmen,” and “that was the intention in framing the [Thirteenth] amendment of the Constitution.”²⁰⁸ Thus, if a state failed to provide justice to an American citizen, Congress provided in the Civil Rights Act the justice that the state withheld.

²⁰⁴ See *supra* notes 173–176 and accompanying text.

²⁰⁵ See *infra* notes 213–216, 228–237 and accompanying text.

²⁰⁶ See CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866) (statement of Sen. Howard); *id.* at 505 (statements of Sens. Johnson, Trumbull, and Fessenden); *id.* at 572, 574 (statement of Sen. Henderson); *id.* at 573–74 (statement of Sen. Williams); *id.* at 1832 (statement of Rep. Lawrence); *id.* at app. 158–59 (statements of Reps. Delano, Wilson, and Niblack).

²⁰⁷ Except where otherwise noted, the following account is taken from *id.* at 1785 (statement of Sen. Stewart).

²⁰⁸ Senator Stewart’s expressed understanding of Congress’s Thirteenth Amendment power to enforce citizens’ rights and his expressed desire to exercise this plenary power expressly contradict Justice Kennedy’s interpretation of Stewart’s objections to the proposed Fourteenth Amendment. See *City of Boerne v. Flores*, 521 U.S. 507, 521 (1997).

It bears repeating that the framers and supporters repeatedly asserted that Congress possessed plenary power to enact any law to secure the rights of U.S. citizens, but that they also disclaimed any intention of exercising the full scope of this power to the exclusion of state authority over citizens' rights. Declaring civil rights to be among the constitutionally secured rights of U.S. citizens, the Civil Rights Act authorized federal civil remedies against anyone who discriminated against a citizen and thereby violated any of the rights enumerated in section 1.²⁰⁹ The statute left the redress of ordinary violations of section 1 rights, such as an ordinary breach of contract claim or the prosecution of a crime not motivated by a discriminatory animus, to the states' systems of civil and criminal justice on the assumption that the states would give appropriate relief. The framers sought to compel state officials and judges to provide impartial justice by imposing criminal penalties on those who did not.²¹⁰ However, if a state court failed to redress an ordinary civil claim or to prosecute an ordinary crime and thereby denied to a party one of the civil rights enumerated in section 1, or, more broadly, if a state failed to enforce any legal right recognized by state law or failed to bring criminal offenders to justice, and the failure violated a citizen's section 1 civil rights, the Civil Rights Act authorized the federal courts and legal officers to supplant the states and to administer the civil or criminal justice that the states denied.²¹¹

Representative Wilson explained this enforcement structure when he asserted the *Prigg*²¹² Court's theory of the plenary power and duty of Congress to enforce a citizen's constitutional rights, stating that, "in relation to the great fundamental rights embraced in the bill of rights, the citizen being possessed of them is entitled to a remedy" whenever they are violated.²¹³ Wilson then noted that the states were depriving American citi-

²⁰⁹ The United States Supreme Court has repeatedly so held. *See* The Civil Rights Cases, 109 U.S. 3, 23–35 (1883); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 423–24 (1968); *Runyon v. McCrary*, 427 U.S. 160, 170–71 (1976); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Section 3 of the Civil Rights Act conferred exclusive jurisdiction on federal courts to try all violations of section 1 rights. Civil Rights Act of 1866 § 3, ch. 31, 14 Stat. 27 (1866).

²¹⁰ Civil Rights Act of 1866 § 2. *See infra* notes 261–291 and accompanying text.

²¹¹ Civil Rights Act of 1866 § 3. *See* *United States v. Rhodes*, 27 F. Cas. 785, 787 (C.C.D. Ky. 1866) (No. 16,151) (upholding federal jurisdiction to try all offenses against the Kentucky criminal code involving black victims of crime and black criminal defendants on the grounds that the state's rules of evidence denied black parties affected by the cause of action the same right to testify as was enjoyed by white parties); *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 593 (1871) (affirming federal jurisdiction to try offenses against state criminal laws, but restricting this jurisdiction to criminal prosecutions against black defendants who were denied or could not enforce under state legal process any right secured by section 1 of the Civil Rights Act of 1866). This enforcement structure is more fully explained at *infra* notes 277–331 and accompanying text.

²¹² *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

²¹³ Except where otherwise noted, the following account is taken from CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866) (statement of Rep. Wilson).

zens of the rights guaranteed by the Bill of Rights. “When such a case is presented can we not provide a remedy?” he asked rhetorically. He answered, “Who will doubt it? . . . The power is with us to provide the necessary protective remedies If not, from whom shall they come?” he queried. Adding the principles of the Declaration of Independence to the constitutional theory of *Prigg*, Wilson boomed, “They must be provided by the Government of the United States, whose duty it is to protect the citizen in return for the allegiance he owes to the Government.” Thus, when U.S. citizens needed the federal government to protect their rights and to remedy their violation, the Civil Rights Act authorized federal courts and law enforcement officers to stand in the place of their state counterparts and to give citizens this civil and criminal justice.

But, if the State administered civil and criminal justice impartially in ordinary cases, there would then be no need for federal intervention or for a federal forum to enforce citizens’ civil rights.²¹⁴ Senator Trumbull explained that the states were not dispensing justice impartially, which necessitated congressional action. However, if everyone recognized that black Americans are entitled to the same civil rights as white Americans, Trumbull opined, “and would act upon [this recognition], the States would do it, and there would be no occasion for the passage of the bill.”²¹⁵ Since the states were unwilling to secure the rights of all Americans, “and Congress has authority to do it under the [thirteenth] constitutional amendment, is it not incumbent on us to carry out that provision of the Constitution?” Representative Wilson made the same point in the House. Explaining that the states were refusing to protect the rights of some Americans, he declared that “the practice of the States leaves us no avenue of escape, and we must do our duty by supplying the protection which the States deny.”²¹⁶

²¹⁴ *See id.* at 600 (statement of Sen. Trumbull). Senator Trumbull paraphrased and answered Senator Davis’s accusation that the Civil Rights Bill “breaks down the local legislation of all the States; it consolidates the power of the States in the Federal Government,” by stating:

Why, sir, if the State of Kentucky makes no discrimination in civil rights between its citizens, this bill has no operation whatever in the State of Kentucky. Are all the rights of the people of Kentucky gone because they cannot discriminate and punish one man for doing a thing that they do not punish another for doing? The bill draws to the Federal Government no power whatever if the States will perform their constitutional obligations.

See id.

²¹⁵ Except where otherwise noted, the following account is taken from *id.* at 605 (statement of Sen. Trumbull). Senator Stewart made the same argument specifically in reference to the penal sanctions of the bill’s second section. *See id.* at 1785.

²¹⁶ *Id.* at 1118 (statement of Rep. Wilson). Senator Thomas Hendricks, Democrat from Indiana and a member of the Senate Judiciary Committee, stated that the Civil Rights Bill

provides, in the first place, that the civil rights of all men, without regard to color, shall be equal; and, in the second place, that if any man shall violate that principle by his conduct, he shall be responsible to the court; that he may be prosecuted

Scholars disagree whether the framers of the Fourteenth Amendment sought to enforce substantive rights or merely equality in state-conferred rights.²¹⁷ Most studies approach this question with the assumption that the framers considered only two alternative courses of action: either the framers intended to supplant state jurisdiction over citizens' rights, or they intended to preserve state jurisdiction.²¹⁸ Scholars have equated the first course of action to enforcing substantive rights and the second to enforcing an equality in state-conferred rights against discriminatory state action.²¹⁹ They have failed to consider a third course of action, namely, that the framers sought to enforce substantive civil rights and to preserve concurrent state jurisdiction over citizens' substantive rights, though subject to congressional oversight and modification.

This Article argues that the framers adopted this third approach and asserted plenary power to enforce substantive rights of U.S. citizens and, at the same time, preserved state concurrent power over those rights, albeit a significantly diminished state power. The Article maintains that this third alternative most accurately explains the framers' understanding of the Civil Rights Act. The least one can say with certainty is that proponents of the Civil Rights Act said that they intended to assert Congress's power to enforce the substantive rights of all American citizens, whites as well as blacks, that they asserted Congress's power to enforce substantive civil rights, and that opponents acknowledged and objected that supporters exercised such plenary power in enacting the Civil Rights Act. The enforcement structure established in the remaining sections of the Civil Rights Act clearly demonstrates that the framers authorized federal law enforcement officials and the federal courts to administer ordinary civil and criminal justice when Americans were unable to get justice within the states' systems of civil and criminal justice.²²⁰

Senator Trumbull regarded section 1 as "the basis of the whole bill."²²¹ Having explained this section, he declared that the only question was: "will this bill be effective to accomplish the object, for the first section will amount to nothing more than the declaration in the Constitution itself unless we have the machinery to carry it into effect."²²² Stating that he intended to make the bill effective in protecting the civil rights of all Americans, Trumbull explained that "[t]he other provisions of the bill

criminally and punished for the crime, or he may be sued in a civil action, and damages recovered by the party wronged.

Id. at 601

²¹⁷ See, e.g., sources cited in *supra* note 161.

²¹⁸ See *id.*

²¹⁹ See *id.*

²²⁰ See *infra* notes 277–331 and accompanying text.

²²¹ CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull).

²²² *Id.* at 475 (statement of Sen. Trumbull) (referring to the Thirteenth Amendment as the "declaration in the Constitution").

contain the necessary machinery to give effect to what are declared to be the rights of all persons in the first section.”²²³

B. Section 2: Violating Citizens’ Rights Is Made a Federal Crime

Like the framers of the Fugitive Slave Act of 1850, the framers of the Civil Rights Act of 1866 imposed criminal sanctions on persons who violated the civil rights secured by section 1. Asserting that “A law is good for nothing without a [criminal] penalty,” Senator Trumbull characterized section 2 as “the valuable section of the bill.”²²⁴ However, Congress did not exercise its full penal powers, for section 2 limited federal criminal sanctions to civil rights violations committed under color of law or custom and motivated by racial animus. Viewed from the perspective of the twenty-first century, section two establishes that one of the remedies the framers of the Fourteenth Amendment adopted to correct racially discriminatory state action was to compel state judges and law enforcement officials to enforce federally secured civil rights by threatening them with criminal prosecution should they fail to do so.

This penal section defined two federal crimes against citizens’ civil rights. The first provided that “any person” who subjected or caused to be subjected “any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act” was “guilty of a misdemeanor,” but only if he acted “under color of any law, statute, ordinance, regulation, or custom” and because the person whose right was being deprived had been “held in a condition of slavery or involuntary servitude . . . or by reason of his color or race.”²²⁵ The second crime consisted of imposing “different punishments, pains, or penalties” on any such persons.²²⁶ These crimes were punishable by a fine of up to \$1,000 or imprisonment for up to one year, or both, at the discretion of the court.²²⁷

C. Congress Asserts Plenary Power To Punish Civil Rights Violators While Preserving Concurrent State Police Powers

Although the drafters of the Civil Rights Act limited criminal sanctions to persons who acted under color of law or custom and out of racial animus, they asserted that Congress possessed plenary power to redress violations of citizens’ rights by imposing criminal sanctions on anyone who violated a citizen’s civil rights.²²⁸ Referring to section 2, Senator Trum-

²²³ *Id.* at 474.

²²⁴ *Id.*

²²⁵ Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 475 (statement of Sen. Trumbull); *id.* at 1758; *id.* at 1155 (statement of Rep. Thayer).

bull explicitly declared that “[t]he right to punish persons who violate the laws of the United States cannot be questioned.”²²⁹ Indeed, he argued that, under the Thirteenth Amendment, “we have a right to pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view, secure freedom to all people in the United States.” Trumbull explained that criminal penalties would stop civil rights violations when everyone understands “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.” But, Senator Trumbull contended, it was not necessary to prosecute all wrong-doers, but only to prosecute a few, particularly the leaders of local communities, to put an end to the racially motivated civil rights violations that pervaded the southern states after the Civil War.²³⁰

Not a single supporter of the Civil Rights Bill denied that Congress possessed the plenary penal powers that its principal author attributed to Congress. Indeed, opponents argued that the bill represented the exercise of such plenary power.²³¹

That there was little debate on this issue is understandable for at least two reasons. First, it had been long established that Congress has implied power to impose criminal penalties on anyone who violates federal statutes.²³² Second, the criminal penalties of section 2 were intended principally

²²⁹ Except where otherwise noted, the following account is taken from *id.* at 475. Senator Trumbull illustrated this point by analogizing to Congress’s penal powers under the Comity Clause. It is noteworthy that Senator Garrett Davis, a strong opponent of the Civil Rights Act, believed that Congress had the power to enact legislation to enforce the Comity Clause against anyone who violated a privilege or immunity secured by this provision. *See supra* note 142 and accompanying text. Chief Justice Taney also believed that Congress possessed the power to enforce the rights secured by the Comity Clause, which, he asserted, authorized Congress to punish anyone who deprived another of a right secured by the Clause, and even to authorize federal authorities to call out the Army and Navy to protect the rightholder. *See supra* note 63 and accompanying text.

²³⁰ Members of the Forty-Second Congress shared this view and included in the Ku Klux Klan Act of 1871, which was by its title designed “to enforce the Provisions of the Fourteenth Amendment,” a section that imposed third-party civil liability on members of local communities who were aware of and could have prevented, but failed to try to prevent, personal injuries and property damage by mobs, such as the Ku Klux Klan. *See* Ku Klux Klan Act of 1871, ch. 22, § 6, 17 Stat. 13, 15 (1871). Their strategy was to force local community leaders publicly to oppose Klan violence in the expectation that community leaders could bring the violence to an end. *See* Robert J. Kaczorowski, *Reflections on Monell’s Analysis of the Legislative History of § 1983*, 31 URB. LAW. 407, 412–13 (1999).

²³¹ *See supra* notes 146–151, 169–171, 192–200 and *infra* notes 288–291, 311–318 and accompanying text. Civil Rights Act proponents did not deny that it supplanted state civil and criminal systems. Indeed, they defended these invasions of state police powers as necessary to enforce and protect the rights of United States citizens. *See supra* notes 198–199 and *infra* notes 250–252, 277, 319–323 and accompanying text.

²³² Chief Justice John Marshall proclaimed that Congress’s penal powers are essentially implied powers. In justifying the broad theory of implied powers the Court adopted in *McCulloch v. Maryland*, Marshall proclaimed that:

Everyone acknowledges that Congress possesses the power to punish any violation of federal law, even though this power is not expressly delegated by the Con-

to punish state judges and law enforcement officers who failed to enforce the Civil Rights Act over racially discriminatory state laws and legal process. To the Civil Rights Act's opponents, punishing state judges and legal officers for enforcing state laws was an intolerable and outrageous invasion of states' rights and the independence of state courts.²³³

The drafters of the bill restricted its criminal penalties to persons who acted under color of law or custom for two reasons. They sought to preserve state jurisdiction over criminal justice, so they brought within the federal system of criminal justice only those violations of civil rights that were not being redressed and were not likely to be redressed within the states' criminal justice systems. One of their strategies was to distinguish federal criminal violations of citizens' civil rights from ordinary crimes punishable under state criminal codes by limiting federal criminal penalties to civil rights violations committed under color of law or custom and motivated by racial animus.²³⁴ However, the framers of the Fourteenth Amendment also conferred federal original jurisdiction to try ordinary crimes and civil suits whenever a party was unable to enforce or was denied under state law a civil right secured in section 1.²³⁵

Senator Trumbull explained that "the words 'under color of law' were inserted as words of limitation, and not for the purpose of punishing persons who would not have been subject to punishment under the act if they had been omitted."²³⁶ Thus, any person punishable under section 2 would already have been subject to federal criminal punishment. Section 2 did not bring the civil rights violator within federal criminal jurisdiction, because the violation of a citizen's civil rights secured by section 1 would have subjected the violator to whatever federal penalties Congress chose to impose. Rather, section 2 limited federal criminal penalties to only a portion of potential civil rights violators upon whom Congress had the constitutional authority to impose criminal penalties.²³⁷

stitution. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 416, 418 (1819). Senator Trumbull and his supporters applied this principle of sovereign power to justify imposing criminal penalties not simply upon the actions of ordinary citizens but of state judges and other public officials as well. See *supra* notes 228–229 and *infra* notes 247–253 and accompanying text.

²³³ See *infra* notes 247–249 and accompanying text.

²³⁴ See CONG. GLOBE, 39th Cong., 1st Sess. 1758 (1866) (Sen. Trumbull); *id.* at 1120 (Rep. Wilson); *id.* at 1294 (Rep. Shellabarger); *id.* at app. 158 (Reps. Delano, Wilson, and Niblack); Kaczorowski, *supra* note 159, at 581, 588.

²³⁵ Civil Rights Act of 1866 § 3. Section 3 is explained *infra* notes 277–282 and accompanying text.

²³⁶ CONG. GLOBE, 39th Cong., 1st Sess. 1758 (1866).

²³⁷ This analysis deviates from the widely held views of scholars who have interpreted the "under color of law or custom" principle as the outer limits of congressional authority

Representative Wilson similarly explained in the House of Representatives that the Civil Rights Bill was not intended to supplant the states in the administration of criminal justice. Representative Benjamin F. Loan asked Wilson “why the [Judiciary] committee limit[ed] the provisions of the second section to those who act under the color of law. Why not let [the provisions] apply to the whole community where the acts are committed?” Wilson responded, “We are not making a general criminal code for the States.”²³⁸ Clearly, the drafters and supporters of the Civil Rights Act sought to preserve state criminal jurisdiction and imposed federal criminal sanctions for civil rights violations only when, in their estimation, federal penalties were needed.

The nation’s experience with the Fugitive Slave Acts demonstrated that federal courts and officials were insufficient to enforce citizens’ constitutional rights effectively and that state and local courts and officials played an essential role in administering civil and criminal justice.²³⁹

to impose criminal sanctions and civil liability on individuals who violate citizens’ constitutional rights. They have understood this principle, and the language of section 1, as limiting congressional authority to discriminatory state action. *See, e.g.*, HERMAN BELZ, *EMANCIPATION AND EQUAL RIGHTS: POLITICS AND CONSTITUTIONALISM IN THE CIVIL WAR ERA* 108–40 (1978); HERMAN BELZ, *A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN’S RIGHTS, 1861–1866*, at 157–77 (1976); MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863–1869*, at 27, 41, 48, 56–69, 122–26, 147–49, 170 (1973); CHARLES FAIRMAN, *RECONSTRUCTION AND REUNION, 1864–88, PART ONE*, at 1228–29, 1238–42 (1971); HAROLD M. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION* 457, 467–68 (1973); MALTZ, *supra* note 161, at 70–78; PHILLIP PALUDAN, *A COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUALITY IN THE CIVIL WAR ERA* 58, 261, 274–75 (1975); Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 *J. AM. HIST.* 65, 78–80 (1974).

²³⁸ CONG. GLOBE, 39th Cong., 1st Sess. 1120 (1866); *see also id.* at 1294 (Rep. Shellabarger stating that section 2 “is meant, therefore, not to usurp the powers of the States to punish offenses generally against the rights of citizens in the several States, but its whole force is expanded in defeating an attempt, under State laws, to deprive races and the members thereof as such of the rights enumerated in this act”). Shellabarger proposed a bill to supplement Trumbull’s Civil Rights Bill, which also posited jurisdictional limits to distinguish federal civil rights crimes from ordinary crimes punishable within the states’ systems of criminal justice. Shellabarger’s proposal was to enforce the privileges and immunities that U.S. citizens enjoy under the Comity Clause by imposing criminal penalties on individuals who violated them, but who were not acting under color of law or custom. Shellabarger recognized Congressional power to punish every violation of a citizen’s fundamental rights, but he proposed requiring an intent element, thus limiting federal criminal jurisdiction in a manner similar to that of section 2 of the Civil Rights Act. Shellabarger proposed criminal penalties for any individual who violated another’s fundamental right with “the intent to deprive one from another state of the particular right or of all rights” secured by the Comity Clause. Letter from S. S. Shellabarger to Lyman Trumbull (Apr. 7, 1866), collected in 65 Lyman Trumbull Papers (collection available in Library of Congress) (emphasis in original). Although Senator Trumbull believed that Shellabarger’s proposal “reenacted [Trumbull’s] civil rights bill,” Shellabarger attempted to persuade Trumbull that his proposal differed from Trumbull’s bill by making it a federal crime to violate the privileges and immunities secured by the Comity Clause “by one not acting under color of law and as against one seeking to go from state to state.” *Id.* (emphasis added).

²³⁹ *See supra* notes 68–82 and accompanying text.

One, or at most two federal judges sat in a state, and U.S. attorneys and marshals were similarly limited in number.²⁴⁰ This was one of the reasons Chief Justice Taney dissented from the Court's holding in *Prigg v. Pennsylvania* that the states did not possess constitutional authority to enforce the Fugitive Slave Clause.²⁴¹ Congress attempted a partial solution to the problem of insufficient federal courts and legal officers in the 1850 Fugitive Slave Act by authorizing federal judges to appoint U.S. commissioners with powers of justices of the peace to enforce the 1850 statute.²⁴² Even then, the federal judicial system sometimes remained inadequate to enforce the Fugitive Slave Act without the assistance of the United States military, the state militia, and local law enforcement personnel.²⁴³ The framers of the Civil Rights Act wisely sought to preserve the jurisdiction and role of state systems of criminal justice as they crafted a system of federal criminal justice which included the enforcement structure originally established under the Fugitive Slave Act of 1850.²⁴⁴

D. Congress Legislates To Compel State Judges and Law Enforcement Officials To Enforce Federal Civil Rights

On the other hand, state and local judicial and executive officials in the southern states were failing to enforce and often were denying citizens' civil rights. The failure of state and local legal institutions to protect citizens' civil rights presented the drafters of the Civil Rights Act with the second practical problem they attempted to resolve and the sec-

²⁴⁰ Senator Cowan commented that giving federal courts exclusive jurisdiction over violations of civil rights was a delusion and no remedy because one, or at most two, federal courts functioned in the former slave states, and they were too few and too remote from most of the claimants intended to use them. He added that black Americans were too poor to gain access to them. These circumstances rendered the federal remedy a virtual nullity. See CONG. GLOBE, 39th Cong., 1st Sess. 1782 (1866).

²⁴¹ *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 630–32 (Taney, C.J., concurring in part and dissenting in part). Taney argued that, because federal courts were too few and too remote, federal remedies would be “ineffectual and delusive” if state authorities did not help in administering them. *Id.* at 631.

²⁴² Fugitive Slave Act of 1850, ch. 60, §§ 1–4, 9 Stat. 462 (1850) (repealed 1864). The framers of the Civil Rights Bill authorized federal judges to exercise the same power to appoint commissioners to enforce the Civil Rights Act. See Civil Rights Act of 1866 § 4 (codified as amended at 42 U.S.C. §§ 1981–82 (2000)).

²⁴³ For example, a company of the United States army, another company of Marines, Massachusetts state militiamen, and Boston police constables assisted federal marshals who took fugitive slave Anthony Burns to a ship in Boston Harbor for his voyage to Charleston, South Carolina. See ALBERT J. VON FRANK, *THE TRIALS OF ANTHONY BURNS: FREEDOM AND SLAVERY IN EMERSON'S BOSTON* 203–19 (1998). Senator Reverdy Johnson recalled that, because the Fugitive Slave Act of 1850 was “obnoxious to the whole communit[ies]” within the Northern states, it was enforced only “by power, by military or civil power, threatening upon each occasion when resort was had to it to involve the particular community where the attempt was made in civil strife and bloodshed” Cong. Globe, 39th Cong., 1st Sess. 505 (1866).

²⁴⁴ See Civil Rights Act of 1866 §§ 4–9. These provisions are discussed *infra* notes 333–345 and accompanying text.

and reason they limited section 2's criminal penalties to persons acting under color of law or custom and out of racial animus: They wanted to compel state judges and law enforcement personnel to enforce the civil rights of all Americans, black as well as white, Unionists as well as southern sympathizers. However, the Supreme Court in *Prigg v. Pennsylvania* and *Kentucky v. Dennison* had ruled that Congress lacked the constitutional authority to compel state officials to enforce constitutional rights and to perform duties that the Constitution imposes on them.²⁴⁵ According to these precedents, Congress could not command state officials to protect and enforce the civil rights of U.S. citizens. In particular, state judges were free to ignore the Civil Rights Act and to enforce racially discriminatory state statutes and customs with impunity.²⁴⁶

Opponents of the Civil Rights Act protested that punishing state officials who performed their duties under state laws, even laws that violated the Civil Rights Act, was a gross violation of Supreme Court precedents and of the states' sovereign powers. Representative Eldridge, for example, asserted that the purpose of section 2 "was to control the judge and prevent his executing the law of the State by his judgment when it operated peculiarly upon the freedman and therefore enforce the execution of the Federal law."²⁴⁷ In an apparent reference to *Prigg* and *Dennison*, he stated that "[t]he question has been decided over and over again that [Congress] cannot enforce [its laws] through a State judge." Echoing Senator Trumbull, Representative Thayer replied that Congress had the authority to punish "anybody" who violates its statutes "under color or authority of any kind." The bill "imposes on a judge [no] more than to refrain from violation of the law." Eldridge was unmollified by Thayer's protests. Instead, Eldridge insisted, section 2 was an unconstitutional invasion of and attack upon the independence of the states' judiciary.

In the Senate, Garrett Davis of Kentucky also objected that section 2 violated state sovereignty, usurped state police powers, and undermined the independence of the state judiciary. He argued that judicial "authority holds that the States are sovereign, 'especially in regard to'" traditionally local matters such as property, family law, and "'the protection of the persons of those who live under their jurisdiction.'"²⁴⁸ Imposing criminal penalties on state judges and other officials for failing to enforce the Civil Rights Act was therefore an unconstitutional intrusion.²⁴⁹

The framers freely acknowledged that their intention in section 2 was to compel state officials, especially state judges, to enforce the rights

²⁴⁵ See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) at 539; *Kentucky v. Dennison*, 65 U.S. (24 How.) at 76–77.

²⁴⁶ *Id.*

²⁴⁷ Except where otherwise noted, the following discussion is taken from CONG. GLOBE, 39th Cong., 1st Sess. 1154 (1866).

²⁴⁸ *Id.* at 596 (apparently quoting from *Dennison*).

²⁴⁹ *Id.*

of black citizens by imposing criminal penalties on those officials if they violated the Civil Rights Act in their official capacities. Senator Trumbull defended the bill's imposition of criminal penalties on state judges and executive officers on the principle that anyone who violates a federal law subjects himself to criminal prosecution, and the fact that he committed the violation while acting under color of state law or authority was no defense.²⁵⁰ Denying Congress this power "places officials above the law," Trumbull admonished. He asserted that Congress possesses the power to punish anyone who violates federal law, even those who violate federal law while acting under color of state law.²⁵¹ Trumbull insisted that Congress may compel state officers to enforce constitutional rights secured by federal statute by subjecting them to criminal sanctions if they did not. The doctrine that Congress may not punish those who violate federal law when acting under color of state authority, Trumbull maintained, is "a doctrine from which the rebellion sprung, and in entire harmony with the declaration of Mr. Buchanan, that there was no power to coerce a State."²⁵²

In the House, Representative Wilson offered a similar explanation of the criminal penalties of section 2.²⁵³ When asked by Representative Loan why section 2 punishes only "those who act under color of law," Wilson explained that the local laws of the states discriminated in reference to civil rights. Penalties were necessary, Wilson asserted, implying the framers' intention of forcing state officials to comply with the civil rights guarantees of the Civil Rights Act: "A law without a sanction is of very little force."

Arguing that Congress did not have the constitutional authority to impose criminal penalties on state officials who failed to enforce constitutional rights without amending the Constitution, Representative John A. Bingham suggested substituting civil liability for section 2's criminal penalties.²⁵⁴ While he supported the goal of compelling state legal officers to enforce citizens' constitutional rights, he did not believe that Congress possessed this power without amending the Constitution. He reasoned "that the care of the property, the liberty, and the life of the citizen, under the solemn sanction of an oath imposed by your Federal Constitution, is in the States, and not in the Federal Government." Bingham then declared that his proposed constitutional amendment sought to delegate to Congress the power to compel state officers to enforce the Bill of Rights and to punish them if they failed to do so. Bingham thus proposed an amendment to the

²⁵⁰ Except where otherwise noted, the following discussion is taken from *id.* at 1758.

²⁵¹ *See id.* at 1759. Senator Trumbull's reference was to the Supremacy Clause. U.S. CONST. Art. VI, cl. 2. Clause 3 further requires that all state executive and judicial officers "shall be bound by Oath or Affirmation, to support this Constitution." U.S. CONST. art. VI, cl. 3.

²⁵² CONG. GLOBE, 39th Cong., 1st Sess. 1760 (1866).

²⁵³ Except where otherwise noted, the following account is taken from *id.* at 1120.

²⁵⁴ Except where otherwise noted, the following account is taken from *id.* at 1292.

Civil Rights Bill, striking out all penal sanctions, “and in lieu thereof” giving to “all citizens injured by denial or violation of any of the other rights secured by” the Civil Rights Bill a civil action for damages and double costs.²⁵⁵

Representative Wilson rejected Bingham’s amendment to the Civil Rights Bill. He retorted that there was no difference in principle between protecting citizens’ rights through a civil remedy and through criminal sanctions.²⁵⁶ Although, he argued, the principle of Congress’s power to provide civil remedies and criminal remedies was the same, Wilson saw a significant practical difference between the costs and effectiveness of civil and criminal remedies. Criminal penalties shifted the cost of rights enforcement to the federal government, thus affording effective protection to “the humblest citizen.” Under Bingham’s suggested civil remedies, “the citizen despoiled of his rights, instead of being properly protected by the Government, must press his own way through the courts and pay the bills attending thereon. This may do for the rich, but to the poor, who need protection, it is a mockery.” Decrying the inadequacy of “a few dollars in the way of damages,” even “against a solvent wrong-doer,” to protect constitutional rights, Wilson insisted that the government had a duty “to provide proper protection, and to pay the costs attendant on it.”

Wilson expected the House to vote for the Civil Rights Bill, either with or without Bingham’s amendments, and so Wilson

shall at least have the consolation of knowing that this intelligent House accepts the conclusion that the Committee on the Judiciary arrived at—that all these rights belong to the citizen and should be protected, the only difference between us being that the committee insists that the protection should be extended at the cost of the government, while those in favor of the instructions believe that we should compel the citizen to seek his remedy at his own cost.²⁵⁷

²⁵⁵ *Id.* at 1291. Representative Latham also objected that section 2 was “a departure from the principles and practices of the Government.” *Id.* at 1296. He reasoned that the Constitution and laws of the United States must be executed by federal officers, and where there is a conflict between federal law and state law, “the legitimate remedy is civil and not penal; or in other words, that the legitimate remedy is by appeal to the United States courts instead of by penalty upon the State officer executing the State law.” *Id.*

²⁵⁶ Except where otherwise noted, the following account is taken from *id.* at 1295.

²⁵⁷ The “instructions” to which Wilson referred were separate amendments to the Civil Rights Bill offered by Representative Bingham and Representative Raymond which would have eliminated the bill’s criminal sanctions. *See supra* notes 254–255 and accompanying text. While Bingham’s proposal would have changed the criminal sanctions of section 2 to civil remedies, Raymond’s proposal simply declared that all persons born in the United States are “citizens of the United States, and entitled to all rights and privileges as such.” CONG. GLOBE, 39th Cong., 1st Sess. 1266–67 (1866). Raymond thought that declaring the freedmen to be citizens entitled them to all of the rights of citizens, including the right to

Nevertheless, it is significant that Bingham stated that he intended his proposed constitutional amendment to compel state officials to enforce citizens' Bill of Rights guarantees and that Congress might do so by imposing civil liability in addition to criminal penalties on those officials who failed to enforce citizens' Bill of Rights guarantees. It is equally significant that Republican leaders and supporters of the Civil Rights Bill expressed their understanding that Congress could compel state officials to enforce federal rights by imposing civil liability and criminal sanctions on them should they fail to do so.²⁵⁸

While scholars have understood section 2's "state action" requirement for federal crimes only as a limitation on Congress's power to enforce citizens' rights,²⁵⁹ the debates on this question demonstrate that it was not so viewed by the Congress that enacted the Civil Rights Act. Opponents of the Civil Rights Act vociferously asserted that imposing criminal sanctions on state officials who violated another person's civil rights when acting under color of law or custom was an unconstitutional expansion of Congress's legislative powers because doing so violated principles of constitutional federalism and Supreme Court precedents by compelling state and local judges and law enforcement officials to enforce federal civil rights.²⁶⁰ The debate these penalties generated evinces the extraordinary expansion of federal legislative power they represented.²⁶¹

sue in federal court to enforce their civil rights whenever they were unable to enforce them or were denied them in state court. *Id.*

²⁵⁸ The exchange between Bingham and Wilson manifests their intention of compelling state officials to enforce federal law by imposing federal civil liability and criminal penalties on the officials' failure to do so. This raises questions regarding recent Supreme Court decisions that have held that Congress lacks the power to impose such sanctions against states, even pursuant to its legislative authority under the Fourteenth Amendment. *See, e.g.*, *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). Scalia's majority opinion in *Printz* is based largely on history, which he found to be lacking in any examples of Congress requiring state executive officials to perform federal duties. Scalia obviously overlooked the Civil Rights Act and other Reconstruction enforcement statutes, which contradict his conclusion. The issue of whether the framers of the Fourteenth Amendment intended to compel state officials to enforce the provisions and statutes that Congress enacts in order to implement the amendment warrants fresh investigation.

²⁵⁹ *See supra* note 237 and accompanying text.

²⁶⁰ Senator Cowan considered section 2 an "atrocious" because a state judge legitimately may question the constitutionality of the Civil Rights Act, but if deciding against its constitutionality "he subjects himself to a criminal prosecution." If deciding in favor of the Act, however, the judge is likely to "be impeached by [his] own State Legislature." CONG. GLOBE, 39th Cong., 1st Sess. 1783 (1866).

²⁶¹ *See, e.g., id.* at 475-76 (Sens. Trumbull and Cowan debating the justice of subjecting state judges to criminal sanctions for enforcing racially discriminatory state laws in violation of the Civil Rights Act); *id.* at 500, 603-04, 1783 (statement of Sen. Cowan) (complaining that section 2 "is the first time I think in the history of civilized legislation that a judicial officer has been held up and subjected to a criminal punishment for that which may have been a conscientious discharge of his duty . . . where a bill of indictment is to take the place of a writ of error, and where a mistake is to be tortured into a crime"); *id.* at 598, 1415, app. 182 (statement of Sen. Davis) (objecting "[t]hat any man or any court or any officer of the law who presumes to inflict upon a negro a different punishment than that to which a white man is subject for the same act, shall himself be regarded as an of-

Thus, by criminalizing civil rights violations committed by persons acting under color of law or custom, the framers of the Civil Rights Act circumvented or ignored Supreme Court precedents which opponents insisted prohibited Congress from compelling state officials to enforce federal rights and to perform federal duties. Through the threat of criminal prosecution, the Act's supporters sought to compel state judges and law enforcement officials to perform the federal duty of enforcing the civil rights of American citizens.

The federal legal officers who were responsible for enforcing the Civil Rights Act interpreted their legislative duty to include the prosecution

fender against the law," and insisting that "[t]he Congress of the United States have no right to take jurisdiction over such a case or the parties to such a transaction . . . to declare and to denounce such punishment against the State courts and State officers for thus executing the constitutions and penal laws of the States"; *id.* at 1758 (statement of Sen. Trumbull) (denying that criminal sanctions attempt to punish state legislators, but "admit[ing] that a ministerial officer or a judge, if he acts corruptly or viciously in the execution or under color of an illegal act, may be and ought to be punished; but if he acted innocently the judge would not be punished"); *id.* at 1778 (statement of Sen. Johnson) (attacking section 2 for destroying the independence of the states' judiciary by making criminals out of state judges who enforced an inconsistent state statute in the good faith belief that the Civil Rights Bill was unconstitutional); *id.* at 1809 (statement of Sen. Saulsbury) (predicting revolution and bloodshed should federal legal officers attempt to enforce the "grossly, palpably, fragrantly unconstitutional" provisions of the Civil Rights Bill against state judges); *id.* at 1119 (statements of Reps. Loan and Wilson) (discussing criminal sanctions imposed on public officers and not on others); *id.* at 1121 (statement of Rep. Rogers) (complaining that section 2 would subject a state judge to federal criminal prosecution for administering a state anti-miscegenation law he was sworn to uphold and was in good conscience enforcing); *id.* at 1154 (statement of Rep. Eldridge) (charging that section 2 is "a most flagrant and tyrannical interference with the independence of the [state] judiciary"); *id.* at 1265 (statement of Rep. Davis of New York) (expressing the fear that section 2 might unconstitutionally subject to federal punishments state judges who performed their duties in obedience to state laws that conflicted with the Civil Rights Act, and state officers who obeyed process issued by state courts under such laws, before a federal court had ruled on the constitutionality of the Civil Rights Act); *id.* at 1267 (statement of Rep. Raymond) (stating it was neither "just" nor "right" to punish a state court judge "for enforcing a State law"); *id.* at 1270 (statement of Rep. Kerr) (declaring that section 2 punishes only "persons acting under State authority in some sort of official capacity," naming county boards, school teachers, and other public officials who discriminated against blacks); *id.* at 1291-92 (statement of Rep. Bingham) (denying that Congress had the authority to impose criminal sanctions on state officers who obeyed and enforced state laws in good faith, recommending that the criminal penalties be changed to civil liability, and declaring that he proposed a constitutional amendment "which would arm Congress with the power to compel [state officials'] obedience to the oath [to uphold the Constitution], and punish all violations by State officers of the bill of rights"); *id.* at 1294 (statement of Rep. Shellabarger) (stating that section 2 punishes only wrongs committed under color of state authority); *id.* at 1680 (President Johnson's veto message) (stating that section 2 "provides for counteracting such forbidden legislation by imposing fine and imprisonment upon the legislators who may pass such conflicting laws, or upon the officers or agents who shall put, or attempt to put, them into execution," thus "invading the immunities of legislators" and "assailing the independence of the judiciary"); *id.* at 1837 (statement of Rep. Lawrence) (responding to President Johnson, stating "it is better to invade the judicial power of the State than permit it to invade, strike down, and destroy the civil rights of citizens. A judicial power perverted to such uses should be speedily invaded.").

of state and local officials and judges who violated citizens' civil rights.²⁶² Conscientious officers of the Freedmen's Bureau sought to secure an impartial administration of civil and criminal justice in the South by arresting and prosecuting state and local judges and law enforcement officers for failing to provide blacks and white Unionists with the equal protection of the law. Southern judges were prosecuted for declaring the Civil Rights Act unconstitutional, for enforcing racially discriminatory state laws, for imposing racially discriminatory punishments on black criminal defendants, and for refusing to allow black witnesses to testify, whether their actions were authorized by or were in violation of state rules of evidence. Bureau agents prosecuted state law enforcement officers for failing to act on complaints filed by blacks and unpopular whites. Bureau agents also prosecuted state officers for infringing the rights of blacks to carry firearms and for infringing blacks' rights to be protected against unreasonable searches and seizures.²⁶³ State officials were also subjected to federal prosecution for participating in outrages committed against blacks and for prosecuting white Unionists in harassment suits motivated by political animus.²⁶⁴

E. Congress Punishes Private Individuals Who Violate Civil Rights Under Color of Law or Custom

There is persuasive evidence that the framers of the Civil Rights Act of 1866 also intended to impose section 2 criminal penalties on private individuals. In a variety of ways, private parties violated civil rights under color of law and custom after the Civil War.²⁶⁵ Black Americans desperately needed federal protection from Southern whites who refused to accept them as free and equal citizens. Supporters emphasized the existence of the black codes and racially discriminatory administration of justice in southern states to demonstrate the need for congressional legislation that recognized and protected the rights of the former slaves.²⁶⁶ These supporters also referred to the black codes to explain the kind of protection Congress should provide.²⁶⁷ The Southern black codes were updated

²⁶² Except where otherwise noted, the following account is taken from ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876*, at 27-48 (1985).

²⁶³ *Id.* at 36-38.

²⁶⁴ *Id.* at 29, 37-38.

²⁶⁵ See *infra* notes 292-297 and accompanying text for the ways in which private individuals violated the civil rights of white Unionists and federal officers under color of law.

²⁶⁶ See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 91-96 (1866) (statement of Sen. Sumner); *id.* at 1118 (statement of Rep. Wilson); *id.* at 474, 1758-59 (statement of Sen. Trumbull).

²⁶⁷ For representative statements, see, for example, CONG. GLOBE, 39th Cong., 1st Sess. 39, 603 (1865) (statement of Sen. Wilson) (expressing, during his proposal of the Civil Rights Act, the need for federal civil rights protection because the old slave codes were still "being executed, and in some [states] in the most merciless manner;" describing

versions of the antebellum slave codes, and they subordinated Southern blacks to white domination under conditions reminiscent of slavery.²⁶⁸

statutes in Georgia, Louisiana, and Mississippi and admonishing that “these reconstructed Legislatures, in defiance of the rights of the freemen and the will of the nation embodied in the [thirteenth] amendment to the Constitution, have enacted laws nearly as iniquitous as the old slave codes that darkened the legislation of other days”); *id.* at 474, 1759 (statement of Sen. Trumbull) (describing Mississippi and South Carolina statutes that denied the freedmen certain rights, subjected them to severe penalties, and imposed restrictions on them that had been imposed on them during slavery, and stating that “[t]he purpose of the [Civil Rights] bill under consideration is to destroy all these discriminations, and to carry into effect the constitutional amendment”); *id.* at 602 (statement of Sen. Lane of Indiana) (explaining that the Civil Rights Bill is necessary “because we fear the execution of these laws if left to the State courts”); *id.* at 603 (statement of Sen. Cowan) (protesting that “[t]his is a proposition to repeal by act of Congress all State laws, all state legislation, which in any way create distinctions between black men and white men in so far as their civil rights and immunities extend”); *id.* at 1785 (statement of Sen. Stewart) (stating that it would be more desirable that the States should “secure to the freedmen personal liberty, but, since they have not, Congress unquestionably possesses the power to do so”); *id.* at 1118–19 (statement of Rep. Wilson) (proclaiming Congress’s duty to protect every citizen in the “great fundamental rights which belong to all men” from “[l]aws barbaric and treatment inhuman . . . meted out by our white [Civil War] enemies to our colored friends,” and explaining that the criminal sanction provided in section 2 “grows out of the fact that there is discrimination in reference to civil rights under the local laws of the States,” for which “we provide that the persons who under the color of these local laws should do these things shall be liable to this punishment”); *id.* at 1123 (statement of Rep. Cook) (stating that the former rebel state legislatures have enacted laws “so malignant in their spirit toward these freedmen, so subversive of their liberties” that the President and military commanders “have set aside those laws and prevented their execution,” and now Congress “provide[s] by legislative action precisely the same thing and nothing more” than the orders issued by military commanders under the authority of the President “to protect these people in the enjoyment of their freedom”); *id.* at 1153 (statement of Rep. Thayer) (stating that Congress must protect the natural rights of citizens because at least six southern legislatures “have enacted laws which, if permitted to be enforced, would strike a fatal blow at the liberty of the freedmen and render the constitutional amendment [abolishing slavery] of no force or effect whatever”); *id.* at 1295 (statement Rep. Latham) (stating that although the wording of section 1 makes no reference “to discriminations by the State or other local law, yet it is very evident from its connections, and from the entire bill, that its reference is to such discriminations”); *id.* at 1293 (statement of Rep. Bingham) (stating that the Civil Rights Bill proposes to “reform the whole civil and criminal code of every State government by declaring that there shall be no discrimination between citizens on account of race or color in civil rights or in the penalties prescribed by their laws”); *id.* at 1123 (statement of Rep. Cook); *id.* at 1160 (statement of Rep. Windom) *id.* at 1263 (statement of Rep. Broomall); *id.* at 1293 (statement of Rep. Bingham); *id.* at 1295 (statement of Rep. Latham); *id.* at 1785 (statement of Sen. Stewart); *id.* at 1833–36 (statement of Rep. Lawrence) (quoting at length from testimony given before the Joint Committee on Reconstruction, from newspapers, and from correspondence of military commanders in Southern states discussing discriminatory statutes enacted by southern legislatures; the legislatures’ failure to enforce the civil rights of blacks; and the actions taken by officers of the military and Freedmen’s Bureau to nullify these statutes and to provide tribunals to dispense to blacks the protection and justice that the states denied).

²⁶⁸ See, e.g., 1865–66 Ala. Acts 86, 98, 100, 112, 116, 120; 1866–67 Ark. Acts 13, 35, 122; 1865–66 Fla. Laws chs. 1465–79; 1865–66 Ga. Laws 3, 43, 101, 108, 233–34, 240, 248, 250–52, 254; 1866 Ga. Laws 38–39, 208, 210, 212, 217; 1865 La. Acts 10–12, 16, 19–20, 34; 1865 Miss. Laws chs. 4–6, 23–24; 1865–66 N.C. Sess. Laws 6, 35, 40, 42, 62, 64, 72; 1865 S.C. Acts 4730 §§ 4–5, 4731, 4733, 4791, 4797; 1865–66 Tenn. Pub. Acts 4, 34, 40, 56; 1866 Tex. Gen. Laws 63, 80, 82, 111, 120, 128, 153–54; 1865 Va. Acts chs. 14–15, 17–19, 21–25, 28, 62, 113, 116, 138, 142, 258. See generally THEODORE BRANTNER

However, the black codes were not the only problem, and perhaps they were not the primary problem that Congress needed to address in 1866 because military commanders nullified the codes and ordered their officers to ensure that they were not enforced before the Civil Rights Act was enacted.²⁶⁹ The Southern states retained the penal codes applicable to slaves except those specifically amended by statute.

An important feature of these Southern black codes is that they legitimated and authorized the practices of Southern whites that subordinated Southern blacks and subjected them to the economic and social control of whites.²⁷⁰ The black codes gave employers contract rights and methods of enforcing contracts against black laborers that were not available in contracts with white laborers. Further, the black codes gave landowners methods of disciplining black tenants and field hands that they were not legally authorized to use against white tenants and field hands. Black codes authorized employers and landowners, as well as ordinary whites organized into patrols, to enforce an informal, customary system of controls that restricted blacks' freedom to move from place to place. In addition, blacks in the South were denied access to local systems of civil and criminal justice when they sought to redress violations of their rights and punishment for crimes committed against them.

Members of the Thirty-Ninth Congress spoke about these injustices as problems they sought to address and remedy. At the very beginning of the congressional session, for example, Senator Henry Wilson of Massachusetts quoted from a Louisiana vagrancy statute requiring the freedmen, among other things, to "furnish themselves with a comfortable home and visible means of support within twenty days after the passage of this act," on penalty of being arrested and "hired out by public advertisement to some citizen, being the highest bidder, for the remainder of the year in which they are hired."²⁷¹ It also required the consent of a freedman's former employer, officially recorded by the parish recorder, before he or she was permitted to change employers. Should his employer die, the freedman was obligated to the deceased's heirs or whoever acquired his property. The statute authorized the employer to enforce these and other provisions, such as a prohibition of general conversation during working hours,

WILSON, *THE BLACK CODES OF THE SOUTH* (1965).

²⁶⁹ See General Orders No. 3, Jan. 12, 1866, Adjutant General's Office, *reprinted in THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION* 122–23 (Edward McPherson ed., 1875). See also General Orders No. 7, Mar. 4, 1866, Headquarters, Dep't of South Carolina, *reprinted in CONG. GLOBE*, 39th Cong., 1st Sess. 1834 (1866).

²⁷⁰ Except as is otherwise noted, this discussion is taken from ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, at 199–201 (1988); LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 292–386 (1979); and WILSON, *supra* note 268.

²⁷¹ Except where otherwise noted, the following account is taken from *CONG. GLOBE*, 39th Cong., 1st Sess. 39 (1866).

by a fine for disobedience, defined as failure to obey reasonable orders, neglect of duty, and leaving home without permission. All disputes were to be settled by the employer, with a right of appeal to the nearest justice of the peace and two freeholders, one each selected by the employer and laborer. If the laborer should leave the employ during the term of employment, the employer was authorized to have the laborer arrested and returned to his employ to finish the contract. Senator Wilson also cited a Mississippi black code that authorized "any person" to arrest and return "any freedman, free negro, or mulatto" who leaves the employ of his master and collect a fee of \$5 plus 10 cents per mile. Private individuals acting under color of these laws violated the Civil Rights Act and thus rendered themselves criminally liable under section 2. Other supporters of the Civil Rights Bill referred to (and quoted) correspondence among Freedmen's Bureau officials and military officers describing the strategies by which Southern whites subordinated blacks through law and by the actions of private individuals authorized by law and/or custom. Representative William Windom of Minnesota quoted from the correspondence between military officers serving as Freedmen's Bureau agents in the South and General O. O. Howard, the Commissioner of the Freedmen's Bureau.²⁷² Windom read a letter from a Colonel De Gauss to General Howard concluding that the "negroes are not yet free" in some portions of Texas. "[T]he pass system is still in force, and when a freedman is found at large without a pass, he is taken up and whipped."

Lieutenant Stewart Eldridge wrote to General Howard on November 28, 1865 from Vicksburg, Mississippi, informing Howard of a "freedmen's bill" that the Mississippi legislature had just enacted into law. The statute prohibited freedmen from holding, leasing, or renting real estate; it compelled them to marry whomever they were living with and "to support the issue of what was in many cases compulsory co-habitation"; it excluded the freedmen's testimony "in cases all white"; it authorized mayors and boards of police "by their sole edict to prevent any freedmen from doing any independent business and to compel them to labor as employes [sic] with no appeal from such decision"; and it "gives power to any white citizen over the person of a freedman unknown to any other law, and denies the right of appeal beyond the county court." Following the enactment of this statute, Colonel Samuel Thomas, assistant Freedmen's Bureau commissioner in Mississippi, wrote that "Thousands of acres have been rented from owners of land by freedmen who expected that they would be allowed to cultivate land in this way. They are notified that they must give up their leases by citizens." Windom reported that, "In Virginia the laws and customs reduce the negro to vagrancy, and then seize and sell him as a vagrant," evidently to white landowners to work off their punishment for vagrancy. In various states "there are laws com-

²⁷² Except where otherwise noted, the following account is taken from *id.* at 1160.

elling the return of the freedman to his master under the name of employer, and allowing him to be whipped for insolence," Windom recounted.

The conditions these legislators described reflected a socio-legal structure that relied on private actors acting under legal authority and/or following customary practices designed to deny civil liberty to Southern blacks and to subordinate them to white domination. Windom detailed these conditions, sardonically characterizing them as "some specimens of protection which [the Freedmen] get from the civil authorities of the States in which they live." He explained that Southern whites used vagrancy laws to keep Southern blacks in a state of virtual slavery. Southern blacks were prohibited from owning or renting a home and from earning a livelihood, and then they were "arrested and sold as vagrants because they have no homes and no business." Planters conspired to "compel" black field workers "to work for such wages as their former master may dictate," and to "deny" blacks the "privilege" of being hired "to any one without the consent of the master."

In response to civil rights opponents who argued that the condition of Southern blacks did not warrant federal legislation, Windom queried,

Sir, do you at this late day call the whipping-post and the pass system evidences of liberty? Do you call that man free who cannot choose his own employer or name the wages for which he will work? Do you call him a freeman who is denied that most sacred of all possessions, a home? Is he free who cannot bring a suit in court for the defense of his rights?

With as much sadness as sarcasm, Windom concluded, "Sir, if this be liberty may none ever know what slavery is."

As the sole representative to speak in the House of Representatives following President Johnson's veto of the Civil Rights Bill, Representative William Lawrence of Ohio, a member of the House Judiciary Committee, elaborately reported conditions in the South that necessitated the bill's enactment. Lawrence quoted at length from testimony given before the Joint Committee on Reconstruction, which was in the process of drafting the proposal that became the Fourteenth Amendment, from newspapers, and from correspondence of military commanders in the Southern states. He quoted the Cincinnati *Commercial* reporting that, under the "rigidly enforced" Mississippi vagrancy statute, "the freed slaves are rapidly being reenslaved."²⁷³ Lawrence lamented that "No negro is allowed to buy, rent, or lease any real estate; all minors of any value are taken from their parents and bound out to planters; and every freedman who does not contract for a year's labor is taken up as a vagrant." Lawrence proclaimed that it would be "barbarous, inhuman, infamous" to abandon the former

²⁷³ Except where otherwise noted, the following account is taken from *id.* at 1833.

slave “to the fury of their rebel masters, who deny them the benefit of all laws for the protection of their civil rights.”

The framers of the Civil Rights Act undoubtedly understood the right to the equal protection of the laws as a personal right citizens possessed in relation to private individuals as well as to the government. They certainly expressed their intention of punishing private parties who violated citizens’ civil rights while acting under color of law or custom. Senator Trumbull made this clear in describing the penalties as aimed not at “State officers especially, but everybody who violates the law. It is the intention to punish everybody who violates the law.”²⁷⁴

One of the reasons Senator Garrett Davis of Kentucky opposed the Civil Rights Act was precisely because of the criminal sanctions imposed by section 2 on public officers and on private individuals who acted under color of discriminatory state statutes. Asserting that the right to marry is a civil right secured by section 1 of the Civil Rights Act, Davis argued that, in states such as Kentucky and Illinois that prohibited interracial marriage, “the clerk who refused a license to a negro to marry a white person, the preacher who would not perform the ceremony,” as well as “the officers of the law who would enforce its penalties against persons who had violated it, would themselves become criminals, and subject to punishment under this act.”²⁷⁵ Davis argued that because racially discriminatory practices in public accommodations were established by law, ordinances and customs, proprietors who enforced these discriminatory laws and customs on ships and steamboats, in hotels and saloons, in churches and on railroads, would subject themselves to criminal penalties under the Civil Rights Act. Davis objected to the enforcement structure that the bill established “for the benefit of the favored negro race.” It “directs the appointment of legions of officers to prosecute [violators] both penally and civilly . . . at the cost of the United States,” and puts at their disposal “the posse comitatus, the militia, and the Army and Navy of the United States, to execute this bold and iniquitous device to revolutionize the Government and to humiliate and degrade the white population . . . to the level of the negro races.”²⁷⁶

²⁷⁴ *Id.* at 500. Echoing Trumbull’s rationale, Chief Justice Salmon P. Chase, as circuit justice, held that an apprenticeship contract between a black child and her former master violated the child’s right to the full and equal benefit of all laws and proceedings for the security of her person and property secured by section 1 of the Civil Rights Act because it did not grant her benefits that state law required masters to extend to white apprentices. In *re Turner*, 24 F. Cas. 337, 339 (C.C. Md. 1867) (No. 14,247).

²⁷⁵ Except where otherwise noted, the following account is taken from CONG. GLOBE, 39th Cong., 1st Sess. app. 183 (1866). See also *supra* note 261 (statements of Senator Davis).

²⁷⁶ *Id.* at app. 183. Davis’s comments regarding the posse comitatus and militia and military provisions refer to the Civil Rights Act’s sections 5 and 9 respectively. *Id.* For additional statements expressing the framers’ intention of imposing criminal penalties on private individuals, see, for example, *id.* at 475 (statement of Sen. Trumbull) (analogizing Congress’s authority to enact the criminal sanctions of the Civil Rights Bill to Congress’s

The framers and supporters of the Civil Rights Act discussed a variety of situations in which private individuals infringed citizens' civil rights under color of law and/or custom. In light of the framers' expressed intention of protecting citizens' civil rights from the actions of private individuals, their statements strongly support the view that the "under color of law or custom" qualification of section 2 criminal punishments was not intended to exclude private individuals, but, as the framers said, to distinguish federal crimes from ordinary crimes and explicitly to extend criminal sanctions to include state judges and other state officers, in addition to private individuals.

F. Section 3: Congress Authorizes a Federal System of Civil and Criminal Justice To Enforce Americans' Civil Rights

Section 3 of the Civil Rights Act prescribed the federal legal process that Representative Wilson said Congress was obligated to provide to citizens who were unable to enforce their rights in the state systems of civil and criminal justice.²⁷⁷ In section 3, Congress exercised plenary power to remedy civil rights violations by conferring jurisdiction on the federal courts to redress, with civil remedies and criminal punishments, violations of citizens' rights committed by private individuals as well as state and local officials. Additionally, Congress explicitly extended federal legal process and remedies to white persons who were unable to enforce or were denied their civil rights in state courts. Thus, said Senator Thomas Hendricks, the Civil Rights Act

provides, in the first place, that the civil rights of all men, without regard to color, shall be equal; and, in the second place, that if any man shall violate that principle by his conduct, he shall be responsible to the court; that he may be prosecuted criminally

authority to punish any individuals who violated a citizen's rights under the Comity Clause); *id.* at 1125 (statement of Rep. Cook) (arguing that Congress was obligated to protect the freedmen from "men who are proving day by day, month by month, that they desire to oppress them, for they had been made free against their consent"); *id.* at 1156 (statement of Rep. Eldridge) (acknowledging that the bill's proponents "refer us to individual cases of wrong perpetrated upon the freedmen of the South as an argument why we should extend the Federal authority into the different States to control the action of the citizens thereof"); *id.* at 1156 (statement of Rep. Thornton) (conceding that "Congress has the power to punish any man who deprives a slave of the right of contract, or the right to control and recover his wages. To that extent it may be necessary to have legislation.").

²⁷⁷ Representative Wilson argued that, since U.S. citizens were entitled to the rights secured by the Bill of Rights, it was the right and duty of Congress "to provide a remedy The power is with us to provide the necessary protective remedies. If not, from whom shall they come? From the source interfering with the right? Not at all." *Id.* at 1294. Senator Lane of Indiana explained, "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 do that, we give the Federal officers jurisdiction." *Id.* at 602-03.

and punished for the crime, or he may be sued in a civil action, and damages recovered by the party wronged.²⁷⁸

Section 3 of the Civil Rights Act of 1866 provided a federal system of civil and criminal justice and conferred civil and criminal jurisdiction on the federal courts in three distinct situations. First, like the Fugitive Slave Act of 1850, it conferred exclusive criminal and civil jurisdiction on federal district courts to try “all crimes and offences committed against the provisions of this act.”²⁷⁹ This provision conferred exclusive jurisdiction on the federal courts to try all civil actions brought against private parties to remedy violations of the civil rights secured in section 1 and all prosecutions brought under the criminal provisions of section 2.²⁸⁰

The other two jurisdictional provisions of section 3 were controversial, extraordinary remedies adopted to redress state action and inaction as well as civil suits filed by private individuals that violated a citizen’s civil rights. The second provision conferred concurrent jurisdiction on federal district and circuit courts to try “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 of this act.”²⁸¹ The third provided for the removal of

any suit or prosecution, civil or criminal, that has been or shall be commenced in any State court against such person [who is denied or cannot enforce rights secured by this act], for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or [the Freedmen’s Bureau Acts], or for refusing to do any act upon the ground that it would be inconsistent with this act.²⁸²

²⁷⁸ *Id.* at 601. Senator Hendricks was a member of the Senate Judiciary Committee that drafted the Civil Rights Bill.

²⁷⁹ Civil Rights Act of 1866, ch. 31, 14 Stat. 27, § 3; *see* Fugitive Slave Act of 1850 § 3, ch. 60, 9 Stat. 462 (1850) (repealed 1864).

²⁸⁰ Referring to the civil remedies, for example, Senator Cowan objected that in those states where certain persons are not permitted to make legally enforceable contracts, “this bill is to give them a right to enforce them, to give them a right to go into a court where the judges say they cannot go, and he has no jurisdiction to determine their causes.” CONG. GLOBE, 39th Cong., 1st Sess. 1783 (1866).

²⁸¹ Civil Rights Act of 1866 § 3.

²⁸² *Id.*

G. Congress Confers Original Jurisdiction on Federal Courts To Try Cases Arising Under State Law Whenever a Party Is Unable To Enforce or Is Denied Section 1 Civil Rights in the State

On its face, section 3 authorized the federal courts to supplant state and local courts and to try ordinary state civil actions and criminal prosecutions whenever a party was unable to enforce or was denied a civil right in the state's legal system.²⁸³ For example, in a state that prohibited the testimony of black witnesses in cases involving white parties, section 3 authorized a black party wishing to sue a white party under state law to bring his suit in federal court. This jurisdiction applied in criminal prosecutions as well.²⁸⁴ Section 3 authorized federal courts to try these civil suits and criminal prosecutions according to federal law, to the extent that federal law provided remedies and penalties applicable to these cases. Where federal law did not provide such remedies and penalties, federal courts were to try these civil and criminal cases according to the common law of the states in which they sat, as modified by the state's constitution and statute law, provided they were not inconsistent with federal law.²⁸⁵ This provision thus afforded persons a federal forum whenever they were unable to enforce or were denied in the states' systems of civil and criminal justice the civil rights secured by section 1 of the statute. Representative Wilson proclaimed that, since the States were failing to enforce and protect the "personal rights" to life, liberty, and property guaranteed by the Bill of Rights to which "every citizen" is entitled, Congress "must do our duty by supplying the protection which the states deny."²⁸⁶ Wilson later explained that he meant that Congress possesses the power to remedy violations of these rights, and that "the necessary protective remedies . . . must be provided by the Government of the United States, whose duty it is to protect the citizen in return for the allegiance he owes to the Government."²⁸⁷ Section 3 demonstrates that the framers exercised plenary remedial power and authorized displacement of state systems of justice whenever the federal government was required to enforce citizens' civil

²⁸³ Senator Davis insisted that the Civil Rights Bill was unconstitutional, in part because it transferred "all penal prosecutions and civil suits instituted in the State courts for offenses and trespasses committed under color of it into the Federal courts." CONG. GLOBE, 39th Cong., 1st Sess. app. 184 (1866).

²⁸⁴ See *infra* notes 288–291 and accompanying text.

²⁸⁵ Civil Rights Act of 1866 § 3.

²⁸⁶ CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866).

²⁸⁷ *Id.* at 1294. Wilson repeatedly insisted that it was Congress's right and duty to provide civil and criminal remedies to redress violations of citizens' civil rights, particularly when the states failed to do so. See *supra* notes 125, 173, 190, 213, 216, 256, 277 and accompanying text. Congress acted on this very theory when it enacted the civil and criminal remedies of the Violence Against Women Act Pub. L. No. 103-322, Title IV, § 40302, 108 Stat. 1941 (1994). The Supreme Court struck down the civil remedy, holding that it exceeded Congress's remedial powers under the Fourteenth Amendment. *United States v. Morrison*, 529 U.S. 598, 627 (2000).

rights because of a state's failure to do so, even to the extent of giving federal courts jurisdiction to try civil causes and criminal prosecutions arising under state law.

H. Congress Authorizes Federal Courts To Try Criminal Prosecutions Arising Under State Criminal Law

The most startling jurisdiction section 3 conferred on federal courts was the authority to prosecute crimes committed in violation of the criminal laws of the states whenever a party to the "cause" was denied or was unable to enforce in the state courts any of the civil rights secured in section 1.²⁸⁸ From 1866 to 1871, the federal court in Louisville, Kentucky administered criminal justice to black Kentuckians who were the victims of crimes committed by whites who would have gone unpunished but for the criminal jurisdiction section 3 conferred on the federal courts.²⁸⁹ Blacks could not get civil or criminal justice in state and local courts because Kentucky rules of evidence prohibited a black person from testifying in any case in which a white person was a party. Since the state's rules of evidence violated section 1 of the Civil Rights Act, the U.S. attorney, Benjamin H. Bristow, simply took over the function of prosecuting whites accused by blacks of having committed crimes against them.²⁹⁰ The federal court dispensed criminal justice in these cases until the Supreme Court decided *Blyew v. United States*, which restricted section 3 jurisdiction to criminal prosecutions brought against black defendants, and the Kentucky legislature repealed the racially discriminatory testimony statute and permitted black witnesses to testify on the same basis as white witnesses.²⁹¹

²⁸⁸ See *supra* note 281 and accompanying text. See *United States v. Rhodes*, 27 F. Cas. 785, 786–87 (C.C.D. Ky. 1866) (No. 16,151) (upholding under section 3 a federal prosecution for a state crime of burglary committed by white defendants who broke into the home of a black woman who was denied the right to testify by Kentucky statutes); *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 591–93 (1872) (upholding the constitutionality of section 3 but restricting federal criminal jurisdiction over state crimes to those committed by black defendants who are unable to enforce or are denied civil rights secured by section 1).

²⁸⁹ *United States v. Rhodes*, 27 F. Cas. at 786–87; KACZOROWSKI, *supra* note 262, at 52; ROSS A. WEBB, *BENJAMIN HELM BRISTOW: BORDER STATE POLITICIAN* 51–58 (1969); Victor B. Howard, *The Black Testimony Controversy in Kentucky, 1866–1872*, 58 J. NEGRO HIST. 140, 146–53 (1973); ROSS A. WEBB, *Benjamin H. Bristow: Civil Rights Champion, 1866–1872*, 15 CIVIL WAR HIST. 39, 39–42 (1969); Letter from Benjamin H. Bristow to John Marshall Harlan (Mar. 20, 1866) (collected in John Marshall Harlan Papers container 14 in the Library of Congress); Letter from John Marshall Harlan to William Belknap (Dec. 15, 1869) (collected in John Marshall Harlan Papers available in The Filson Club); Letter from Bland Ballard to Lyman Trumbull (Mar. 30, 1866) (collected in 65 Lyman Trumbull Papers; microfilm collection available in the Library of Congress); Letters from Noah H. Swayne to Rutherford B. Hayes (Jan. 10, 1870 and Apr. 27, 1871) (collected in Rutherford B. Hayes Papers in Rutherford B. Hayes Library).

²⁹⁰ See Webb, *Benjamin H. Bristow: Civil Rights Champion*, *supra* note 289, at 39–42.

²⁹¹ 80 U.S. (13 Wall.) 581, 592–93 (1871); KACZOROWSKI, *supra* note 262, at 142, 165; ROSS A. WEBB, *Kentucky: Pariah Among the Elect*, in *RADICALISM, RACISM, AND PARTY*

*I. Congress Confers Jurisdiction on Federal Courts To Enforce the
Civil Rights of Whites as Well as of Blacks*

The text of section 3, particularly when understood within the context of conditions in the South immediately after the Civil War, demonstrates that the framers and supporters of the Civil Rights Bill intended section 3 to protect the civil rights of white Unionists and Union soldiers in the South from violations committed by private individuals motivated by political animus. The framers repeatedly expressed the need to protect southern white Unionists from civil rights deprivations.²⁹² They recounted pervasive incidents of southerners persecuting white Unionists and military personnel by bringing vexatious lawsuits and criminal prosecutions for actions they undertook during the Civil War and under authority of federal law.²⁹³ Former Confederates also intimidated Unionists through acts of violence and economic harassment.²⁹⁴

The federal systems of civil and criminal justice provided by section 3 offer some of the strongest evidence that the framers and supporters of the Civil Rights Act intended to secure through federal legal process the substantive rights of all Americans, whites as well as blacks, as rights of U.S. citizens. In defending this section, Representative Lawrence quoted a variety of sources that demonstrated not only that the former slaves, but also Union military personnel and “the white Union population” in the South required federal protection “to secure [their] civil rights.”²⁹⁵

Lawrence read from a letter to Representative William D. Kelley from Governor W. G. Brownlow of Tennessee, dated March 8, 1866, complaining that rebel candidates for local offices “‘have made a clean sweep, turning the Union men out and electing their own candidates’” Since President Johnson’s policy of lenient pardons, rebels had become more impudent, “‘cursing loyal men, and threatening them with shooting or hanging, boasting that they have the President on their side . . . [L]oyal men cannot travel on a steamboat, or in a railroad car, without being insulted.’” They “‘feel that there is no safety for them, unless Congress shall choose to protect them.’” The governor reported that federal troops had to be dispatched “‘to protect loyal men and freedmen, who were fleeing for safety’” to the state capital.

REALIGNMENT: THE BORDER STATES DURING RECONSTRUCTION 128 (Richard O. Curry ed., 1969); Victor B. Howard, *The Breckinridge Family and the Negro Testimony Controversy in Kentucky, 1866–1872*, 49 *FILSON CLUB HIST. Q.* 56 (1975); Howard, *supra* note 289; Mary S. Donovan, *Kentucky Law Regarding the Negro, 1865–1877* (unpublished M.A. thesis, University of Louisville, 1967).

²⁹² See *supra* notes 171–176 and accompanying text.

²⁹³ See Kaczorowski, *supra* note 137, at 874–79.

²⁹⁴ See *id.*

²⁹⁵ Except where otherwise noted, the following account is taken from *CONG. GLOBE*, 39th Cong., 1st Sess. 1835 (1866).

Lawrence quoted the Cincinnati *Commercial* of February 26, 1866, describing “outrages against freedmen” across its southern border in Kentucky and reporting that the criminals boasted of turning out not only blacks but also certain whites. The newspaper’s account of the outrages was based on at least six letters it received from U.S. Representative Samuel McKee of Kentucky detailing outrages in various parts of the state. One horrific case involved “a party of white men” who raided the home of a nearly eighty-year-old free black man, kicked him to death, and robbed him of his money. “They then raked coals from the fire and putting him on them, roasted first one side, then the other.” The perpetrators “also burnt two others nearly to death, putting out the eye of one, and boasted that they had not only intended to drive out the negroes, but intended also to drive out certain whites.”

Lawrence reported the persecution of white Quakers in North Carolina who were native North Carolinians, but who held pro-Union political views. He quoted at length from the Raleigh (North Carolina) *Progress* of March 21, 1866, which described the intimidation and oppression of Quakers that forced them to leave the state. The Quakers believed they were denied “that equality and protection which they feel they ought as loyal citizens to enjoy.” The Raleigh newspaper reported that, “because they would take no voluntary part in the war against the Government, and hailed with joy the coming of their deliverers, they are driven out from the land of their nativity and the homes of their childhood by persecutions and oppressions heaped upon them by the disaffected” Lawrence went on to state that “They tell that they are driven out by persecutions, and that they have been hunted down because of their opposition to the war and their devotion to the Union”

Representative Lawrence quoted General George Thomas as saying, in Congressional testimony before the Joint Committee on Reconstruction, that the Union Army should remain in the state “until the people show that they are themselves willing and determined to execute civil law with impartial justice to all parties.”²⁹⁶ If the army and the Freedmen’s Bureau were removed from Alabama, the general testified, “I do not believe the Union men or the freedmen could have justice done them.” He testified that legal process and other forms of harassment would be used against white Unionists to drive them out of the state. “Injustice toward [white Unionists] would commence in suits in courts for petty offenses, and neighborhood combinations [would] annoy them so much that they could not reside among them.” Without a restraining force in the South, state law would force the freedmen “back into a condition of virtual

²⁹⁶ See also *id.* at 1264 (statement of Rep. Broomall) (stating that “citizens of the United States, whether of the North or the South, loyal men who never took part in treason, have had their property confiscated by the State courts, and are denied remedy in the courts of the reconstructed South”).

slavery.” “[T]hey would be compelled by legislative enactments to labor for little or no wages,” and these laws “would assume such form that they would not dare to leave their employers for fear of punishment.”

Representative Broomall listed ways in which private individuals were infringing the civil rights of white Unionists and Union soldiers under color of state law.²⁹⁷ He proclaimed, *inter alia*, that he was “ready to prove that white men, citizens of the United States, have been, and are now being punished under color of State laws for refusing to commit treason against the United States” Union soldiers “have been arraigned in State courts, under State laws, for the crime of shooting down traitors on the field of battle” They have been convicted of murder and have been “saved from being hanged . . . [only] by the interposition of” the Freedmen’s Bureau. Broomall admonished that Southern Unionists “are begging in vain for a redress of wrongs in the courts of the reconstructed South.”

J. Congress Protects Unionists and Union Soldiers by Authorizing Them To Remove Vexatious Lawsuits and Prosecutions to Federal Courts for Trial

Representative Lawrence freely quoted the testimony of Major General Alfred H. Terry, Commander of the Department of Virginia, before the Joint Committee on Reconstruction, in which Terry stated that, because of prejudice in Virginia, state and local courts would not afford white Unionists “any adequate protection for their rights of person and property,” but that they “would be persecuted through the machinery of the courts, as well as privately.”²⁹⁸

Former Confederates controlled Southern state governments, and state and local law enforcement officers used their legal systems to sanction and assist individuals in defying federal law and authority and to persecute Unionists and Federal officers, in addition to the freedmen, with violence and economic intimidation.²⁹⁹ Southerners also filed thousands of

²⁹⁷ The following account is taken from *id.* at 1263.

²⁹⁸ Except where otherwise noted, the following account is taken from *id.* at 1833. Terry believed Unionists would not be safe if the military were removed from the state, a belief “supported by, as I think, the unanimous feeling of the Unionists themselves.” Virginians varied in their attitudes toward the freedmen. Although some treated them kindly and justly, many more “treat them with great harshness and injustice . . . and to reduce them to a condition which will give to the former masters all the benefits of slavery, and throw upon them none of its responsibilities.” *Id.*

²⁹⁹ See JOINT COMM. ON RECONSTRUCTION, 39th Cong., 1st Sess. REPORT ON RECONSTRUCTION (1866), and the correspondence sent to senators and representatives in the 39th Congress, e.g., Letter from J. W. Shafter to Lyman Trumbull (Dec. 12, 1865), Letters from T. J. Gretlou to Lyman Trumbull (Jan. 8, 19, 1866), Letter from G. Koerner to Lyman Trumbull (Jan. 11, 1866), Letter from A. A. Smith to Lyman Trumbull (Jan. 18, 1866), Letter from Grant Goodrich to Lyman Trumbull (Feb. 1, 1866) (collected in 63 Lyman Trumbull Papers; available in Library of Congress); Letter from John Dietrich to Lyman Trumbull (July 16, 1866) (collected in 68 Lyman Trumbull Papers, *supra*); Letter from H. S. Parmenter to John Sherman (Jan. 29, 1866) (collected in 92 John Sherman Papers; avail-

civil lawsuits and criminal prosecutions against Union soldiers in revenge for their actions on behalf of the Union, Federal authority, and emancipation.³⁰⁰ Harassment suits and prosecutions were especially virulent in Kentucky.³⁰¹ For example, Senator Garrett Davis, a leading opponent of the Civil Rights Bill in the Senate, and Representative Brutus Clay, who opposed the statute in the House, sued General John M. Palmer for \$10,000 and \$40,000 respectively for freeing their slaves.³⁰² Senator Davis may have had his lawsuit in mind when he argued that the Civil Rights Bill was unconstitutional, among other reasons, because it transferred “all penal prosecutions and civil lawsuits instituted in the State courts for offenses and trespasses committed under color of it into the Federal courts.”³⁰³

K. Section 3 Authorizes State and Federal Officials To Remove State Prosecutions for Refusing To Enforce Racially Discriminatory State Laws or for Enforcing Federal Law During and After the Civil War

The text of section 3 demonstrates that politically motivated harassment suits and prosecutions were important evils that the Thirty-Ninth

able in the Library of Congress); Letter from Brig. Gen. J. W. Sprague to John Sherman (Apr. 4, 1866) (collected in 98 John Sherman Papers, *supra*); Letter from Gen. George A. Custer to Zachariah Chandler (Jan. 4, 1866) (collected in Zachariah Chandler Papers, container 4 in the Library of Congress); Letter from Judge John C. Underwood to Benjamin F. Butler (Jan. 24, 1866) (collected in Benjamin F. Butler Papers, box 37 in the Library of Congress); Letter from William Ware Peck to Charles Sumner (Jan. 1, 1866), Unsigned Letter to Charles Sumner (Jan. 9, 1866) (collected in 76 Charles Sumner Papers in Houghton Library, Harvard University); Letter from Tho. Shankland to Judge Adj. Gen. Joseph Holt (May 19, 1866) (collected in 52 Joseph Holt Papers in the Library of Congress); Letter from George W. Kingsbury to Justin S. Morrill (June 18, 1866) (collected in 10 Justin S. Morrill Papers in the Library of Congress); Letter from H. B. Allis to Benjamin F. Wade (Mar. 21, 1866) (collected in Benjamin F. Wade Papers in the Library of Congress).

³⁰⁰ See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1526 (1866) (Rep. McKee); *id.* at 2021 (Sen. Clark); *id.* at 2054 (Sens. Wilson and Clark); E. MERTON COULTER, *THE CIVIL WAR AND READJUSTMENT IN KENTUCKY* 293 (1926); David Achtenberg, *With Malice Toward Some: United States v. Kirby, Malicious Prosecution, and the Fourteenth Amendment*, 26 RUTGERS L.J. 273, 275–76 (1995) (documenting the various kinds of civil suits and criminal prosecutions that were brought against Unionists and Union soldiers); see also *United States v. Kirby*, 74 U.S. (7 Wall.) 482 (1869) (murder prosecution for killing of anti-Union guerrillas).

³⁰¹ Assistant United States Attorney for Kentucky Benjamin H. Bristow informed Attorney General James Speed on February 9, 1866 of how Kentuckians were using state and local legal process to intimidate and harass white Unionists and Union soldiers: “Suits and prosecutions are being instituted against Federal officers for acts done in the line of duty.” Unionists were also being sued and prosecuted for giving the federal government “a hearty and cordial support.” Bristow informed the Attorney General of “a concerted movement . . . in every portion of the State . . . to oppress and impoverish Union men, and as far as possible drive them from the State.” Letter from Benjamin H. Bristow, Assistant United States Attorney to James Speed, Attorney General (Feb. 9, 1866), in *Papers of the Attorney General of the United States: Letters Received 1809–1870* [hereinafter A.G. Source-Chronological File] folder 1 at 87 (on file at Record Group 60, National Archives), *quoted in* Achtenberg, *supra* note 300, at 302.

³⁰² Achtenberg, *supra* note 300, at 299.

³⁰³ CONG. GLOBE, 39th Cong., 1st Sess. app. 184 (1866).

Congress legislated to remedy.³⁰⁴ It also shows that the framers of the Civil Rights Act intended to protect state officials who refused to enforce state statutes that were inconsistent with the proposed statute. For example, Representative Wilson introduced the amendment to section 3 that authorized state officers to remove to federal courts civil and criminal cases commenced against them in state courts “for refusing to do any act upon the ground that it would be inconsistent with this act” with the explanation “that this amendment is intended to enable State officers, who shall refuse to enforce State laws discriminating in reference to these rights on account of race or color, to remove their cases to the United States courts when prosecuted for refusing to enforce those laws.”³⁰⁵

In providing for the removal to federal courts of civil and criminal cases instituted in the state courts, the framers of the Civil Rights Act claimed they were merely emulating the actions the military took to protect freedmen, white Unionists, and military officials from this oppression. Representative Lawrence quoted at length General Ulysses S. Grant’s orders directing military commanders to suspend such civil suits and criminal prosecutions in the state courts and to interpose military authority “to protect [freedmen, Unionists, and military personnel] from any penalties or damages that may have been or may be pronounced or adjudged in said [state] courts in any of said cases.”³⁰⁶ To protect the freedmen from prosecutions under vagrancy laws and criminal statutes that imposed different penalties on blacks and whites for the same offenses, military officers removed such cases for trial in federal courts, or to military or Freedmen’s Bureau courts where federal courts were not established.³⁰⁷ Indeed, all cases in which freedmen were unable to enforce their rights in the state courts of South Carolina were to be removed to federal tribunals.³⁰⁸ The Freedmen’s Bureau was particularly important in assisting the freedmen to enforce their labor contracts, because local tribunals refused to do so.³⁰⁹ The framers of the Civil Rights Act cited the military’s actions as precedents for section 3 jurisdictional provisions which replaced state systems of civil and criminal justice with federal systems in situations just like those described and others in order to enforce citizens’ civil rights.³¹⁰

³⁰⁴ Professor Achtenberg shows that Congress discussed the problem of vexatious lawsuits and prosecutions in at least three different contexts: the debates on amendments to the Habeas Corpus Suspension Act, the debates on the Civil Rights Act of 1866, and the report and hearings of the Joint Committee on Reconstruction. Achtenberg, *supra* note 300, at 337–42.

³⁰⁵ CONG. GLOBE, 39th Cong., 1st Sess. 1366–67 (1866).

³⁰⁶ General Orders No. 3, *quoted in* CONG. GLOBE, 39th Cong., 1st Sess. 1834 (1866).

³⁰⁷ *See id.*

³⁰⁸ *See* General Orders No. 7, *quoted in* CONG. GLOBE, 39th Cong., 1st Sess. 1834 (1866).

³⁰⁹ DONALD NIEMAN, *TO SET THE LAW IN MOTION: THE FREEDMEN’S BUREAU AND THE LEGAL RIGHTS OF BLACKS* 179–89 (1979).

³¹⁰ *See infra* notes 319–325 and accompanying text.

L. Civil Rights Act Opponents Attack Displacement of State Administration of Justice

Opponents attacked section 3 on federalism grounds, because it completely supplanted state laws in administering civil and criminal justice. Senator Saulsbury, for example, objected that all civil and criminal cases in which a black person might be called as a witness in a state that prohibited black testimony in state courts would have to be tried in federal court.³¹¹ In addition, Saulsbury argued that the removal provision of section 3 “is flagrantly unconstitutional,” because it gave to the federal courts exclusive jurisdiction to carry state law into effect. He insisted that this provision violated Article III of the Constitution.³¹² He gave as an example an action of ejectment against a free Negro who was forbidden by state law to testify in state court. “In such a case as that, this bill authorizes the circuit or district court of the United States to take cognizance of that action of ejectment, and the state courts are excluded from its consideration.” This hypothetical case did not arise under the Constitution, laws, or treaties of the United States, to which “alone the courts of the United States have jurisdiction,” Saulsbury insisted. “If there is one principle more clearly recognized than another, it is that the Federal courts will not attempt to administer the State laws, and neither will the State courts attempt to administer the Federal laws.” Saulsbury explained further, “a Federal court will not apply to an act a punishment created under the statute of a State. It will not execute the criminal laws of a State, and you cannot confer upon it jurisdiction to do so, because its jurisdiction is defined and limited in the [U.S.] Constitution.”³¹³

Even worse, section 3’s “cause affecting a party” provision potentially deprived state courts of jurisdiction even in cases in which only whites

³¹¹ Except where otherwise noted, the following account is taken from CONG. GLOBE, 39th Cong., 1st Sess. 479 (1866).

³¹² U.S. CONST., Art. III, § 2, cl. 1 (defining the judicial power of the United States).

³¹³ CONG. GLOBE, 39th Cong., 1st Sess. 480 (1866). President Johnson vetoed the Civil Rights Bill, in part, on this theory of federalism and constitutional delegation. Whenever a black American commits “murder, arson, rape, or any other crime” in states that denied blacks any right secured by the Civil Rights Act, “all protection and punishment through the courts of the States are now taken away,” and they are transferred to the federal courts, the President protested. He denied that Congress had the power to confer this jurisdiction on federal courts, insisting that Article III limited federal judicial power to cases arising under the Constitution, treaties, and laws of the United States. *Id.* at 1680. Senator Reverdy Johnson, the leading Senate authority on the Constitution, more broadly complained that section 3 of “the [Civil Rights] bill goes upon the theory that there is but one Government created by the Constitution, having all legislative power and all judicial power within the limits of every State. The whole criminal code of the States, therefore, is hereby abolished.” *Id.* at 1778. *See also id.* at 599 (statement of Sen. Davis) (objecting that section 3 provides for the removal of cases from the state courts into the federal courts in cases arising under state law and relating to local transactions); *id.* at 1782 (statement of Sen. Cowan) (objecting that local contract and property disputes that should be settled in state courts under state law must now be resolved in federal courts under section 3, which also transferred to federal courts the prosecution of “ordinary crimes and offenses”).

are parties. In a hypothetical assault by a white person against another white person in which the victim introduces the testimony of “twenty white men” to prove it, Saulsbury maintained, the defendant, who “does not want to suffer, and at least if he has to suffer he wishes to put it off as long as possible,” will call a black witness, who “knows nothing about the case,” just to get the case into federal court.³¹⁴ Because in his home state of Delaware blacks were prohibited from testifying in such cases unless there were no white witnesses, the judge would bar the black witness from testifying. Under the Civil Rights Act, Saulsbury complained, the case would be transferred to Federal court. Saulsbury concluded, “The passage of this bill is the last act to convert a Federal Government with limited and well-defined powers into an absolute, consolidated despotism.”³¹⁵

In the House, Representative Kerr, speaking for the bill’s opponents, agreed that the Civil Rights Act usurped the states’ police powers, specifically, the states’ power to regulate their own internal affairs, to select their own public policies, to enact and administer their own criminal codes.³¹⁶ Kerr insisted that, if Congress had the constitutional authority to enact a law like the Civil Rights Act, Congress could constitutionally dispense with the states entirely. If Congress could determine who could sue and testify in state courts, he argued, it could determine who could not. If Congress could order the transfer of lawsuits and criminal prosecutions from the state courts to federal courts as this bill provided, it could “dispense with the State courts entirely.” In fact, Kerr objected, under section 3 “the people of the States are denied all remedy in their own courts, but must seek it at great expense and inconvenience, almost equivalent to its denial, in the Federal Courts.”³¹⁷ Kerr admonished that Congress was dictating to each state how to protect their citizens’ right to life, liberty and property under due process of law and was “usurp[ing] the functions of the State government.” In short, if the principles of the Civil Rights

³¹⁴ Legal counsel for two white defendants who were convicted in federal court of a brutal murder of four blacks ranging in age from seventeen to ninety made the same argument to the United States Supreme Court in a challenge to the federal court’s section 3 jurisdiction in the case. *See Blyew v. United States*, 80 U.S. (13 Wall.) 581, 586–88 (1871). In a decision based on statutory construction, the Supreme Court affirmed this argument in limiting section 3 jurisdiction in criminal cases to prosecutions involving black defendants. The Court dismissed the case against the white defendants, holding that the language of section 3 did not confer jurisdiction on federal courts in criminal prosecutions of white defendants. Nevertheless, the Supreme Court upheld section 3 jurisdiction in criminal prosecutions brought under state law against black defendants. *See id.* at 592–95.

³¹⁵ *Id.* at 481. *See also id.* at 601 (statement of Sen. Guthrie) (warning that “when you overturn the State governments, interfere by your legislation with their laws, supersede their courts, keep up a constant contention between the individuals and the tribunals, you are destroying the unity of this Government, and the purposes for which the States were formed”).

³¹⁶ Except where otherwise noted, the following account is taken from *id.* at 1270. For Representative Kerr’s actual words, see *supra* notes 195–196.

³¹⁷ *Id.* at 1271.

Bill were sound, Congress “could erect a great centralized, consolidated despotism in this capital.”³¹⁸

M. Civil Rights Act Supporters Defend Replacing State Civil and Criminal Jurisdiction with Federal Civil and Criminal Jurisdiction

The Act’s House and Senate supporters not only did not deny opponents’ charges that the Civil Rights Act supplanted state civil and criminal process, they defended the incursion into the states’ police powers. They asserted that the Civil Rights Act simply authorized federal legal officers to do what President Johnson had authorized the military to do to protect the civil rights of U.S. citizens.³¹⁹

For example, Representative Wilson quoted from military orders issued by General Grant and other field commanders to protect military personnel and white Unionists from retaliatory civil suits and criminal prosecutions and the freedmen from discriminatory prosecutions in the local courts.³²⁰ “By these orders,” Wilson summarized, “‘State laws,’ ‘State courts,’ municipal ordinances and courts, are crushed and pushed out of the way to make room for the perfect enjoyment by the citizen of a portion of his rights.” He noted that these were “some of the very things which this bill proposed to secure through the powerful operations of the courts.” Wilson insisted that “we may provide by law for the same ample protection through the civil courts that now depends on the orders of our military commanders.”

Senator Trumbull made the same arguments in the Senate to defend Congress’s substitution of federal for state civil and criminal process. Trumbull rebutted the President’s veto message of the Civil Rights Bill, in which the President objected that section 3 took away from the states the administration of criminal justice as it applied to black Americans in states that denied them any of the rights secured by section 1.³²¹ The senator argued, in part, that orders issued by military commanders under the President’s authority provided the very remedies for civil rights violations that were provided in the Civil Rights Bill.³²² “Adequate remedy can be provided without assailing the independence of the judiciary, says the President,” Trumbull remarked. Trumbull read military orders which directed that cases concerning “persons of color” be taken from state and given “the same rights and remedies accorded to all other persons” in

³¹⁸ *Id.*

³¹⁹ *See id.* at 1759 (statement of Sen. Trumbull); *id.* at 1119 (statement of Rep. Wilson); *id.* at 1124 (statement of Rep. Cook); *id.* at 1153 (statement of Rep. Thayer); *id.* at 1158, 1160 (statement of Rep. Windom); *id.* at 1263 (statement of Rep. Broomall); *id.* at 1833–35 (statement of Rep. Lawrence).

³²⁰ The following account is taken from *id.* at 1119.

³²¹ *See id.* at 1680.

³²² Except where otherwise noted, the following account is taken from *id.* at 1759–60 (quoting General Sickles’s order dated Mar. 4, 1866).

such courts, that judges and other state officials who disobeyed these orders shall be punished, that all laws shall apply equally to all inhabitants in order “[t]o secure the same equal justice and personal liberty to the freedmen as to other inhabitants.” Trumbull admonished, “Why, sir, here are the very provisions of this bill embodied in military orders issued under presidential authority.” In view of these actions, Trumbull chided, “who is breaking down the barriers of the States, and making strides toward centralization?”³²³

The actions the Union army took to protect the freedmen, white Unionists, and Union soldiers from civil rights violations thus provided the framers and supporters of the Civil Rights Act with another model, in addition to the Fugitive Slave Acts of 1793 and 1850, for enforcement provisions to secure the rights of Americans.³²⁴ The Civil Rights Act authorized federal legal officers and federal courts to displace state systems of civil and criminal justice and to remedy civil rights violations regardless of the source of the violation, not simply to remedy state violations of civil rights. Senator Trumbull explained that, with respect to a black American, federal jurisdiction was not conferred, and a federal cause of action did not arise, simply “because there was on the statute-book of the State a law discriminating against him.”³²⁵ If the discriminatory statute or custom “was held valid [the claimant] would have a right to remove [his cause] to a Federal court—or, if undertaking to enforce his right in a State court he was denied that right, then he could go into the Federal court.” Thus, it was the violation of the right, not a particular state statute or custom, that was the wrong the Civil Rights Act was directed to remedy. However, judicial enforcement of a discriminatory state statute or custom provided conclusive evidence of the civil right denial.

The framers’ remedy for the denial of the equal protection of the laws was to confer jurisdiction on the federal courts to dispense the protection that was being denied.³²⁶ The state denial of a civil right or its failure to enforce the right served as the prerequisite for section 3 federal jurisdiction to try civil and criminal cases arising under state law and those cases removed from the state courts. The state action did not limit the scope of the federal court’s subject matter jurisdiction or its remedial powers. That

³²³ Representative Lawrence similarly replied to President Johnson’s veto message complaining that the Civil Rights Bill “invades the judicial power of the State,” stating, “I answer it is better to invade the judicial power of the State than permit it to invade, strike down, and destroy the civil rights of citizens. A judicial power perverted to such uses should be speedily invaded.” *Id.* at 1837.

³²⁴ See Achtenberg, *supra* note 300, at 337–42; Kaczorowski, *supra* note 159, at 580–81; Kaczorowski, *supra* note 137, at 875 nn.48–49; Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1987*, 98 *YALE L.J.* 541, 547–57 (1989).

³²⁵ Except where otherwise noted, the following account is taken from CONG. GLOBE, 39th Cong., 1st Sess. 1759 (1866) (statement of Sen. Trumbull).

³²⁶ See *supra* notes 311–318 and accompanying text.

is, Congress did not limit the federal court's jurisdiction or remedial powers to the discriminatory state action. Rather, Congress remedied the civil rights by authorizing the federal courts to adjudicate and decide the substantive issues in the civil suit or criminal prosecution in which the party was unable to enforce or was denied a civil right.³²⁷ The framers of the Civil Rights Act conferred this extraordinary jurisdiction on the federal courts as one of the remedies they adopted to redress civil rights violations attributable to state action or state inaction. This extraordinary civil and criminal jurisdiction was an additional remedy to the exclusive jurisdiction section 3 conferred on federal courts to punish criminal offenses against the statute and to dispense civil remedies to redress violations of the civil rights enumerated in section 1.

Trumbull made this clear when he declared that Congress possessed the constitutional authority under the Thirteenth Amendment to authorize the federal courts to exercise jurisdiction over all cases affecting the freedmen in states where a discriminatory custom or statute prevails, if such jurisdiction were necessary to secure them in their civil rights. Trumbull stated, "I think we have the authority to confer that jurisdiction under the second clause of the [Thirteenth Amendment]. That clause authorizes us to do whatever is necessary to protect the freedman in his liberty."³²⁸ Of course, racially discriminatory statutes and customs would not have authorized white citizens to bring their claims in the federal courts under section 3.

Declaring the government's obligation to protect its citizens' personal rights, Representative Wilson similarly explained the need for the extraordinary civil and criminal jurisdiction Congress conferred on federal courts to provide federal systems of civil and criminal justice which supplanted those of the states.³²⁹ The need arose because state and local judges and executive officials in the southern states were failing to enforce and often were denying citizens' civil rights. If a state should deprive a citizen "without due process of law, of these rights, as has been the case in a multitude of instances in the past, have we no power to make him secure in his priceless possessions?" Wilson queried. "[W]hen such a case is presented, can we not provide a remedy? Who will doubt it? Must we wait for the perpetration of the wrong before acting? Who will affirm this?" Wilson then made clear that the Civil Rights Act authorized federal courts to replace those of the states and dispense the civil and criminal

³²⁷ The actions taken by the federal officers who were responsible for enforcing the Civil Rights Act on its enactment evince this understanding of the statute. They prosecuted private individuals for ordinary state crimes, such as murder, manslaughter, assault, and theft, when state or local institutions failed to bring perpetrators to justice because of racial or political animus. See KACZOROWSKI, *supra* note 262, at 9–10, 34, 38, 52–53, 135–43; see also *supra* notes 288–291 and accompanying text.

³²⁸ CONG. GLOBE, 39th Cong., 1st Sess. 1759 (1866).

³²⁹ Except where otherwise noted, the following account is taken from *id.* at 1294.

remedies to redress substantive civil rights the states were denying. “The power is with us to provide the necessary protective remedies They must be provided by the government of the United States, whose duty it is to protect the citizen in return for the allegiance he owes to the Government.” Wilson thus grounded Congress’s power and duty to civilly remedy and criminally punish violations of Americans’ civil rights in its obligation under the social contract.³³⁰

Section 3 authorized perhaps the deepest intrusion of federal legal process and displacement of state legal process of any statute Congress has ever enacted. It did not simply confer exclusive jurisdiction on the federal courts to try all civil actions and criminal prosecutions to remedy violations of the civil rights it secured. It conferred jurisdiction on the federal courts to try civil causes of action that arose under state law and to prosecute crimes committed against the penal laws of the states whenever a state failed to enforce or denied any of the civil rights secured by the statute to a party to the civil or criminal cause of action. Significantly, the Supreme Court upheld this section 3 jurisdiction.³³¹

N. Sections 4 through 10: Civil Rights Enforcement Structure Adopted from the Fugitive Slave Act of 1850

The drafters of the Civil Rights Act of 1866 copied most of the rest of the “necessary machinery to give effect to” civil rights protection from the Fugitive Slave Act of 1850.³³²

Like the Fugitive Slave Act of 1850, section 4 of the Civil Rights Act of 1866 created a federal structure to enforce the statute more effectively. It authorized federal judges to appoint U.S. commissioners to enforce the provisions of and the rights secured by the statute.³³³ Perhaps

³³⁰ See *supra* notes 99, 213, 254–257, and *infra* notes 388–391 and accompanying text for additional statements of the importance of social contract theory to the framers’ understanding of Congress’s power and obligation to secure citizens’ civil rights by enacting a statute like the Civil Rights Act.

³³¹ *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1871).

³³² Senator Trumbull so informed his colleagues, stating that the Civil Rights Bill’s enforcement provisions were “copied from the late fugitive slave act, adopted in 1850 for the purpose of returning fugitives from slavery into slavery again.” CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866). Senator Trumbull repeated that the genesis of sections 4 through 7 of the Civil Rights Act was in the Fugitive Slave Act of 1850 when Congress was deciding to pass the Civil Rights Act over President Johnson’s veto. *See id.* at 1759–60.

³³³ Civil Rights Act of 1866 § 4 ordered that, “with a view of affording reasonable protection to all persons in their constitutional rights of equality before the law . . . and to the prompt discharge of the duties of this act, it shall be the duty of” the federal circuit courts and superior courts of the territories of the United States “to increase the numbers of commissioners, so as to afford a speedy and convenient means for the arrest and examination of persons charged with a violation of this act.” *Compare* Civil Rights Act of 1866, § 4 with Fugitive Slave Act of 1850 §§ 1–4. Opponents attacked this provision as deputizing anybody to arrest a state judge who refused to admit the testimony of a black witness or a white man who infringed the civil rights secured to Negroes under this bill and to try them in federal court. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 479–80 (1866).

more importantly, section 4 imposed a duty on all federal officers, “at the expense of the United States, to institute proceedings against all and every person who shall violate the provisions of this act,” and to arrest violators for the purpose of trying them in the appropriate federal court.³³⁴

Emulating the Fugitive Slave Act of 1850, section 5 imposed the duty on all federal marshals and deputy marshals “to obey and execute all warrants and precepts issued under the provisions of this act . . . and to use all proper means diligently to execute the same.” If they failed to do so, they were subject to a fine “in the sum of one thousand dollars, to the use of the person upon whom the accused is alleged to have committed the offense.”³³⁵ Congress thus imposed a \$1,000 fine payable to the victim of a civil rights violation on federal officials who failed diligently to execute the statute.

Section 5 of the Civil Rights Act of 1866, like section 5 the 1850 Fugitive Slave Act, also authorized federal commissioners “to summon and call to their aid the bystanders or posse comitatus” of the county as may be necessary to perform their duties under the act. The 1866 statute authorized the summoning of a posse comitatus “to insure a faithful observance of” the Thirteenth Amendment.³³⁶

Section 6 of the 1866 Act was analogous to section 7 of the 1850 Fugitive Slave Act in that it subjected to federal criminal penalties any one who “shall knowingly and wilfully obstruct, hinder, or prevent any officer, or other person” from executing any warrant or process under this act or from “arresting any person for whose apprehension such warrant or process may have been issued.”³³⁷ This section also imposed criminal penalties on any one who “shall rescue or attempt to rescue such person from [federal] custody . . . or shall aid, abet, or assist any person so arrested . . . to escape from [federal] custody” or anyone who “shall harbor or conceal any person for whose arrest a warrant or process shall have been issued as aforesaid, so as to prevent his discovery and arrest after notice or knowledge of the fact that a warrant has been issued for the apprehension of such person.”³³⁸ This provision was almost identical to section 7 of the

³³⁴ Civil Rights Act of 1866 § 4. Senator Davis of Kentucky interpreted section 4 “of this unconstitutional, void, and iniquitous act” as requiring federal legal officers to institute both civil suits and criminal prosecutions on behalf of black victims of civil rights violations. CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866). Senator Cowan characterized the U.S. commissioners authorized by the bill as “paid, hired informer[s]” and “public prosecutors” who were commissioned “to pry about, and they are to see that this law is executed and that all lawgivers, all Governors, all judges, all juries, everybody who has anything to do with the administration of the State law are punished if this law be violated.” *Id.* at 1784.

³³⁵ Compare Civil Rights Act of 1866 § 5 with Fugitive Slave Act of 1850 § 5.

³³⁶ Compare Civil Rights Act of 1866 § 5 with Fugitive Slave Act of 1850 § 5.

³³⁷ Compare Civil Rights Act of 1866 § 6 with Fugitive Slave Act of 1850 § 7.

³³⁸ *Id.* Referring to the civil fine of section 5 and the criminal fine of section 6, Senator Davis complained that a federal legal officer was subject to the two penalties, noting that the Civil Rights Act “creates two separate penalties on a defaulting officer, . . . one for the benefit of the United States, and the other for the benefit of the free negro . . . [which] is

Fugitive Slave Act of 1850, which imposed penalties on anyone who prevented the arrest or harbored, concealed, rescued, or assisted the escape of fugitive slaves.³³⁹

Section 7 of the 1866 Act provided that federal attorneys, marshals, and deputy marshals were to be paid their fees for services under the Act.³⁴⁰ These fees, and the costs of arresting, housing, and feeding prisoners were to be paid out of the United States Treasury.³⁴¹

Section 8 authorized the President of the United States to reassign federal judges and legal officers to locations where they were needed to redress violations of the Civil Rights Act.³⁴² Section 9 of the Civil Rights Act authorized the President of the United States to deploy the army, navy, or militia “as shall be necessary to prevent the violation and enforce the execution of this act.”³⁴³ Although the Fugitive Slave Act of 1850 did not have a comparable military provision, it did authorize federal legal officers to remove fugitive slaves by force and at government expense to the states from which they fled if the claimant made out an affidavit that he had reason to believe that the fugitive would be rescued by force.³⁴⁴ However,

assessed in the form of liquidated damages.” CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866).

³³⁹ § 7, 9 Stat. 462, 464.

³⁴⁰ Compare Civil Rights Act of 1866, § 7 with Fugitive Slave Act of 1850 § 8.

³⁴¹ Civil Rights Act of 1866 § 7.

³⁴² § 8, 14 Stat. 27, 29. There was no analogous provision in the Fugitive Slave Act of 1850.

³⁴³ Ch. 31, § 9, 14 Stat. 27, 29 (1866). Senator Lane of Indiana defended the authorization of “the power of the military to enforce” the statute because

[n]either 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 constitutional amendment; but because we believe they will not do that, we give the Federal officers jurisdiction.

Id.

Senator Lane reminded his Senate colleagues that the military “were called upon to execute the fugitive slave law and to suppress a riot growing out of the attempt to enforce it” in Boston, a reminder of the struggle to return Anthony Burns from Boston to Virginia. CONG. GLOBE, 39th Cong., 1st Sess. 602–03 (1866). When opponents protested that this provision set up a military despotism to enforce the Civil Rights Act, Senator Trumbull answered that the Militia Clause of Article I authorizes Congress to provide for calling out the militia to aid in the execution of the laws of the United States and to prevent their violation, asserting that “the militia may be called out to prevent them from committing an act. We are not required to wait until the act is committed before anything can be done,” and citing past precedents, including the Act of Mar. 10, 1838, ch. 31, 5 Stat. 212, 214, § 8 (1838), which he quoted word for word in section 9. *Id.* at 604–05 (1866). Representative Lawrence conceded that in ordinary times it may be better to await the Supreme Court’s ultimate decision on questions regarding the constitutionality of discriminatory state law and legal process. But, he noted, “we now employ military power to reach the same results, to secure civil rights,” because the need to secure civil rights was so immediate and urgent. *Id.* at 1837. This strategy presaged the tactics Department of Justice lawyers and marshals would use to enforce the 1870 and 1871 Enforcement Acts against the Ku Klux Klan. See KACZOROWSKI, *supra* note 262; ALAN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION 383–418 (1971).

³⁴⁴ Section 9 provided that, on affidavit of the claimant that he had reason to believe

the Fillmore and Pierce administrations used the U.S. armed services to enforce the Fugitive Slave Act of 1850.³⁴⁵ The final section of the Civil Rights Act of 1866 authorized final appeals to the U.S. Supreme Court for all questions of law arising under this statute.³⁴⁶

III. THE FOURTEENTH AMENDMENT INCORPORATES THE CIVIL RIGHTS ACT OF 1866

Having thoroughly debated issues relating to citizenship, citizens' rights, Congress's power to enforce citizens' rights, and the remedies and enforcement structure to secure citizens' rights in the Civil Rights Act debates, there was relatively little debate of these issues when the proposal that became the Fourteenth Amendment was before Congress. Nevertheless, supporters and opponents of both of these measures understood that the framers and proponents of the proposed Fourteenth Amendment intended it to achieve the same objectives as the Civil Rights Act: to secure the fundamental rights of U.S. citizens. The following discussion will show that the members of the Thirty-Ninth Congress understood that section 1 of the proposed Fourteenth Amendment was intended to put the guarantees of the Civil Rights Act of 1866 into the Constitution, thereby ensuring its constitutionality and insulating it against repeal. The Act's provisions, as explained in this Article, demonstrate that Congress exercised plenary legislative power to define and enforce the rights of U.S. citizens when it enacted the Civil Rights Act of 1866, giving federal legal officers and federal judges jurisdiction that displaced that of their state counterparts in administering civil and criminal justice. Because the framers of the Fourteenth Amendment intended it to put the guarantees of the Civil Rights Act into the Constitution and thus ensure its constitutionality, they necessarily understood the Fourteenth Amendment, at a minimum, as a delegation to Congress of the plenary power to define and enforce in the federal courts the substantive rights of U.S. citizens that they had just exercised in enacting the Civil Rights Act of 1866.

that the fugitive slave would be rescued by force, it became the duty of the federal officer who held the fugitive "to remove him to the State whence he fled, and there to deliver him to said claimant, his agent, or attorney." Fugitive Slave Act of 1850 § 9. This authorization of the use of force to execute the Fugitive Slave Act was in addition to two other authorizations of the use of force: the posse comitatus provision of section 5 and the right of the claimant to seize the fugitive slave without legal process recognized in section 6. *See id.* §§ 5–6.

³⁴⁵ LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 89–90* (1957); JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 119–20* (1988); VON FRANK, *supra* note 243, at 72, 174–75.

³⁴⁶ Ch. 31, § 10, 14 Stat. 27, 29 (1866).

A. *Civil Rights Act Debates and the Proposed Fourteenth Amendment*

The original version of the proposed Fourteenth Amendment was worded as a delegation of plenary congressional power to secure the privileges and immunities of U.S. citizens and to secure the equal protection of the rights of life, liberty, and property of all persons.³⁴⁷ The proposed amendment borrowed language from the Necessary and Proper Clause, the Comity Clause, and the Fifth Amendment and expressly delegated to Congress the “power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.”³⁴⁸ Opponents of the proposed amendment and the Civil Rights Bill argued that the Bingham amendment demonstrated that supporters of these measures believed that Congress did not have the power to enact the statute and that the proposed amendment rendered the statute unnecessary.

The House of Representatives took up the original Bingham amendment immediately before it considered the Civil Rights Bill. Representative Andrew J. Rogers, Democrat from New Jersey, led the opposition. Rogers’s comments are especially authoritative, because he was a member of the House Judiciary Committee from which the Civil Rights Bill was reported, and he also served on the Joint Committee on Reconstruction which drafted the proposed Fourteenth Amendment.³⁴⁹ He noted the equivalence between the two measures even before the House of Representatives took up the Civil Rights Bill. Rogers acknowledged that Bingham intended his proposal “so to amend [the Constitution] that all persons in the several States shall by act of Congress have equal protection in regard to life, liberty, and property.”³⁵⁰

³⁴⁷ Representative John A. Bingham introduced the original version of his proposed constitutional amendment in the House of Representatives on February 26, 1866. CONG. GLOBE, 39th Cong., 1st Sess. 1033–34 (1866). The House debated the proposal for three days in February 1866. It decided to return Bingham’s proposal to committee on February 28, and the next day, March 1, it began debate on the Civil Rights Bill. The Senate had debated the Civil Rights Bill from January 29 through February 2, 1866, when it passed the bill and sent it to the House of Representatives. The Senate did not debate the original version of Bingham’s amendment. Justice Kennedy acknowledged that the original Bingham proposal delegated plenary power to enforce fundamental rights when he noted that it was replaced with the language that is now in the Constitution. He asserted that, “Under the revised Amendment, Congress’s power was no longer plenary but remedial.” *City of Boerne v. Flores*, 521 U.S. 507, 522 (1997).

³⁴⁸ CONG. GLOBE, 39th Cong., 1st Sess. 1033–34 (1866). The Joint Committee of Fifteen on Reconstruction adopted this version on February 3, 1866. BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39TH CONGRESS, 1865–1867, at 61 (photo. reprint 1969) (1914). Cf. U.S. CONST. art. I, § 8, cl. 18; U.S. CONST. art. IV, § 1; U.S. CONST. amend. V.

³⁴⁹ CONG. GLOBE, 39th Cong., 1st Sess. 1120 (1866); KENDRICK, *supra* note 348, at 196–97.

³⁵⁰ CONG. GLOBE, 39th Cong., 1st Sess. app 133–34 (1866). See also Rogers’s comments in *id.* at 135.

When the House began debate on the Civil Rights Bill three days later, Rogers maintained that Bingham had offered his proposed amendment to provide Congress with the constitutional authority “to pass this [Civil Rights] bill,” because it was intended to grant Congress the power ““to make laws which shall be necessary and proper to secure to the citizens of each State all the privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the right of life, liberty, and property.””³⁵¹ He asserted that the Civil Rights Bill and Bingham’s proposed amendment were identical in objectives and scope and that Bingham’s amendment authorized all of the remedies and guarantees contained in the Civil Rights Bill: “There is no protection or law provided for in that constitutional amendment which Congress is authorized to pass by virtue of that constitutional amendment that is not contained in this proposed act of Congress which is now before us.” Rogers claimed that Bingham’s amendment implied that the Republican members of the Joint Committee on Reconstruction, including Representative Bingham, believed that a constitutional amendment was necessary to empower Congress to enact the Civil Rights Bill. He claimed that those who supported the Civil Rights Bill were about to enact a statute they knew to be unconstitutional.³⁵²

Republican supporters of Bingham’s proposed amendment, such as Burton C. Cook, Republican from Illinois and member of the House Judiciary Committee, conceded that both measures were intended to protect the freedmen in their civil liberties and that the Bingham Amendment, if adopted, would delegate to Congress the power to enact the Civil Rights Act, but insisted that Congress was empowered to enact the statute even without Bingham’s amendment.³⁵³ However, Cook noted that Rogers had opposed Bingham’s proposed constitutional amendment, which would have given Congress the power to enact the Civil Rights Act. “[Rogers] is for the protection of these men, but he is against every earthly mode that can be devised for protecting them,” Cook chided.³⁵⁴

Supporters argued that both the statute and the constitutional amendment were needed to secure citizens’ rights. Representative Thayer, for example, explained that Bingham’s amendment put the protections afforded by the Civil Rights Act into the Constitution. “I approve of the

³⁵¹ *Id.* at 1120 (quoting Bingham’s proposed constitutional amendment). Except where otherwise noted, the following account is taken from *id.*

³⁵² *See also id.* at 1155 (statement of Rep. Eldridge) (arguing that Bingham “admitted, or seemed to admit, when [his] resolution was under consideration, that there is by the Constitution as it now stands no warrant for the Federal Government to go into a State for the purpose of protecting the citizen in his rights of life, liberty, and property,” and “that the majority of this House have urged the necessity of the passage of [Bingham’s] resolution to amend the Constitution in order to enable them to attain the purpose sought by this bill”).

³⁵³ *See id.* at 1124.

³⁵⁴ *Id.* Representative Rogers’s speech is in *id.* at app. 133–40.

proposition of the gentleman from Ohio, [Mr. Bingham,] in which he offers to put this protection [extended by the Civil Rights Act] substantially into the Constitution of the United States.”³⁵⁵ Although he believed that Congress possessed the legislative authority to enact the Civil Rights Act without Bingham’s proposed amendment, Thayer would vote for both the Civil Rights Bill and Bingham’s proposed amendment “in order to make things doubly secure.”

Bingham, however, argued that Congress did not have the constitutional authority to enact the Civil Rights Act without his proposed amendment. He believed that the Civil Rights Bill and his proposed constitutional amendment sought to achieve the same objective: “to enforce in its letter and its spirit the bill of rights as embodied in [the] Constitution. I know that the enforcement of the bill of rights is the want of the Republic,” Bingham opined.³⁵⁶ However, because of judicial precedents interpreting the Bill of Rights as limitations upon the powers of Congress, but not upon the states, Bingham argued that Congress did not possess the constitutional power to enforce the Bill of Rights without amending the Constitution, and therefore did not possess the power to enact the Civil Rights Act. He intended to give Congress this very power, as well as the power to compel state officials to perform what Bingham said was their constitutionally imposed duty to enforce the guarantees of the Bill of Rights.³⁵⁷

Representative Wilson agreed with Bingham that the Civil Rights Bill and Bingham’s proposed constitutional amendment sought to secure to U.S. citizens the rights guaranteed by the Bill of Rights. However, applying the *McCulloch/Prigg* theories of constitutional delegation and interpretation, he argued that Congress could enforce the Bill of Rights without Bingham’s constitutional amendment. Wilson insisted that the Bill of Rights secured the rights of life, liberty, and property and the rights incident thereto, that these rights are the civil rights of U.S. citizens, and that their enforcement and protection are therefore within the jurisdiction of the United States.³⁵⁸

³⁵⁵ Except where otherwise noted, the following account is taken from *id.* at 1153.

³⁵⁶ *Id.* at 1291.

³⁵⁷ See *id.* at 1292. Bingham insisted that the Constitution required state officials to enforce its provisions. Because he believed that Congress lacked the power to force state officials to perform this duty, Bingham proposed to delegate this power to Congress. *Id.*; see also *supra* notes 254–255 and accompanying text.

³⁵⁸ Wilson said:

I find in the bill of rights which the gentleman [Bingham] desires to have enforced by an amendment to the Constitution that “no person shall be deprived of life, liberty, or property without due process of law.” I understand that these constitute the civil rights belonging to the citizens in connection with those which are necessary for the protection and maintenance and perfect enjoyment of the rights thus specifically named, and these are the rights to which this [Civil Rights] bill relates.

Id. at 1294 (quoting the Fifth Amendment). Although Wilson directed his comments to the rights guaranteed by the Fifth Amendment’s due process clause, he also stated that the

Wilson quoted *Prigg v. Pennsylvania*³⁵⁹ as authority for the theory of Congress's power to enforce the rights secured by the Bill of Rights and to remedy their violation, where Justice Story said that the constitutional guarantee of a right delegates to Congress plenary power to enforce it:

Now, sir, in relation to the great fundamental rights embraced in the bill of rights, the citizen being possessed of them is entitled to a remedy. That is the doctrine of the law as laid down by the courts. There can be no dispute about this. The possession of the rights by the citizen raises by implication the power in Congress to provide appropriate means for their protection; in other words, to supply the needed remedy.³⁶⁰

Thus, both the Republican House leader on the Civil Rights Act, Representative Wilson, and the principal author of the Fourteenth Amendment, Representative Bingham, stated that the proposed constitutional amendment and the Civil Rights Act were intended to achieve the same objective: the federal enforcement of rights secured in the Bill of Rights as rights of United States citizens.

B. House Debates on the Revised Proposed Fourteenth Amendment

The House of Representatives referred Bingham's original amendment back to the Joint Committee on February 28, 1866.³⁶¹ On April 28, after the Civil Rights Act was enacted into law, the Joint Committee, on Bingham's motion, substituted a new section for Bingham's original proposal. The substitute, with a citizenship provision added by Senator Howard on the floor of the Senate, was ratified as section 1 of the Fourteenth Amendment.³⁶² The text no longer explicitly delegated to Congress the power to enforce citizens' privileges and immunities and their right to the equal protection of the laws.³⁶³ The new version was expressed as prohi-

Civil Rights Bill was intended to remedy violations of rights guaranteed generally by the Bill of Rights. *See supra* notes 257–258 and accompanying text.

³⁵⁹ 41 U.S. (16 Pet.) 539 (1842).

³⁶⁰ *Id.* at 1294.

³⁶¹ *Id.* at 1095.

³⁶² *See supra* note 348. Section 1 provided that:

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

³⁶³ The original language provided that:

The Congress shall have the power to make all laws which shall be necessary and

bitions upon the states from infringing citizens' privileges and immunities and all persons' rights to life, liberty, and property under due process of law and the right to the equal protection of the law. Nevertheless, the express delegation of legislative power to Congress to enforce the rights secured by section 1, in addition to the power to enforce the other three sections of the Fourteenth Amendment, was moved to a new section 5.³⁶⁴ The following discussion will show that House members interpreted the new proposed constitutional amendment exactly as they did Bingham's original proposal, and that they understood that the revised amendment incorporated the Civil Rights Act of 1866 and ensured Congress's plenary power to enforce citizens' constitutional rights.³⁶⁵

Representative Thaddeus Stevens, Radical Republican from Pennsylvania, co-chair of the Joint Committee of Fifteen on Reconstruction and House floor manager of the proposed amendment, saw no change in Congress's plenary powers to define and enforce citizens' rights between Bingham's original proposed amendment and the revised proposed amendment, and he understood that the final version incorporated the Civil Rights Act of 1866.³⁶⁶ It is noteworthy that Stevens and other Bingham amendment supporters understood the revised proposed amendment, like Bingham's original proposal, as putting into the Constitution the affirmative guarantees of the Civil Rights Act. Stevens made this assertion on introducing the revised proposal, paraphrasing it as follows: "The first section prohibits the States from abridging the privileges and immunities of citizens of the United States, or unlawfully depriving them of life, liberty, or property, or of denying to any person within their jurisdiction the 'equal' protection of the laws." Stevens interpreted these prohibitions on the states from infringing fundamental rights as incorporating the Civil Rights Act and as delegating to Congress the plenary power to enact this statute and any other legislation Congress deemed appropriate to protect these rights. This interpretation of the proposed Fourteenth Amendment was analogous to the Supreme Court's interpretation of the Fugitive Slave Clause's prohibitions on the states from interfering with slave holders' right of recapture.³⁶⁷ Moreover, Stevens equated the guarantees of this proposal to other

proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

KENDRICK, *supra* note 348, at 106, 116.

³⁶⁴ Section 5 declares that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5; *see also* KENDRICK, *supra* note 348, at 115–17.

³⁶⁵ Justice Kennedy failed to consider these debates in the legislative history of the Fourteenth Amendment presented in *City of Boerne v. Flores*, 521 U.S. 507, 520–23 (1997).

³⁶⁶ Except as otherwise noted, the following account is taken from CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

³⁶⁷ *See supra* notes 34–49 and accompanying text.

constitutional guarantees of citizens' rights, such as the Bill of Rights and the Privileges and Immunities Clause of Article IV.³⁶⁸

Like the congressional Republican leaders in the Civil Rights Bill debates, Stevens explained the necessity for the constitutional amendment even though the Civil Rights Act had been enacted into law.³⁶⁹ One of the amendment's purposes, he said, was to prevent a future Congress from repealing the protections afforded to citizens by the Civil Rights Act. Acknowledging that Bingham's proposed constitutional amendment and "the civil rights bill secur[e] the same things," Stevens cautioned that a statute is not as effective a guarantee of individuals' rights as a constitutional amendment, because "a law is repealable by a majority." He predicted "that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed This amendment once adopted cannot be annulled without two thirds of Congress. That they will hardly get."³⁷⁰

Nor did the revised proposed amendment's opponents see any change in Congress's powers to define and enforce the rights of U.S. citizens. House opponents repeatedly attacked the proposal's supporters for unscrupulously enacting the Civil Rights Act and proposing a constitutional amendment to ensure the statute's constitutionality after the fact. Thus, Representative William E. Finck, Democrat of Ohio, replied to Stevens, stating, "Well, all I have to say about this [first] section is, that if it is necessary to adopt it, in order to confer upon Congress power over the matters contained in it, then the civil rights bill, which the President vetoed, was passed without authority, and is clearly unconstitutional."³⁷¹

Finck's attack brought Republican James A. Garfield of Ohio to the defense of himself and his Republican colleagues who voted for the Civil Rights Act from the imputation that they knowingly acted unconstitutionally. The future President said in rebuttal that section 1 of the proposed amendment was intended to put the Civil Rights Act into the Constitution in order to prevent Finck's party from repealing the statute when they

³⁶⁸ CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866). Stevens said that the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause "are all asserted, in some form or other in our [Declaration of Independence] or [Bill of Rights]." *Id.*

³⁶⁹ Except where otherwise noted, the following account is taken from *id.*

³⁷⁰ *See also* CONG. GLOBE, 39th Cong., 1st Sess. 2506 (1866) (statement of Rep. Eldridge) (acknowledging that Stevens's stated purpose for adopting section 1 of the proposed amendment was to prevent the repeal of the Civil Rights Act by placing the statute into the Constitution); *id.* at 2540 (statement of Rep. Farnsworth) (urging passage of section 1 on the grounds that Democrats will join with representatives of the rebel states when they are readmitted to Congress and that they will repeal the civil rights bill).

³⁷¹ *Id.* at 2461; *see also id.* at 2506 (statement of Rep. Eldridge) (insisting that section 1 of the proposed amendment was an admission that the Civil Rights Act is unconstitutional, and that Stevens's stated purpose for adopting section 1 was to prevent the Act's repeal by placing it in the Constitution). Eldridge also made similar statements regarding Bingham's original proposal earlier in the Civil Rights Bill debates. *See supra* note 352.

gained control of Congress.³⁷² Garfield stated that Finck “undertakes to show that because we propose to vote for this section we therefore acknowledge that the civil rights bill was unconstitutional.” Denying that this was the reason for Republicans’ support of section 1, Garfield asserted that “every gentleman knows [the Civil Rights Bill] will cease to be a part of the law whenever the sad moment arrives which [sic] [the Democratic] party comes into power. It is precisely for that reason,” Garfield declared,

that we propose to lift that great and good law above the reach of the plots and machinations of any party, and fix it . . . in the eternal firmament of the Constitution For this reason, and not because I believe the civil rights bill unconstitutional, I am glad to see that first section here.³⁷³

Nevertheless, other House Republicans expressed their intention of ensuring the constitutionality of the Civil Rights Act by adopting the revised proposed constitutional amendment. Representative John M. Broomall, Republican from Pennsylvania, observed that Republicans had “voted for this proposition in another shape, in the civil rights bill.”³⁷⁴ It was because Bingham expressed the view that the statute was unconstitutional without a constitutional amendment delegating to Congress the power to enact it, Broomall explained, that “we put a provision in the Constitution which is already contained in an act of Congress.” He noted, moreover, that Democrats voted against the Civil Rights Bill on the ground that it was unconstitutional. Although Broomall said he believed the Civil Rights Act was constitutional as enacted, “yet it is not with that certainty of being right that would justify me in refusing to place the power to enact the law unmistakably in the Constitution. On so vital a point I wish to make

³⁷² *Id.* at 2462. Justice Kennedy, in his discussion of the Fourteenth Amendment’s legislative history, failed to mention Garfield’s remarks quoted here, which clearly express Garfield’s understanding that the revised language of the proposed Fourteenth Amendment delegated plenary power to Congress to enforce fundamental rights. *See City of Boerne v. Flores*, 521 U.S. 507, 522 (1997). Justice Kennedy instead quoted remarks Garfield made five years later for the proposition that “[t]he revised Amendment proposal did not raise the concerns expressed earlier regarding broad congressional power to prescribe uniform national laws with respect to life, liberty, and property. (‘The [Fourteenth Amendment] limited but did not oust the jurisdiction of the State[s].’)” *Id.* at 523 (citing CONG. GLOBE, 42d Cong., 1st Sess. app. 151 (1871)). This account shows that Justice Kennedy was clearly mistaken in this conclusion. *See also infra* notes 392–396 and accompanying text.

³⁷³ CONG. GLOBE, 39th Cong., 1st Sess. 2462 (1866). Representative Thayer joined Garfield in denying that Republicans supported section 1 of the proposed amendment because they believed the Civil Rights Act was unconstitutional without it. Rather, Republicans supported it “in order, as was justly said by [Representative Garfield], that that provision so necessary for the equal administration of the law, so just in its operation, so necessary for the protection of the fundamental rights of citizenship, shall be forever incorporated in the Constitution of the United States.” *Id.* at 2465.

³⁷⁴ Except where otherwise noted, the following account is taken from *id.* at 2498.

assurance doubly sure.”³⁷⁵ He also shared his Republican colleagues’ objective of preventing the statute’s repeal by a future Congress.³⁷⁶

It is significant that no one in the House of Representatives saw any difference in the power delegated to Congress to define and enforce citizens’ rights in Bingham’s original proposed amendment and the revised proposal that became section 1 of the Fourteenth Amendment. To the contrary, even conservative Republican Representative Henry J. Raymond of New York, who voted to sustain President Johnson’s veto of the Civil Rights Bill, explicitly asserted that Bingham’s original proposed amendment, the Civil Rights Act, and the revised proposed constitutional amendment expressed the same principle: that declaring persons U.S. citizens entitled them to all of the rights, privileges, and immunities of citizens and delegated to Congress plenary power to secure citizens’ rights.³⁷⁷ In the debates relating to the Civil Rights Act, Raymond had defined the principle of the bill as securing to all Americans “whatever rights, immunities, privileges, and powers [that] belong as of right to all citizens of the United States.”³⁷⁸ Later, in the Fourteenth Amendment debates, he stated that this same principle was again before the House in the form of the proposed constitutional amendment.³⁷⁹ Raymond acknowledged that, when this principle was before the House in the form of the Civil Rights Bill, he voted against it because he believed the proposed statute was unconstitutional, and he expressed the belief that many who voted for it also believed it was unconstitutional.³⁸⁰ This principle was again before the House in this revised proposal “so to amend the Constitution as to confer upon Congress the power to pass [the civil rights bill].”³⁸¹ Declaring himself “heartily in favor of the main object which that [civil rights] bill was intended to secure,” Raymond stated, “I shall vote very cheerfully for this proposed amendment to the Constitution, which I trust may be ratified by States enough to make it part of the fundamental law.”³⁸²

It is because he agreed that these measures were essentially the same that Representative Wilson was skeptical that Raymond voted against the

³⁷⁵ See also *id.* at 2511 (statement of Rep. Eliot) (stating, “I voted for the civil rights bill . . . under a conviction that we have ample power to enact into law the provisions of that bill. But I shall gladly do what I may to incorporate into the Constitution provisions which will settle the doubt which some gentlemen entertain upon that question.”).

³⁷⁶ *Id.* at 2498 (statement of Rep. Broomall) (“If we are already safe with the civil rights bill, it will do no harm to become the more effectually so, and to prevent a mere majority from repealing the law and thus thwarting the will of the loyal people.”).

³⁷⁷ See *id.* at 2512.

³⁷⁸ See *id.* at 1266.

³⁷⁹ See *id.* at 2502.

³⁸⁰ *Id.* Raymond explained in the Civil Rights Act debates that he could not support the bill because he did not believe Congress had the authority to impose criminal penalties on state judges who enforced racially discriminatory state laws in violation of the Civil Rights Act. See *supra* notes 127, 138–141, 257 and accompanying text.

³⁸¹ CONG. GLOBE, 39th Cong., 1st Sess. 2502 (1866).

³⁸² *Id.*

Civil Rights Act because he thought it was unconstitutional. He recalled that, earlier in the session, Raymond had introduced his own bill to protect citizens in their civil rights.³⁸³ Raymond's bill simply declared that all native-born persons are "'citizens of the United States, and entitled to all rights and privileges as such.'"³⁸⁴ Raymond expressly stated that his proposed constitutional amendment would have delegated to Congress the power to secure all citizens in the enjoyment of their citizenship rights and to provide remedies for their violation. It is noteworthy that Raymond's bill and comments reflected the *McCulloch/Prigg* interpretation of Congress's implied power to enforce constitutionally recognized, constitutionally secured, and constitutionally conferred rights. He saw no inconsistency in voting against the Civil Rights Bill because he thought it was unconstitutional and later supporting the principle "of securing to all the rights of citizenship with whatever power we possessed."³⁸⁵

Wilson was no more convinced of Raymond's motivation now that the proposed Fourteenth Amendment was before the House than he was in the Civil Rights Act debates.³⁸⁶ Wilson insisted that section 1 of the Civil Rights Act embodied "its essential and vital principle. All the other sections [of the Civil Rights Act of 1866] provide merely for the enforcement of the principle embraced in the first section, which was simply a declaration that all persons without distinction of race or color should enjoy in all the States and Territories civil rights and immunities."³⁸⁷ The principle of section 1 of the Civil Rights Act, in other words, was that the federal government would guarantee and enforce the civil rights of all Americans.

As he did in the Civil Rights Act debates,³⁸⁸ Wilson argued a social contract theory of congressional power to enforce citizens' rights supported by the Supreme Court's decision in *Prigg v. Pennsylvania*.³⁸⁹ He stated that Congress possessed the power to confer citizenship and to declare citizens entitled to fundamental rights as such, which included the power to enforce the rights of citizens.³⁹⁰ In thus explaining the principle of the

³⁸³ *Id.* at 2505.

³⁸⁴ *Id.* (quoting Rep. Raymond's proposed civil rights bill).

³⁸⁵ *Id.*

³⁸⁶ Except where otherwise noted, the following account is taken from *id.* at 2512.

³⁸⁷ *Id.* at 2505.

³⁸⁸ See *supra* notes 99, 213, 256, 286–287, 329 and accompanying text.

³⁸⁹ 41 U.S. (16 Pet.) 539 (1842).

³⁹⁰ CONG. GLOBE, 39th Cong., 1st Sess. 2512–13 (1866). Wilson reasoned that, "after declaring all persons born in the United States citizens and entitled to all the rights and privileges of citizens," as Raymond's bill provided, "it would be competent for the Government of the United States to enforce and protect the rights thus conferred, or thus declared." "That being conceded, the power to protect those rights must necessarily follow." Wilson continued, "as was laid down in the well-known case of *Prigg vs. The Commonwealth of Pennsylvania*, where the Supreme Court declared that the possession of the right carries with it the power to provide a remedy." He insisted, therefore, that the remedial "sections of the civil rights bill were but the result of that power, affirmed by the Supreme Court in the [*Prigg* case], to protect the rights which the citizen possessed."

Civil Rights Act of 1866 and equating it to the principle of the revised proposed constitutional amendment, Wilson, like the unanimous Supreme Court in its interpretation of the Fugitive Slave Clause in *Prigg*, interpreted the prohibitions against state infringements of individual rights in the revised proposed Fourteenth Amendment as a delegation of plenary power to enforce these rights. Moreover, in defending the criminal penalties the Civil Rights Act imposed on state judges and executive officers who violated citizens' civil rights and arguing that the revised proposed constitutional amendment delegated such power to Congress, Wilson, and through his agreement, Raymond, suggested that the Fourteenth Amendment empowered Congress to compel state officials to enforce federal guarantees of citizens' rights.³⁹¹

It is because the revised version of the proposed constitutional amendment, like Bingham's original proposal, attempted to incorporate the Civil Rights Act into the Constitution that Representative Rogers opposed it. He viewed the Civil Rights Act as a usurpation of the states' police power, and, by incorporating it into the proposed constitutional amendment, all of these measures were attempts by their framers to usurp and consolidate the states' police powers in the federal government. The proposed Fourteenth Amendment "is no more nor less than an attempt to embody in the Constitution of the United States that outrageous and miserable civil rights bill," Rogers stated, "which was a direct attempt to consolidate the power of the States and to take away from them the elementary principles which lie at their foundation."³⁹² At the end of the House debate on the revised proposed amendment one month later, Rogers continued to insist that the Joint Committee's proposed amendment "simply embodied the gist of the civil rights bill . . . and gave authority to Congress to pass appropriate legislation to enforce the amendment."³⁹³ He protested that the revised proposed amendment represented a radical change in American federalism, which intruded upon and consolidated in the federal government traditional state police powers, a view shared by his Democratic colleagues.³⁹⁴

³⁹¹ For a discussion of the framers' intent to compel state judges and executive officers to enforce the guarantees of the Civil Rights Act, see *supra* notes 245–264 and accompanying text.

³⁹² CONG. GLOBE, 39th Cong., 1st Sess. 2538 (1866). Rogers's remarks explicitly contradict Justice Kennedy's suggestion that the revised amendment did not raise the federalism concerns that Bingham's original proposal aroused. *City of Boerne v. Flores*, 521 U.S. 507, 523 (1997). President Johnson stated in his veto message that he could not sign the Civil Rights Bill because of similar federalism concerns. The President's veto message is briefly quoted in *supra* note 200 and accompanying text. For the full text of the President's veto message, see CONG. GLOBE, 39th Cong., 1st Sess. 1679–81 (1866).

³⁹³ CONG. GLOBE, 39th Cong., 1st Sess. app. 229 (1866).

³⁹⁴ See, e.g., *id.* at 2260–64 (statement of Rep. Finck); *id.* at 2500 (statement of Rep. Shanklin); *id.* at 2538, app. 230–31 (statement of Rep. Rogers); *id.* at 3147 (statement of Rep. Harding of Kentucky).

Opponents of the revised proposed amendment also attacked it because it delegated to Congress the power to define and enforce the rights of U.S. citizens that Congress had just exercised in enacting the Civil Rights Act under the Thirteenth Amendment. Thus, Representative Charles E. Phelps of Maryland declared that “The ‘privileges or immunities’ of citizens are such as Congress may by law ascertain and define.”³⁹⁵ He “presumed” that “it would be for Congress to define and determine by law in what the ‘privileges and immunities’ of citizens of the United States consist,” just as Congress defined the rights of emancipated blacks under the authority of the Thirteenth Amendment. However, he differentiated between “civil rights” and “privileges and immunities, arguing that the proposed constitutional amendment was a covert Republican scheme to secure Negro suffrage.”³⁹⁶

C. Senate Debates on the Revised Proposed Fourteenth Amendment

The Senate did not debate the proposed Fourteenth Amendment until after Congress had enacted the Civil Rights Act of 1866. Additionally, the Senate did not debate Bingham’s original proposal, but only considered the revised Bingham Amendment. Nevertheless, like members of the House, senators equated the Civil Rights Act and the revised proposed amendment. Senators noted the connection between the two measures as soon as the Fourteenth Amendment debates began. Senator Jacob Howard, a member of the Joint Committee of Fifteen on Reconstruction, opened debate on the revised proposed amendment on May 30, 1866, introducing an amendment to the revised Bingham Amendment that added the Citizenship Clause.³⁹⁷ The citizenship provision stated that “[a]ll persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside.”³⁹⁸ Howard declined to discuss this citizenship amendment because “the question of citizenship has been so fully discussed in this body [during the Civil Rights Bill debates] as not to need any further elucidation, in my opinion.”³⁹⁹ He simply asserted, “This amendment . . . is simply declaratory of

³⁹⁵ *Id.* at 2398. Phelps’s statement directly contradicts Justice Kennedy’s conclusion that the revised version of the amendment was intended to deprive Congress of the power to define the substance of citizens’ rights. See *Boerne*, 521 U.S. at 523–24.

³⁹⁶ See CONG. GLOBE, 39th Cong., 1st Sess. 2398 (1866).

³⁹⁷ CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866). Howard served as the floor manager because Senator William P. Fessenden, co-chair of the Joint Committee, was sick the day the proposed amendment came up for debate in the Senate. KENDRICK, *supra* note 348, at 311.

³⁹⁸ *Id.* at 2890.

³⁹⁹ *Id.* As part of the exhaustive congressional debate on the nature and rights of U.S. citizens that had preceded his introduction of the citizenship amendment, Senator Howard had explained his conception of the privileges and immunities of U.S. citizens, as “the ordinary rights of freemen;” which “include personal rights guaranteed and secured by the first eight amendments to the Constitution.” *Id.* at 2765. See *supra* notes 115–223 and accompanying

what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States.”⁴⁰⁰

Senator Howard’s comment explains why Congress gave so little attention to the Citizenship Clause of section 1 of the Fourteenth Amendment, which the framers understood delegated to Congress plenary power to define and enforce the fundamental rights of U.S. citizens. The framers had also amended section 1 of the Civil Rights Act of 1866 with a Citizenship Clause, which defined and conferred citizenship on all Americans, and limited the protective guarantees of section 1 only to citizens of the United States. They said they made these changes precisely to ensure that Congress possessed the power to enact the Civil Rights Act and to ensure that black Americans would be recognized as U.S. citizens and receive the federal protection of their civil rights that the statute provided to all citizens.⁴⁰¹ Supporters repeatedly proclaimed that U.S. citizenship entitled the individual to the natural rights of all freemen. The citizen being entitled to these rights, Congress possessed plenary power to enforce and protect citizens’ rights.⁴⁰²

Legislators made the same arguments in the Fourteenth Amendment debates. Thus, Senator John Conness of California supported the addition of the Citizenship Clause to section 1 of the proposed amendment, complaining that “the Mongolian” was a victim of crimes committed with impunity because he was prohibited from testifying in California state courts.⁴⁰³ He understood the Citizenship Clause as a declaration that persons born in the United States are citizens of the United States, and, as such, they are “entitled to civil rights.”⁴⁰⁴ Conness expressed his satisfaction that it therefore provided “that the children born here of Mongolian parents shall be declared by the Constitution of the United States to be entitled to civil rights and to equal protection before the law with others,” as rights conferred by this clause.⁴⁰⁵ Senator James R. Doolittle of Wisconsin, on the other hand, wanted an express exclusion of Native Americans from the Citizenship Clause precisely because “citizenship, if con-

text for an analysis of the framers’ understanding of the rights of U.S. citizenship and Congress’s power to enforce these rights.

⁴⁰⁰ CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866). *Accord id.* at 3031 (statement of Sen. Henderson) (stating that “this [citizenship] section will leave citizenship where it now is”). The Citizenship Clause produced a debate over what groups were included and excluded from U.S. citizenship, a debate similar to that which ensued in the debates relating to the Civil Rights Bill. While Republicans argued that citizenship was open to all peoples, most Democrats argued that American citizenship should be restricted to white Europeans to protect them from races they regarded as inferior. *See, e.g., id.* at 498–500, 504–07, 523, 528–31, 575, 1776–77, 1780–81.

⁴⁰¹ *See supra* notes 159–162 and accompanying text.

⁴⁰² *See id.*

⁴⁰³ *See* CONG. GLOBE, 39th Cong., 1st Sess. 2892 (1866).

⁴⁰⁴ *See id.*

⁴⁰⁵ *Id.*

ferred, carries with it, as a matter of course, the rights, the responsibilities, the duties, the immunities, the privileges of citizens, for that is the very object of this constitutional amendment to extend."⁴⁰⁶ In extending these privileges, immunities, and duties of citizenship, the Citizenship Clause delegated to Congress the authority to enforce these privileges, immunities, and duties.⁴⁰⁷ Doolittle then equated the proposed Fourteenth Amendment and the Civil Rights Act, stating that the Civil Rights Act "was the forerunner of this constitutional amendment, and to give validity to which this constitutional amendment is brought forward, and which without this constitutional amendment to enforce it has no validity so far as this question is concerned."⁴⁰⁸ Senator Henderson, citing various authorities, including Chief Justice Taney's opinion in *Dred Scott*,⁴⁰⁹ argued that U.S. citizenship entitles Americans to "all the personal rights, privileges, and immunities guaranteed [sic] to citizens of this 'new Government,'" and, when such citizens "desired to remove from one State to another they had a right to claim in the State of their domicile the 'privileges and immunities of citizens in the several States.'"⁴¹⁰

However, the Constitution had failed to define citizenship and to specify who is entitled to citizens' rights and privileges. Section 1 of the Fourteenth Amendment was intended to fill this constitutional gap. Thus, Senator Reverdy Johnson acknowledged that "very serious questions have arisen, and some of them have given rise to embarrassments, as to who are citizens of the United States, and what are the rights which belong to them as such; and the object of this amendment is to settle that question."⁴¹¹ Acknowledging this gap, Representative Joseph H. Defrees of Indiana noted that the Citizenship Clause addressed and resolved this problem.

Section one indisputably fixes the character of those who are entitled to be regarded as citizens of the United States or citizens of the several States, and secures to all life, liberty, and property, and places all persons upon an equality, regardless of their condition or color, so far as equal protection of the law is concerned. Certainly none can take exceptions to the provisions of this section.⁴¹²

The Citizenship Clause of section 1 of the Fourteenth Amendment, which defined and conferred citizenship on all Americans, ensured the constitu-

⁴⁰⁶ *Id.* at 2892–93.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* at 2896.

⁴⁰⁹ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 422–23 (1857).

⁴¹⁰ CONG. GLOBE, 39th Cong., 1st Sess. 3032 (1866) (quoting *Dred Scott*).

⁴¹¹ *Id.* at 2893.

⁴¹² *Id.* at app. 227.

tionality of the Citizenship Clause of section 1 of the Civil Rights Act of 1866. These legislators expressed the understanding that, in securing the status of all Americans as citizens of the United States, the Amendment's Citizenship Clause delegated plenary power to Congress to define and enforce the rights of every U.S. citizen, thus ensuring the constitutionality of all of the provisions of the Civil Rights Act. The Civil Rights Act debates also demonstrate that both proponents and opponents of the Civil Rights Act expressed the view that, in conferring citizenship, Congress entitled individuals to the rights of citizenship and to the protection of the federal government in enjoying and exercising these rights.⁴¹³

Senator Doolittle also equated Bingham's original proposed amendment, the Civil Rights Act, and the revised proposed amendment that ultimately became the Fourteenth Amendment, concluding that the revised amendment was intended, like Bingham's original amendment, to ensure the constitutionality of the Civil Rights Act of 1866.⁴¹⁴ He maintained that the Joint Committee of Fifteen on Reconstruction feared that the Civil Rights Act was unconstitutional "unless a constitutional amendment should be brought forward to enforce it." When Senator William P. Fessenden, co-chair of the Joint Committee, denied this, Doolittle argued that he had the right to infer that the Joint Committee doubted the constitutionality of the Civil Rights Act.⁴¹⁵

⁴¹³ See *supra* notes 214–220 and accompanying text. Senator Garrett Davis of Kentucky suggested that supporters understood the Citizenship Clause of the proposed amendment to be sufficient to assure the constitutionality of the Civil Rights Act and to secure the civil rights of African Americans. He asserted that

The real and only object of the [Citizenship Clause], which the Senate added to [section 1], is to make negroes citizens, to prop the civil rights bill, and give them a more plausible, if not a valid, claim to its provisions, and to press them forward to a full community of civil and political rights with the white race, for which its authors are struggling and mean to continue to struggle.

CONG. GLOBE, 39th Cong., 1st Sess. app. 240 (1866). In the Civil Rights Act debates Davis conceded that citizenship entitled the individual to all of the fundamental rights that citizens enjoy. See *supra* note 142 and accompanying text. He nevertheless objected that the Comity Clause restricted Congress's power over citizenship "to such matters as concern the citizens of different States," and insisted that Congress "has no power whatever to act in relation to the matters of this bill so far as those matters concern the citizens of a single State." CONG. GLOBE, 39th Cong., 1st Sess. 595 (1866). He objected, therefore, that "[t]he principles involved in this bill, if they are legitimate and constitutional, would authorize Congress to pass a civil and criminal code for every State in the Union." *Id.* at 1414. For additional discussion of Senator Davis's views, see *supra* notes 197–199, 248 and accompanying text.

⁴¹⁴ Except where otherwise noted, the following account is taken from CONG. GLOBE, 39th Cong., 1st Sess. 2896 (1866).

⁴¹⁵ See *id.* Doolittle asserted that Bingham had "maintained that the civil rights bill was without any authority in the Constitution," and that he proposed "to amend the Constitution so as to enable Congress to declare the civil rights of all persons." Doolittle insisted that he had a "right to infer that it was because of Mr. Bingham," other House Republicans, and members of the Joint Committee of Fifteen, to which the proposed amendment had been referred, "had doubts, at least, as to the constitutionality of the civil rights bill" that they

In the debate that ensued from Doolittle's question, Senate supporters of the Civil Rights Act of 1866 and the proposed Fourteenth Amendment, like their counterparts in the House, stated that they intended section 1 of the amendment to put the statute's guarantees into the Constitution in order to protect those guarantees from future repeal and to remove any doubt about the statute's constitutionality.⁴¹⁶ Senator Howard answered Senator Doolittle, explaining that the revised constitutional amendment was intended to put the Civil Rights Act and federal guarantees of citizenship and citizens' rights into the Constitution, placing those rights beyond the possibility of legislative repeal:

We desired to put this question of citizenship and the rights of citizens and freedmen under the civil rights bill beyond legislative power of such gentlemen as the Senator from Wisconsin [Doolittle], who would pull the whole system up by the roots and destroy it, and expose the freedmen again to the oppressions of their old masters.⁴¹⁷

The importance of the Citizenship Clause of section 1 of the Fourteenth Amendment for Congress's power to secure the rights of all Americans and the Republicans' political and constitutional theories which defined the scope of this power, has not been fully understood. According to the *McCulloch/Prigg* theory of constitutional delegation, which most congressional Republicans endorsed, in defining and conferring U.S. citizenship on all Americans, the Fourteenth Amendment delegated plenary power to Congress to define and protect citizens' rights.⁴¹⁸ And, in prohibiting the states from infringing the privileges and immunities of U.S. citizens, the Privileges or Immunities Clause implicitly recognized and secured citizens' constitutional rights, which additionally secured citizens' rights

now proposed "to amend the Constitution" in order "to give [the statute] validity and force." Indignant, Senator James W. Grimes of Iowa, a member of the Joint Committee, denied Doolittle's accusation and characterized it as "an imputation upon every member who voted for the [civil rights] bill, the inference being legitimate and logical that they violated their oaths and knew they did so when they voted for the civil rights bill." *Id.*

⁴¹⁶ Senator Luke P. Poland of Vermont elaborated this intention, stating that the Civil Rights Act and section 1 of the proposed constitutional amendment were intended to enforce the principles of republican government expressed in the Declaration of Independence and secured throughout the Constitution, an implied reference to Bill of Rights guarantees. *See id.* at 2961. Poland observed that Congress had already legislated to advance these principles when it enacted "what is called the civil rights bill." However, he also noted that "persons entitled to high consideration" had doubted and denied Congress's power to enact this statute and "to enforce principles lying at the very foundation of all republican government." Asserting the desirability of leaving no doubt as to Congress's power to enforce these principles, Poland was confident that "every Senator will rejoice" in supporting the proposed constitutional amendment which would "remove all doubt upon this power of Congress." *Id.*

⁴¹⁷ *Id.* at 2896.

⁴¹⁸ *See supra* notes 92–102 and accompanying text.

by creating a self-executing guarantee in addition to delegating plenary power to Congress to enforce the rights thus secured.⁴¹⁹ Under the Republicans' theory of constitutional interpretation, the Due Process and Equal Protection Clauses extended constitutional protection to all persons in the U.S., whether citizens or not, and delegated to Congress plenary power to enforce the rights of life, liberty, and property and the right to the equal protection of the laws for all inhabitants of the United States.⁴²⁰ Section 5 of the Fourteenth Amendment constituted an explicit delegation of plenary power to Congress to enforce citizens' and non-citizens' rights secured by section 1, thus putting Congress's power to enforce constitutionally secured rights beyond cavil.⁴²¹

Pursuant to this understanding of the Fourteenth Amendment, Congress, after the Fourteenth Amendment was ratified, re-enacted the Civil Rights Act of 1866 in section 18 of the Enforcement Act of 1870.⁴²² Congress also extended to non-citizens the civil rights secured to U.S. citizens in section 1 of the Civil Rights Act of 1866, except the right to property, in sections 16 and 17 of the Enforcement Act of 1870.⁴²³ The Senate Floor Manager of the 1870 Act was Senator William Stewart, one of the Republican senators who voted for the Fourteenth Amendment. Senator Stewart stated that securing the civil rights of non-citizens was simply extending to all American inhabitants the equal protection of the laws along with the means of enforcing this right in federal courts, just as the Civil Rights Act of 1866 had secured the civil rights of U.S. citizens:

The original civil rights bill protected all persons born in the United States in the equal protection of the laws. This bill extends it to aliens, so that all persons who are in the United States shall have the equal protection of our laws. It extends the operation of the civil rights bill, which is well known in the Senate and to the country, to all persons within the jurisdiction of the United States.⁴²⁴

⁴¹⁹ See *supra* notes 120–151 and accompanying text.

⁴²⁰ See *supra* notes 31–56, 91–102 and accompanying text.

⁴²¹ See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 43 (1866) (statement of Sen. Trumbull) (stating that the framers of the Thirteenth Amendment intended its prohibition of slavery in section 1 as a positive guarantee of liberty which delegated to Congress plenary power to enforce the natural rights of free men, and that they intended section 2 “to put it beyond cavil and dispute”).

⁴²² Ch. 114, § 18, 16 Stat. 140, 144 (1870).

⁴²³ *Id.* §§ 16–17. Recall that the framers amended the original version of section 1 of the Civil Rights Bill by narrowing its application from all inhabitants in the several states to citizens of the United States because they believed that restricting the bill's guarantees to citizens' civil rights would remove doubts over Congress's authority to enact it. See *supra* notes 124–127 and accompanying text.

⁴²⁴ CONG. GLOBE, 41st Cong., 2d Sess. 1536 (1870).

Stewart added, “The civil rights bill, then, will give the United States courts jurisdiction to enforce it.”⁴²⁵

The framers of the Fourteenth Amendment understood that it authorized Congress to extend to noncitizens the kinds of guarantees of constitutional rights and remedies to redress their violation that the Civil Rights Act of 1866 secured to U.S. citizens. The Civil Rights Act, in turn, evidences the kind of legislation the framers of the Fourteenth Amendment intended to empower Congress to enact to enforce the constitutional rights of all persons. Senator Stewart explicitly stated that the Senate Judiciary Committee deemed it Congress’s duty to put into the 1870 Enforcement Act provisions to secure to aliens the Fourteenth Amendment right to the equal protection of the laws. “For twenty years every obligation of humanity, of justice, and of common decency toward [the Chinese] people has been violated. . . in California and on the Pacific coast . . . If the State courts do not give them the equal protection of the law,” he promised, “if public sentiment is so inhuman as to rob them of their ordinary civil rights . . . we will protect Chinese aliens or any other aliens . . . and give them a hearing in our courts” to ensure they are “protected by all the laws and the same laws that other men are.”⁴²⁶

CONCLUSION

The Civil Rights Act of 1866 offers a critical insight into the framers’ understanding of the Fourteenth Amendment and the power they intended to delegate to Congress to remedy violations of constitutional rights.

⁴²⁵ *Id.* For additional statements on the meaning of “equal protection of the laws,” see *id.* and *id.* at 3807–08 (statement of Sen. Stewart) (stating that the aliens provisions that became sections 16 and 17 of the 1870 statute “giv[e] all the protection of the laws”). See also *id.* at 1536 (statement of Sen. Pomeroy) (supporting the extension of equal protection to aliens); *id.* at app. 473 (statement of Sen. Carpenter) (suggesting that the Fourteenth Amendment’s Equal Protection Clause authorizes the civil remedies and criminal penalties adopted in the various sections of the 1870 statute); *id.* at 3802 (statement of the Vice-President) (stating that “The Senate . . . inserted various propositions to enforce the fourteenth amendment . . . to put down illegal bands of marauders; To protect the equal rights of citizens under the laws; to reenact the civil rights law”); *id.* at 3871 (statement of Rep. Bingham) (stating that the Fourteenth Amendment entitles white immigrants “to the equal protection of the laws,” not only of state law but of federal law as well). *But see id.* at app. 473 (May 20, 1870) (statement of Sen. Casserly) (rejecting the understanding of proponents of the Enforcement Act of 1870 that the Fourteenth Amendment authorizes Congress to punish “the criminal or illegal acts of a private person in a State, in depriving another of his life by murder, or of his liberty by false imprisonment, or of his property by stealing it, all ‘without due process of law,’ Otherwise Congress might take to itself, under pretense of enforcing the fourteenth amendment, the entire criminal and civil jurisdiction in the States of offenses and trespasses against life, liberty, and property by private persons acting without any color of State authority.”). *Accord id.* at 3874 (statement of Rep. Beck) (stating that re-enacting the Civil Rights Act was intended to enforce the Fourteenth Amendment); app. 546 (statement of Rep. Prosser) (agreeing with Beck and the Democrats that re-enacting the Civil Rights Act was intended to enforce the Fourteenth Amendment).

⁴²⁶ *Id.* at 3658.

This Article has shown that the framers of the Fourteenth Amendment enacted the Civil Rights Act of 1866 to enforce and protect the civil rights of U.S. citizens and then incorporated it into the Fourteenth Amendment to ensure its constitutionality, to insulate it against future repeal, and to put its statutory guarantees of civil rights into the Constitution.

The framers of the Fourteenth Amendment modeled the remedies and enforcement structure of the Civil Rights Act of 1866 on the remedies and enforcement structure earlier Congresses adopted to enforce the slaveholders' constitutionally secured property right in their slaves. They legislated within the context of federal constitutional rights enforcement dating back to the nation's founding. Republicans in 1866 asserted theories of constitutional interpretation and delegation of congressional powers that the Supreme Court had articulated in explaining Congress's plenary power to enforce personal rights secured by the Constitution, theories articulated by jurists such as Chief Justice John Marshall, Chief Justice Roger B. Taney, and Justice Joseph Story and derived from *Federalist Papers* authored by James Madison.

The provisions of the Civil Rights Act demonstrate that the framers of the Fourteenth Amendment exercised plenary power to define and enforce the civil rights of U.S. citizens. But, they exercised this plenary power in a way that preserved the states' concurrent power over civil rights. In section 1 of the Civil Rights Act, the framers exercised the plenary power of a sovereign nation and defined and conferred U.S. citizenship on native-born Americans and declared that all U.S. citizens were to enjoy civil rights on the same bases as the most favored citizens enjoyed them. This provision fixed the status of all Americans as citizens and overrode any states' laws to the contrary. In defining some of the civil rights of U.S. citizens as they did, the framers preserved the state laws that regulated the manner in which these rights were enjoyed and exercised, with the exception that states could no longer discriminate on the basis of race, color, or previous condition of servitude. The framers also required that state crimes and punishments be the same for all citizens.

In section 2 of the statute, the framers adopted a criminal remedy for violations of a person's civil rights by making it a federal crime to violate the rights secured in section 1, but, again, they did so in a way that preserved the states' police power over ordinary crimes against persons and property. The framers distinguished federal crimes from ordinary crimes by restricting federal criminal penalties to persons who violated a citizen's civil rights when acting under color of law or custom and out of racial animus. This provision is one of the remedies for state-action violations of civil rights the framers of the Fourteenth Amendment adopted.

In section 3, the framers conferred exclusive jurisdiction on federal courts to remedy violations of the civil rights secured in section 1. Because section 1 secured civil rights on the basis of equal enjoyment rather than absolute enjoyment, federal civil jurisdiction was limited to viola-

tions that were motivated by some animus the framers regarded as impermissible, such as race, ethnicity, or political affiliation. Thus, ordinary civil violations of civil rights remained within state jurisdiction. Federal criminal jurisdiction was limited to violations motivated by racial animus and committed under color of law or custom. Notwithstanding these restrictions on federal jurisdiction, the framers conferred on federal courts jurisdiction directly to remedy violations of substantive rights.

The framers devised a truly extraordinary remedy for violations of civil rights caused by state action or inaction: they conferred jurisdiction on the federal courts to the exclusion of the states, to administer civil and criminal justice in actions arising under state law. Whenever a party to a civil cause of action, a victim of a crime, or a defendant in a criminal prosecution arising under state law was unable to enforce or was denied by the state any of the rights secured in section 1, the framers granted federal courts original jurisdiction to try the civil action or the criminal prosecution. The remedial structure the framers adopted to remedy violations of civil rights caused by a state's affirmative denial of a section 1 civil right, that is, state action, or by the failure of the state to enforce a section 1 civil right, in other words, state inaction, authorized federal courts and federal legal officers to supplant state courts and state legal officers and to try the underlying action. In addition, the framers provided for the removal to a federal court of any civil or criminal action commenced against a party who was unable to enforce or was denied in the state court a civil right secured by section 1. Federal courts were to try these civil actions and criminal prosecutions according to federal law, unless federal law was not sufficient to furnish suitable civil remedies and criminal punishments. In these situations, federal courts were to try these cases under state law, so long as the relevant state law was consistent with the Constitution and laws of the United States. As this Article has shown, the lower federal courts and the Supreme Court upheld this remarkable assumption by the federal government of the state's authority to enforce its own civil and criminal laws.

The Rehnquist Court has held that the framers of the Fourteenth Amendment intended to withhold from Congress plenary power to define and enforce the substantive rights it secures, and that the framers left to the states the power to enforce Americans' substantive constitutional rights. The Rehnquist Court has also concluded that the Court, not Congress, is authorized to define the rights the Fourteenth Amendment secures and to determine when these rights are violated. In its view, the framers intended to limit Congress's remedial power under the Fourteenth Amendment to correcting unjust state action. The framers thus intended to deprive Congress of the power to remedy violations of Fourteenth Amendment rights caused by the actions of private individuals.

The provisions of the Civil Rights Act of 1866 demonstrate that the Rehnquist Court's understanding of the intent of the framers of the Four-

teenth Amendment is quite wrong. In enacting this statute, the framers exercised the plenary power that the Rehnquist Court said the framers did not want Congress to have, and they adopted the kinds of remedies to redress violations of substantive rights that the Rehnquist Court said they wanted to leave to the states. Whatever justifications one might advance in support of the Rehnquist Court's state-action interpretation of the Fourteenth Amendment, the intent of its framers is not among them. To the contrary, any justification will have to be strong enough to overcome original intent.

