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Private Accountability and the Fourteenth Amendment; State Action, Federalism and Congress

*Alan R. Madry**

The great and *chief end* . . . of men's uniting into common-wealths, and putting themselves under government, *is the preservation of their [lives, liberties and estates]*.

John Locke**

The rights and duties of allegiance and protection are corresponding rights and duties . . . [Wherever] I owe allegiance to my country, there it owes me protection, and wherever my Government owes me no protection I owe it no allegiance and can commit no treason.

Cong. John Martin Broomall***

[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.

Chief Justice William Rehnquist****

* Assistant Professor, Marquette University Law School. B.A., 1974; J.D. 1981, University of Michigan. Research for this Article was generously supported by the Bradley Institute for Democracy and Public Values of Marquette University. I would also like to thank Patricia Bradford, Jacquelyn Core, Judith McMullen and Phoebe Williams for commenting on early versions of this Article, listening to the revisions, editing and in many cases pushing me much harder in directions that I might not otherwise have seen with the result that I arrived at conclusions that were greatly more satisfying. I dedicate this article to Jeff and Carly with the confidence and hope that their lives too will be much happier and more secure when everyone enjoys as fundamental rights their same opportunities.

** SECOND TREATISE OF GOVERNMENT Section 123-24 (C. B. McPherson ed., 1980) (1690) (emphasis in original).

*** CONG. GLOBE, 39th Cong., 1st Sess. 1263-64 (1866) (successfully urging enactment of the Civil Rights Act over the veto of President Andrew Johnson).

**** *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195

INTRODUCTION

The state action doctrine of the Fourteenth Amendment is more than merely a "conceptual disaster area," as Charles Black characterized it a generation ago.¹ To paint it that way, after all, is simply to complain about its lack of coherence.² The problem with the state action doctrine is far deeper. It reflects a profound ignorance of the workings of federalism and the origins and concerns of the Fourteenth Amendment, particularly the Privileges and Immunities Clause.³ In that respect, the doctrine continues to bear the scars of the *Slaughter-House Cases*⁴ of 1873.

This article seeks to resolve the quagmire of the state action doctrine by reexamining what is perhaps the most paradoxical dimension of the Supreme Court's interpretation of that illusive phrase "No State shall" which introduces all of the Amendment's guarantees.⁵ It focuses on the problem of private accountability under the Fourteenth Amendment. But that focus also, necessarily, concerns the proper and complementary roles of the Supreme Court, Congress and the states in securing the fundamental interests of citizenship against violation from any quarter.

(1989).

1. Charles L. Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967). I have argued elsewhere that in the hands of Justice Rehnquist the doctrine is in fact becoming more coherent, but even more pernicious for the effort. See Alan R. Madry, *State Action and the Obligation of the States to Prevent Private Harm: The Rehnquist Transformation and the Betrayal of Fundamental Commitments*, 65 S. CAL. L. REV. 781 (1992).

2. On the difference and relationship between coherence and truth, see Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273 (1992), and JERRY A. FODOR AND ERNEST LEPORE, *HOLISM* (1992).

3. Justice Rehnquist is to that extent correct when he holds that nothing in the Due Process Clause requires the states to protect people against people. The great error is when the Court, having found the Due Process Clause barren of such a duty, fails to look elsewhere to find it. For example, in *DeShaney*, based only on the Court's earlier decisions concerning the purpose of the Due Process Clause, Justice Rehnquist concluded: "The Framers were content to leave the extent of governmental obligation [to protect people from each other] to the democratic political processes." 489 U.S. at 195.

4. 83 U.S. (16 Wall.) 36 (1873).

5. Section 1 of the Fourteenth Amendment reads in pertinent part:

No State shall make or enforce laws 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 any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

These two distinct, though obviously related questions of state responsibility for private conduct and private accountability under the Constitution,⁶ are merely implicit in the contemporary doctrine of state action. Indeed, the thorough incoherence of that doctrine is largely attributable to the Court's failure to disentangle these issues. The Court instead determines the initial applicability of the Amendment to each circumstance using a single test which is insensitive to the nuances of either. If a state sufficiently "involves" itself in private conduct, then the private conduct is itself state action, the private party a state actor, and the conduct is subject to the standards of the Fourteenth Amendment. Correlatively, state regulation of interpersonal affairs is not subject to the Amendment unless the regulation sufficiently "involves" the state in the private conduct.⁷ Once a private party is transformed into a state actor, or the state conduct is found to be subject to the Amendment, i.e., once there is the requisite "state action" to satisfy the premise of the Amendment, the exact same standard is applied to either circumstance.⁸

Among the consequences of this approach is that in some circumstances, private parties may be sued in the federal courts directly under the Fourteenth Amendment for purely private initiatives. Indeed, as the Court has given scope to the critical notion of "involvement," a private party may be held to account even when his or her conduct was compelled by the state.⁹ The poverty of "involvement" as a standard for state and private liability is apparent as soon as one attempts to give substance to the notion. The immediate intuitive reaction is that the idea is altogether reasonable, at least as applied to the conduct of the states; if a state becomes involved in any

6. It is uncontroversial that the Fourteenth Amendment's guarantees apply to initiatives of the states. How the guarantees apply may be controversial but their applicability is not. The heart of the problem of state action then involves the two questions identified in the text. First, does the Fourteenth Amendment apply at all to private conduct. That question might most accurately be expressed as follows: Does the Fourteenth Amendment create rights between people that can be vindicated in the federal courts? Second, does the Fourteenth Amendment apply to state regulation of private initiatives? Again, that question could be more technically expressed as: Does the Fourteenth Amendment create rights between citizens and their states with regard to state regulation of private conduct? In terms of the language of state action doctrine, the first question might also be phrased: Is private conduct ever state action; and the second: What state action is governed by the Fourteenth Amendment?

7. See *infra* text accompanying notes 57-58.

8. See *infra* text accompanying notes 35-56. These two inquiries are distinct. First, the conduct must be governed by the Fourteenth Amendment. It must, consistent with "No State shall," be "state action." Only when the conduct is first determined to be state action is it then subject to scrutiny under the Fourteenth Amendment. See *also supra* note 6.

9. See *infra* text accompanying notes 42-51.

conduct which violates some fundamental interest, it ought to be enjoined and held liable for any injury. However, some commentators have argued plausibly that a state is implicated in all private conduct simply by virtue of the fact that it has the power to intervene, at least by creating the disincentive of a civil remedy.¹⁰ It begs the question to respond that the state is not responsible for all private conduct, since it is precisely the function of "involvement" to carve out the domain of the states' responsibility. Obviously what is required, and what is not supplied by any merely formalistic notion of involvement, is a substantive theory of the duties of the states to mediate private conduct.

The notion of "involvement" and the Court's unitary test are also problematic when viewed from the point of view of private accountability. If involvement were interpreted as broadly as suggested in the preceding paragraph, then in its corollary application to private conduct, the breadth of the concept has the perverse effect of making every person a federal agent for every private initiative. The Court has repeatedly abjured this, however, in the name of maintaining the wall between public and private.¹¹ Finding a line short of this position, however, has proven illusive. That and the thorough incoherence of "involvement" as the doctrine's touchstone is apparent from its erratic application by the Court itself.¹²

In an earlier essay, I separated the problem of state responsibility from the problem of private accountability and examined the former.¹³ My conclusion there, that the Fourteenth Amendment should be understood to require the states to protect fundamental rights against private infringement,

10. See, e.g., Lawrence A. Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893, 894-95 (1975); Jerre C. Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347 (1963).

11. See, e.g., *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) ("[T]his Court in the *Civil Rights Cases* [citation omitted] affirmed the essential dichotomy set forth in that Amendment between deprivation by the State . . . and private conduct . . ."); accord, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

In *Lugar*, the Court added that the doctrine also "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Id.* at 936. This is simply not true. In the first place, the state action doctrine has never been interpreted as a limitation on Congress' power to create law. Secondly, even if it did limit the power of the federal government, the real consequence is to leave private conduct to the discretion of state courts. See *infra* note 60. In addition, freedom to one person may well mean a lack of freedom to someone who happens to be the victim of the freedom of the first. No freedom is expanded; at best the state has simply failed to mediate and left outcomes to the clash of private powers.

12. See *infra* text accompanying notes 40-51; Madry, *supra* note 1, at 809-12.

13. Madry, *supra* note 1.

was based upon the nature of the interests that best explain the Amendment's guarantees.¹⁴ With only slight exaggeration, any interest that might be attributed to those guarantees can be violated by a private party as well as by the state.¹⁵ The Constitution's commitment to the preservation of those interests, therefore, *prima facie* entails an obligation to protect them universally.

In this essay, I hope to expand the foundation of that conclusion and further explore its implications for private accountability and the duties of the Court, Congress and state lawmakers. Part I extends the discussion from state responsibility to private accountability. It first examines the paradoxes implicit in the Courts doctrine of private accountability. Among the forces that have shaped the present doctrine of private accountability, and motivated the scholarly debate, is the palpable need to protect the fundamental interests of people against invasion by powerful private initiatives. To open the federal courts to private action against private parties under the Fourteenth Amendment as currently conceived, however, entails accepting a theory of constitutional interpretation that no one seriously countenances. That tension, I argue, is resolved by reading "No State shall" in conjunction with the Privileges or Immunities Clause as creating a duty, running from each state to its citizens, the nature of which is that the states must intervene between private parties to protect fundamental interests. The failure of a state to provide adequate redress would be reviewable by the Supreme Court.

The soundness of this view as an account of the Fourteenth Amendment is suggested by a reinterpretation of Justice Bradley's opinion for the *Civil Rights Cases* of 1883. That opinion, aside from describing the mechanism outlined above, implicitly gave an expansive interpretation to the Privileges and Immunities Clause as the source of the fundamental right to protection

14. These are distinct dimensions. The Constitution might coherently be read not to require regulation but to nonetheless impose standards for any regulation once the state within its discretion decides to regulate. See *infra* text accompanying notes 24-26.

15. Barbara Rook Snyder has argued that the initiatives of a state are more serious than private initiatives because they represent the violation of a trust not owed by private parties to other private parties, the nature of which is that the state will always act in the best interests of its citizens. Barbara Rook Snyder, *Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 CORNELL L. REV. 1053, 1060-63 (1990). While this is certainly true, it nevertheless presumes that in both cases there is harm to a significant interest but that there is an additional harm when the interest is violated by the state. Snyder's argument does not concern itself with the intention of the framers of the Fourteenth Amendment to assure the protection of fundamental interests against all invasions.

that the states must not fail to honor and enforce.¹⁶ Following the scholarly lead of Robert Kaczorowski and others, the present Article revives the notion that the Privileges or Immunities Clause enshrines all of the fundamental interests of citizenship, including the right to be protected by the government. Thus, whereas the earlier article was based on a general sense of the interests to be protected by the Fourteenth Amendment, this Article grounds the right to government protection more concretely and specifically in a historical reading of the Privileges or Immunities Clause.

Any argument based on the Privileges or Immunities Clause must of course contend with the *Slaughter-House Cases*, decided eleven years before the *Civil Rights Cases*. Fearful of the effect that a robust Privileges and Immunities Clause would have on "the whole theory of the relations of the State and Federal government to each other,"¹⁷ *Slaughter-House* emasculated the clause and thereby removed the foundations of the *Civil Rights Cases*.

Drawing on recent scholarship on the origins of the Fourteenth Amendment, Part II argues that the Republican framers debated the effect of the Privileges or Immunities Clause on the scheme of federalism, that they intended to alter the original allocation of discretion to the states. They did so too for good reasons, consistent with the goals of federalism, and in a manner that affected the functions of federalism only marginally, if at all. The argument of Part II extends the insights of recent scholarship on the Privileges and Immunities Clause by focusing on the fundamental right to protection by the government and its implications for our understanding of the *Civil Rights Cases* and the state action doctrine.

Part III examines in more detail the role that this view of state action leaves for Congress under Section 5 of the Fourteenth Amendment in implementing the guarantees of Section I.¹⁸ The Court's current state action doctrine renders Section 5 virtually redundant. If private conduct is itself state action under some circumstances so that it can violate the guarantees of the Fourteenth Amendment, Article III would appear adequate to endow the courts with jurisdiction over those cases. Under the procedures imagined by the *Civil Rights Cases* the principle route to vindicate the fundamental right to government protection is through an action in state court with an appeal to the Supreme Court. What then is left for Congress? The answer again was given

16. The Privileges or Immunities Clause of the Fourteenth Amendment reads in its entirety: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1, cl. 2.

17. The *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78 (1873).

18. Section 5 reads in its entirety: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

by the *Civil Rights Cases*: Congress may create a private cause of action between private parties when, because a state is likely to be unwilling to protect the interest, the Supreme Court's review would provide inadequate protection. Judgment in a private cause of action would be the premise for federal enforcement of those rights.

Part IV brings the discussion back to the concerns of *Slaughter-House* and examines the effect of the intended Fourteenth Amendment on the original strategy of federalism.

I. THE PARADOX OF CONTEMPORARY DOCTRINE AND ITS RESOLUTION

The paradox in the Court's treatment of private accountability derives from the enormous gap between what it says and what it does and its failure to offer an explanation that adequately bridges the two. *Shelley v. Kraemer*,¹⁹ for instance, early in the modern development of the doctrine, removed from the Fourteenth Amendment in no uncertain terms any concern for the way in which private parties treat other private parties. "The action inhibited by the first section of the Fourteenth Amendment," Chief Justice Vinson wrote, "is only such action as may fairly be said to be that of the States. *That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.*"²⁰ *Shelley* purported to be paraphrasing the *Civil Rights Cases* of 1883,²¹ widely regarded as the source of the current state action doctrine.²² There, Justice Bradley, writing for the majority, observed somewhat more ambiguously that: "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment."²³

Shelley itself prohibited a state from enforcing a purely private, racially restrictive deed covenant. That decision is still consistent with a view of the Fourteenth Amendment which excludes private initiatives from the scope of its protection. The prohibited conduct in *Shelley*, after all, was the *state's* enforcement of the racially restrictive covenant. *Shelley* is perhaps best

19. 334 U.S. 1 (1948).

20. *Id.* at 13 (emphasis added).

21. 109 U.S. 3 (1883).

22. See, e.g., *Shelley*, 334 U.S. at 13. It was preceded, however, by *Virginia v. Rives*, 100 U.S. 313 (1879), and *United States v. Cruikshank*, 92 U.S. 542 (1875). Most, if not all scholarly writing accepts the continuity between the *Civil Rights Cases* and the modern doctrine. See, e.g., Snyder, *supra* note 15; Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 507 (1985). But see Madry, *supra* note 1, at 786-95; *infra* text accompanying notes 71-79.

23. *The Civil Rights Cases*, 109 U.S. at 11.

interpreted as representing a moderate version of the state action doctrine, according to which the Fourteenth Amendment establishes certain interests as fundamental, but creates rights relative to those interests only against the states and regulates the states in regard to private conduct only when they decide to regulate such conduct.²⁴ When a state intervenes between private parties, it must do so in a manner consistent with those fundamental interests.²⁵ Such a doctrine is still a far cry, at least in theory, from one that would require the states to protect those interests against private invasion, and even further from a doctrine that would give aggrieved victims of private conduct a cause of action in the federal courts directly under the Constitution.²⁶

With the exception of a few isolated cases involving free speech claims,²⁷ in which the state action issues were allowed to remain unaddressed below the surface, the Court never again followed *Shelley's* approach to the Fourteenth Amendment. Undoubtedly the horrible opacity of the Court's own rationalization contributed to that opinion's subsequent neglect.²⁸ What survives of *Shelley*, beyond its baffling specter, is the dicta quoted earlier—"no shield against merely private conduct."²⁹ That dicta is now invoked talismanically, but interpreted in a way that theoretically restricts the

24. I distinguish three versions of state action theory. The first is the moderate version, associated with *Shelley v. Kraemer*, 334 U.S. 1 (1948), and described in the text above. The second is a strong version, the subject of this article, according to which the states have a constitutional duty to protect people's fundamental interests against infringement by other people. The third is the Court's current doctrine which ostensibly restricts the Fourteenth Amendment guarantees to initiatives of the states themselves, but in fact permits actions against private parties who are transformed into state actors when the state becomes involved in the private initiative. I refer to this last version as narrow state action.

25. For a more complete discussion of this interpretation of *Shelley* and the moderate theory of state action see Madry, *supra* note 1, at 795-806.

26. In practice there would be little difference between *Shelley's* moderate state action and the stronger theory of state action that would require the states to protect against private invasions of fundamental interests. This is because the only way for a state to avoid the applicability of constitutional standards to any particular dispute is to refuse to decide the dispute at all, a politically untenable position to take in most cases. Widespread refusal to entertain actions involving constitutional standards would obviously result in anarchy. See *infra* text accompanying notes 70-71 and Alexander, *supra* note 10.

27. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (citing *New York Times v. Sullivan*, 376 U.S. 254 (1964)).

28. Herbert Wechsler's critique of *Shelley v. Kraemer* is widely regarded as a classic. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). For a critical discussion of Wechsler's critique see Madry, *supra* note 1, at 804-05.

29. *Shelley*, 334 U.S. at 13.

protection of the Amendment far beyond what even *Shelley* can reasonably be read to have contemplated.

For example, while the moderate doctrine of *Shelley* would have brought within the reach of the Fourteenth Amendment a state's legitimation of creditor self-help, the Court in *Flagg Bros. v. Brooks*³⁰ refused to even consider New York's warehouseman's self-help statute³¹ as state action subject to the Constitution *unless* the statute involved the state in the execution of the remedy.³² In *Blum v. Yaretsky*³³ the Court narrowed the compass to the barest minimum. Under *Blum*, the only state conduct respecting private initiatives that implicates the Fourteenth Amendment is the encouragement or compulsion of private conduct that the states themselves are prohibited from undertaking.³⁴ *Blum*, if followed consistently, would allow states unlimited discretion to regulate private initiatives.

Despite this emphatic commitment to a narrow state action doctrine, one which theoretically excludes private conduct from the concerns of the Fourteenth Amendment, the Court, both before and after *Shelley*, has routinely allowed private actions in the federal courts against private parties and held private conduct to be subject to the same standards of the Fourteenth Amendment as applied to the states.³⁵

This paradox between theory and practice first arose in the deceptively sympathetic context of the *White Primary Cases*.³⁶ In this series of cases,

30. 436 U.S. 149 (1978).

31. N.Y. U.C.C. § 7-210 (McKinney 1964).

32. *Flagg Bros.*, 436 U.S. at 160.

33. 457 U.S. 991 (1982). *See also* Madry, *supra* note 1, at 814-24.

34. *But see* Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (O'Connor, J., dissenting, joined by Rehnquist, and Scalia, JJ.).

35. These actions are generally brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983. A finding of state action is a predicate for an action under § 1983 because the Act refers to violations of constitutional rights. The same criteria for state action also apply to the condition articulated in § 1983 that the conduct complained of be under color of state law. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 928 (1982); *infra* text accompanying notes 226-33.

36. This series of cases, all concerned with the conduct of Democratic primaries in Texas, began with *Nixon v. Herndon*, 273 U.S. 536 (1927) (Holmes, J.), in which the Court struck down a Texas statute excluding Blacks from voting in Democratic primaries. It included *Nixon v. Condon*, 286 U.S. 73 (1932) (Cardozo, J.), which invalidated a state statute authorizing racial discrimination; *Grovey v. Townsend*, 295 U.S. 45 (1935) (Roberts, J.), in which the Court refused to invalidate the party's own racial discrimination; and *Smith v. Allwright*, 321 U.S. 634 (1944) (Reed, J.), overturning *Grovey*. The *White Primary Cases* culminated in *Terry v. Adams*, 345 U.S. 461 (1953) (no majority opinion), in which the Court extended the Amendment's protections from state to county primaries.

the Court battled the efforts of the State of Texas and the Texas Democratic Party to exclude Blacks from voting in Democratic primaries. Each case was filed in federal court seeking damages against officials of the state Democratic party, an organization which the Court conceded was a private association.³⁷ On that ground, the Court might have refused to take jurisdiction of these cases and awaited appeals from the results of actions in the state courts. The cases then would have reached the Supreme Court through the same route later traversed in *Shelley* and the Court would have addressed the decisions of the state concerning the private conduct rather than the private conduct itself. Instead, beginning with *Nixon v. Condon*³⁸ in 1932 and culminating in *Terry v. Adams*³⁹ in 1953 the Court found that the conduct of the Democratic party was itself state action and the officials who administered its rules were subject to sanctions under the same constitutional standards applicable to the states.

The justification for this stretch is no less mysterious than the miracle of transubstantiation:⁴⁰ When there is a significant nexus between the private actor and the state, or involvement of the state in the private initiative, the private actor is transformed into an agent of the state and the private initiative into state action.⁴¹

37. See *Smith*, 321 U.S. at 664.

38. 286 U.S. 73 (1932).

39. 345 U.S. 461 (1953).

40. Transubstantiation is the term given by Catholic dogma to the transformation of ordinary bread and wine into the body and blood of Christ in the sacrament of the Eucharist, or Holy Communion.

41. See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) ("[P]rivate conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it."); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972) ("Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' . . . in order for the discriminatory action to fall within the ambit of the constitutional prohibition.") (quoting *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967)). In more recent cases, the Court has spoken of a required "nexus" between the private initiative and the state. See *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) ("The complaining party must also show that 'there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.'") (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). The inquiry is arguably the same and remains in all events a factual one not informed by any normative theory of state responsibility for private conduct and still based on an acceptance of narrow state action. See, e.g., *Lugar*, 457 U.S. at 939 ("Whether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation need not be resolved here."). See *Burton*, 365 U.S. at 722 ("Only by sifting facts and weighing circumstances . . .").

In the early decisions, including the *White Primary Cases*, the significant involvement was said to consist in the states' delegation of state authority to the private actor, itself a dubious characterization.⁴² Since the *White Primary Cases* the Court has found state action in private conduct and held the private actor potentially liable for damages in an array of circumstances that defy even that fiction.

It found state action, for instance, when a private carrier accepted a charter from the District of Columbia to operate a municipal subway;⁴³ when a tenant of a municipal parking authority refused to serve Blacks in its restaurant;⁴⁴ when a department store sought the assistance of the police to remove protesters from a lunch counter;⁴⁵ when lunch counters refused service to Blacks in accordance with state and municipal laws;⁴⁶ when a private club accepted a liquor license which required it to abide by its own bylaws;⁴⁷ and when a private creditor attached property with the aid of a sheriff under an invalid pretrial creditor remedy.⁴⁸ As recently as 1991 the Court held that the exercise of a peremptory challenge by a private litigant in a civil suit itself constituted state action subject to the Fourteenth Amendment.⁴⁹

In many cases the Court's reasoning is utterly baffling.⁵⁰ For example, in *Reitman v. Mulkey*⁵¹ the Court permitted a private action against the owners of a discriminatory lunch counter because the police assisted in removing protesting Blacks. The Court explained the involvement as follows:

42. These cases are especially problematic because each involved conduct at the core of the Freedom of Assembly Clause of the First Amendment. Thus, the Democratic party not only did not require any state authorization, it was largely immune from state regulation of its membership.

43. *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952) (Burton, J.).

44. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (Clark, J.).

45. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970) (Harlan, J.).

46. *Peterson v. City of Greenville*, 373 U.S. 244 (1963) (Warren, J.); *Lombard v. Louisiana*, 373 U.S. 267 (1963) (Warren, J.); *Robinson v. Florida*, 378 U.S. 153 (1964) (Black, J.).

47. *Moose Lodge v. Irvis*, 407 U.S. 163 (1972) (Rehnquist, J.).

48. *Lugar v. Edmondson Oil Company, Inc.*, 457 U.S. 922 (1982).

49. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991). The Court could have reached the same result in *Edmonson* under either the moderate theory of *Shelley*, because the Court enforced the private, discriminatory decision, or the strong theory which would have the states vigilantly guarding fundamental interests against violation by anyone. See Madry, *supra* note 1.

50. Charles Black, among others, notoriously referred to the doctrine as a "conceptual disaster area." Black, *supra* note 1, at 95.

51. 387 U.S. 369 (1967).

Although the State neither commanded nor expressly authorized or encouraged the discriminations, the State had "elected to place its power, property and prestige behind the admitted discrimination" and by "its inaction . . . has . . . made itself a party to the refusal of service . . ." which therefore could not be considered the purely private choice of the restaurant operator.⁵²

The theory behind this sort of decision making seems to be that as long as we are doing something virtuous, we don't have to offer a coherent explanation. Indeed, the Court regularly insists that a theory of its decisions would only inhibit it. In *Burton v. Wilmington Parking Authority*⁵³ the Court explained:

Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an "impossible task" which "This Court has never attempted."⁵⁴

The Court has invoked this language talismanically ever since.⁵⁵ Unfortunately, as I have argued elsewhere, the very vagueness of the doctrine has permitted the Court to sharply back away from the salutary commitments that motivated the early state action doctrine without acknowledging or justifying the departure.⁵⁶

The development of private accountability inevitably fed back on the issue of state responsibility, and the parallel evolution of both sadly confirms the worst fears of some scholars: Interpreting the Constitution to hold private parties accountable under the same standards as applied to the states will only dilute protections against the states.⁵⁷ In terms of "involvement," if a state were to become "involved" in private conduct any time it regulated a private initiative, the regulated private actors would always be state actors, subject to the Fourteenth Amendment. As agents of the state itself, they would be judged by the standards applicable to state initiatives, standards altogether

52. *Id.* at 380.

53. 365 U.S. 715 (1961).

54. *Id.* at 722.

55. For a recent occurrence *see, e.g., Lugar*, 457 U.S. at 939.

56. *See Madry, supra* note 1. *See also Lugar*, 457 U.S. 922.

57. *See, e.g., William P. Marshall, Diluting Constitutional Rights: Rethinking "Rethinking State Action"*, 80 NW. U. L. REV. 558 (1985).

inappropriate for private actors. Of course, the Court might recognize that these private "state" actors were in fact private parties with interests far different from the states. That, however, would lead to this curious paradox: The private agent would be a state agent for the purpose of bringing the agent under the Amendment, but once under would shed her state identity for the way in which the Amendment were to be applied. With that avenue closed, the only escape is to exclude from the notion of "involvement" state regulation of private initiatives. Thus, Justice Rehnquist in *Flagg Brothers, Inc. v. Brooks*, considering the legitimacy of New York's self-help creditor remedy, observed:

If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner.

Not only is this notion completely contrary to that "essential dichotomy" between public and private acts, but it has been previously rejected by this Court.⁵⁸

Which returns us to the original paradox, somewhat expanded. While the Court insists that the Fourteenth Amendment provides no shield against merely private conduct and scales back the responsibility of the states to protect citizens against citizens, it nonetheless allows actions in the federal courts directly under the Amendment against private agents, mysteriously transformed into state agents. The fiction would be no more harmful than any other constructive doctrine, though certainly still awkward, if, like those doctrines, it were supported by sound reasons consistent with the powers of the courts. However, the problem with this fiction is that the Court has never offered a sound reason for its currency, which would seem especially imperative given that the Court is simultaneously committed to a narrow interpretation of "No State shall."

The incoherent state of the contemporary state action doctrine is thus, in large part, a legacy of the *White Primary Cases*. *Shelley v. Kraemer* showed

58. 436 U.S. 149, 165 (1978) (citation omitted). Earlier in that opinion, Justice Rehnquist wrote:

It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to "state action" even though no process or state officials were ever involved in enforcing that body of law. *Id.* at 160 n.10.

one way out of the thicket, as I will discuss below, but guaranteed its own desuetude by again applying to state regulation of private initiatives the same standards as applicable to initiatives of the state itself.⁵⁹

Critical scholarly reaction to the narrow doctrine⁶⁰ has come primarily from two directions, both sharing a common origin in the pioneering work of Robert Hale⁶¹ and Harold Horowitz.⁶² Common to all of these scholars⁶³ is that though dismayed by the Court's reasoning, they applaud opening the federal courts to private actions and indeed have called for an even greater expansion of constitutional private accountability.

Down one direction, some of these scholars, apparently untroubled by the mystery of involvement, have urged that the notion of involvement be enlarged to include at least every act permitted by the state. Surely by permitting the conduct, the argument goes, the state has involved itself in the private initiative at least as much as in any other circumstance already recognized to constitute sufficient involvement.⁶⁴ After all, if the state has the power to

59. For a more thorough discussion of *Shelley* see Madry, *supra* note 1, at 795-806.

60. Of course, not all scholars are critical of the doctrine. A notable recent exception is Maimon Schwarzschild. See Maimon Schwarzschild, *Value Pluralism and the Constitution: In Defense of the State Action Doctrine*, 1988 S. CT. REV. 129. Along with Justice White in *Lugar v. Edmonson Oil Co.*, Schwarzschild makes the common mistake of finding in the state action doctrine, particularly its avowed commitment to the "essential dichotomy between public and private acts," constitutional protection for a sphere of private discretion. See *supra* note 11. But as Jesse Choper pointed out long ago:

The primary purpose of the state action requirement of the fourteenth amendment's due process and equal protection provisions is not to protect individual autonomy; that is, it is not meant to guarantee individuals immunity from all governmental regulation. Rather, the state action requirement serves to allocate power within the federal system; it limits the power of the national government vis-à-vis the states.

Jesse H. Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 WASH. U. L.Q. 757, 757-58.

61. Robert Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW GUILD REV. 627 (1946).

62. Harold W. Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957).

63. Among the most notable contributions to this scholarship in addition to the work of Professors Hale and Horowitz are at least the following: Chemerinsky, *supra* note 22; Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Bros. v. Brooks*, 130 U. PA. L. REV. 1296 (1982); Lawrence Alexander, *supra* note 10; Black, *supra* note 1; and William W. Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 DUKE L.J. 220.

64. See, e.g., Alexander, *supra* note 10.

prevent the conduct, then surely its failure to intervene implicates the state in the causal chain which resulted in the deprivation of the claimed fundamental interest. Whatever one thinks of the causal attribution, the argument still begs at least two questions: (1) whether or not the state had any duty to intervene, so that its failure to act is normatively significant, and (2) how the state's failure to discharge its legal duty can give rise to a cause of action against the private perpetrator.

The second and more radical direction is less patient with the rhetoric of involvement and more straight-forwardly concerned with the substantial power of private parties to interfere with the fundamental interests at the foundation of the Amendment's guarantees, in many cases, a power indistinguishable from the power of the states. Erwin Chemerinsky, one of the most forceful and articulate of this group, concluded:

I have argued that limiting the Constitution's protections to state action is harmful because it permits deprivations of fundamental liberties and that it is completely unnecessary because nothing valuable would be lost without it. The inescapable conclusion is that the doctrine should be banished from American law. The effect of discarding the concept of state action is that the Constitution would be viewed as a code of social morals, not just of governmental conduct, bestowing individual rights that no entity, public or private, could infringe without a compelling justification. Such an approach makes sense especially because the Constitution was designed to embody and celebrate values and to inculcate proper acceptance of them, as much as to compel governments to abide by them.⁶⁵

Some such concern is, of course, the motivation for the entire school, as it surely is for the Court as well. It is a deep and abiding concern of American scholarship. The dissolution of the public-private distinction was prominently among the preoccupations of the Legal Realists.⁶⁶ Laurence Tribe only recently observed that

particularly where ostensibly "private" power is the primary source of the coercion and violence that oppressed individuals and groups experience, it is hard to accept with equanimity a rigid legal

65. Chemerinsky, *supra* note 22, at 550.

66. See, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935).

distinction between state and society. The pervasive *system* of racial apartheid which existed in the South for a century after the Civil War, for example, thrived only because of the "resonance of society and politics . . . the close fit between private terror, public discrimination, and political exclusion." So too, where it is the state's persistent *inaction* in the face of patterns of deprivation for which state and society seem to many to bear collective responsibility, the premise that only identifiable state "action" may be called to constitutional account is deeply troubling.⁶⁷

The more radical branch avoids the danger of diluting the constitutional guarantees noted earlier by recognizing that altogether different interests are opposed when the states are accused than when private parties are alleged to have invaded a fundamental interest. Unencumbered by a doctrine that converts private actors into state actors, in each circumstance, the court must strike a balance sensitive to the different particular interests involved.⁶⁸ This position nonetheless runs headlong into the unambiguous language of the Fourteenth Amendment: "No *State* shall." To accept this position then is to disregard clear and substantial language in the Constitution. That necessarily entails accepting as a general matter a theory of constitutional interpretation and the Supreme Court's discretion that no one seriously proposes.

The debate thus presents us with the following dilemma: We either exclude from the Constitution any concern for private conduct, a choice which appears to run contrary to the fundamental commitments apparently embodied in the Fourteenth Amendment's guarantees, or we disregard the clear language of the Constitution and accept an unacceptable theory of the Supreme Court's powers, a horror which may explain in part the Court's own tortured path to a larger state action doctrine.

In an earlier essay I argued for a proposition that opens the way to a third alternative: the Fourteenth Amendment *binds the states* to protect the fundamental interests of persons against invasion by anyone.⁶⁹ Under this strong version of state action, the Fourteenth Amendment would still not itself be a source of legal rights among people. It would, however, require the states to create or recognize legal rights consistent with a proper accommodation of the fundamental interests embodied in the Amendment's guarantees and the significant opposed private interests. "No State shall" thus creates legal rights between the people and the states the nature of which is that no state shall fail to protect the fundamental interests of the people. Rather than

67. LAURENCE H. TRIBE, *Refocusing the "State Action" Inquiry: Separating State Acts from State Actors*, in CONSTITUTIONAL CHOICES 246 (1985).

68. See, e.g., Chemerinsky, *supra* note 22, at 550-51.

69. Madry, *supra* note 1.

"erect[ing] no shield against merely private conduct," the Constitution, according to the third alternative, interposes the states as a shield, with the Fourteenth Amendment as a sword at their backs. The principal route to the vindication of these rights is an action in the state courts and an appeal to the United States Supreme Court to review the actions of the state, much as in *Shelley v. Kraemer*.⁷⁰

The difference between this strong version of state action and the more moderate version that I attribute to *Shelley* is more theoretical than practical. Under the moderate version, the states are not required to regulate private conduct to protect fundamental rights. They might theoretically refuse to enforce or protect the desires of either party in any category of dispute. The result in that area would of course be anarchy and for that reason, refusing to regulate would be politically and practically out of the question. Once a state began to regulate, it would have to do so respecting the constitutionally established fundamental interests. The strong version would require the states to regulate for the purpose of protecting such fundamental interests.

The virtue of the strong version of state action is that it is both consistent with the language of the Fourteenth Amendment and it does justice to the yearning for universal protection for some interests regarded as fundamental, interests which would appear to be the foundation for the Amendment's guarantees.

It is also consistent with what is the best interpretation of the *Civil Rights Cases*,⁷¹ the presumed root of contemporary doctrine, and through the *Civil Rights Cases*, the intentions of the framers themselves. In the same way that the strong version of state action can be read from "No State shall", one can read it consistently with the dicta from the *Civil Rights Cases* quoted at the outset: "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."⁷² The prohibited state action is the failure to protect fundamental interests. Individual invasion of individual rights is not the subject matter of the Amendment only in the sense that the Fourteenth Amendment does not itself create rights between people.⁷³

70. 334 U.S. 1 (1948). While this may be the principal and in most cases sufficient route, when vindication of these rights requires additional action, or action in the state courts is futile, other routes may be made available by Congress under Section 5. See *infra* part III.

71. 109 U.S. 3 (1883).

72. *Id.* at 11.

73. The *Civil Rights Cases* considered the power of Congress under § 5 of the Fourteenth Amendment to enforce the provisions of § 1. The Court held invalid a federal statute that provided private causes of action in the federal courts against private accommodations, carriers and places of amusement that refused service because

More importantly, once we recognize the possibility for this third arrangement of rights, it is clear from the remainder of Justice Bradley's opinion that this is precisely the Court's understanding of the Fourteenth Amendment. Justice Bradley is careful to distinguish between the "invasion" of rights, the term he uses above, and the "abrogation" and "denial" of rights, which he says can only be done by the states:

In this connection, it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an *invasion* of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefore to the laws of the State where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offences but *abrogation and denial* of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy. *This*

of race. *Id.* at 25. The Court found that Congress's power was limited to the enforcement of rights given by § 1. *Id.* at 11. Those rights were against the states, not against private parties. *Id.* at 17-18. Again, there is nothing inconsistent between turning back a statute on those grounds and imposing upon states obligation to protect people from people. The relief would be through an appeal to the Supreme Court from the final decision of a state court in an action to vindicate the interest violated by the private party. Nonetheless, the Court did leave room for Congress to open the federal courts to private actions against private parties when the states failed to vindicate the interests at stake. *Id.* at 16-17. *See also infra* part III.

*abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied.*⁷⁴

The foregoing explains and gives force to other dicta appearing earlier in the opinion:

Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges⁷⁵

Justice Bradley's careful reference in these passages to "[t]he wrongful acts of an individual, unsupported by any such [state] authority, [being] simply a private wrong"⁷⁶ has been read to support the Court's doctrine of sufficient involvement.⁷⁷ The implication drawn from the dicta is that when there is state authority, then the private act is more than a private wrong, it is state action. The implication ignores, however, the rest of the language in the passage, including most significantly the juxtaposition of the notions of "invasion" and "abrogation and denial." The Court is quite clear, an individual can never abrogate or deny a right, and it is abrogation and denial of rights that is the "great seminal and fundamental wrong which was intended to be remedied."⁷⁸ As is clear from the passage, the rights⁷⁹ are abrogated when the state, among other things, fails to provide remedies for the private wrongs. There is thus no need to convert private conduct into state conduct to adequately protect fundamental interests against private initiatives. Those interests are already adequately protected at the federal level through Supreme Court review of state court decisions.

To reinterpret the *Civil Rights Cases* in this light is also to raise the specter of the *Slaughter-House Cases*,⁸⁰ decided only ten years earlier. The Court's opinion in the *Slaughter-House Cases* is not, strictly speaking, con-

74. *Id.* at 17-18 (emphasis added).

75. *Id.* at 11.

76. *Id.* at 17.

77. *See, e.g., Burton*, 365 U.S. at 722.

78. *The Civil Rights Cases*, 109 U.S. at 18.

79. The reference to "rights" in this connection is probably best understood against the then still widely accepted theory of natural rights. Natural rights would have been moral rights, or ideal legal rights, which were antecedent to any laws, including the Constitution. *See Daniel A. Farber and John E. Muench, The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENT. 235, 241-46 (1984).

80. 83 U.S. (16 Wall.) 36 (1873).

cerned with the state action doctrine, with offering an interpretation of the general language "No State shall." It is concerned rather with identifying the fundamental interests protected by the Privileges or Immunities Clause of the Fourteenth Amendment.⁸¹ Plaintiffs argued that the Clause protected the most basic interests of free citizens, including in that case, the freedom to pursue one's trade without interference from a state created monopoly.⁸²

The majority disagreed. The only interests protected by the Privileges or Immunities Clause, the Court held, are those that have their source in other provisions of the Constitution or legislation adopted pursuant to them.⁸³ They include, for example, the rights to petition the federal government, to hold its offices, to free access to its seaports and its courts.⁸⁴ The function of the Privileges and Immunities Clause then was simply to explicitly create rights between citizens and the states that would restrain the states from interfering with rights already enjoyed between citizens and the federal government. Coming to this conclusion, the Court was greatly impressed by the fact that the Privileges and Immunities Clause of Article IV, Section 2 referred to the privileges and immunities "of Citizens in the several States" while the Privileges or Immunities Clause of the Fourteenth Amendment referred only to the privileges or immunities of "citizens of the United States."⁸⁵ The former enjoyed a well recognized ambit which included fundamental rights of citizenship. The Court referred to earlier decisions, including *Corfield v. Coryell*,⁸⁶ which had declared the expansive scope of the clause. The latter, by contrast, so the Court reasoned, could therefore only refer to the rights given in the Constitution itself:

It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those citizens of the several States

81. U.S. CONST. amend. XIV, § 1, cl. 2.

82. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 54-55.

83. *Id.* at 78-79.

84. *Id.* at 79.

85. *Id.* at 73-80. U.S. CONST. amend. XIV. § 1, cl. 1.; U.S. CONST. art. IV, § 2, cl. 1.

86. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

Of the privileges and immunities of the citizen of the United States, and the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.⁸⁷

Thus, it was only the earlier clause that guaranteed anything like the most basic interests of citizens of a free society, and even then only between citizens and foreign states.⁸⁸ In sum, with the exception of a few enumerated rights,⁸⁹ the Constitution nowhere guaranteed anything like basic rights of free persons to citizens of the United States. *Slaughter-House* left the definition and protection of fundamental rights to the discretion of the states.

Thus, although the *Slaughter-House Cases* did not address the state action doctrine, that opinion nevertheless precluded the broad reading of "No State shall" which is a necessary premise for the analysis of the *Civil Rights Cases*. The Privileges or Immunities Clause, which *Slaughter-House* wrung lifeless, is the natural source of the fundamental interests that "No State shall . . . abridge." This is transparently clear from the dissents of both Justices Bradley and Field to the majority's opinion in *Slaughter-House*. Both men identified as among the privileges and immunities meant to be protected by the clause at least the following: "*Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety . . .*"⁹⁰ Bradley's opinion for the *Civil Rights Cases*, in the passages quoted earlier, similarly presupposes a vital Privileges or Immunities Clause. Among the private invasions, the

87. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 74.

88. The Privileges and Immunities Clause of Article IV assumed that the states surely would protect the fundamental interests of their own citizens and therefore excluded that concern from its ambit. *See, e.g., The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 73-77; Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 889 (1986). *See also* *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (Fifth Amendment not a delegation of affirmative authority to secure fundamental rights).

89. Of course, nothing in *Slaughter-House* affected the rights given against the states in Article I, § 10, cl. 1 against bills of attainder, ex post facto laws, and the impairment of contracts.

90. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 117 (Bradley, J., dissenting) (emphasis added) (quoting *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230)). Justice Field used identical language to identify the fundamental interests to be protected. *Id.* at 97 (Field, J., dissenting) (quoting *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230)).

authorization of which would constitute abrogation of a right, was "assault against the person, or . . . murder" and even "slander [of] the good name of a fellow citizen."⁹¹ Indeed, if the Court in the *Civil Rights Cases* had not read the Privileges or Immunities Clause broadly, the entire discussion of invasion and abrogation would have made no sense whatsoever.

Slaughter-House poses a problem for the interpretation given by the *Civil Rights Cases* beyond stare decisis. For while *Slaughter-House* relied in part on a contrast between the language of the two privileges and immunities clauses, the greater motivation by far was federalism. To interpret the Privileges or Immunities Clause as the dissents urged, the majority feared, would

fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character [and] radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people⁹²

Surely the majority is at least partially correct. To interpret the Privileges or Immunities Clause in this way is to remove from the states discretion that they enjoyed prior to the adoption of the Fourteenth Amendment. Given the Court's parsimonious understanding of the purposes of the Reconstruction Amendments, simply to eliminate slavery and place the freed slaves on an equal legal footing with whites,⁹³ there was little reason to believe that the drafters and ratifiers of the Fourteenth Amendment could have intended anything so radical. Nonetheless, the majority's interpretation essentially renders the Privileges or Immunities Clause redundant. It is consistent with the Supremacy Clause, even in the absence of the Fourteenth Amendment, that the states were prohibited from taking actions that interfered with the will of Congress or its relationship to the people.⁹⁴

91. *The Civil Rights Cases*, 109 U.S. at 17.

92. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 78.

93. *Id.* at 71 ("We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.").

94. *See id.* at 97 (Field, J., dissenting).

Is it possible that the Fourteenth Amendment is redundant? Has history inadvertently given the *Civil Rights Cases* the neglect it deserves? Perhaps the answer to the dilemma I identified earlier is that the Fourteenth Amendment does not provide private accountability for violations of fundamental interests because it assumes that fundamental interests are already well protected by the states.⁹⁵

In the next two sections, I hope to show that is not the case and that *Slaughter-House* not only constitutes a radical evisceration of the Privileges and Immunities Clause, as many other scholars have already demonstrated, but that the Court grossly misunderstood the strategy of the Fourteenth Amendment and its effect on federalism. Congress, on the other hand, well understood what it was about. It acted deliberately to reallocate the definition of fundamental rights from the states to the Constitution and it did so in a way that affected federalism only marginally. In fact, the changes introduced by the Fourteenth Amendment improved on the original institutional strategy, without changing its goals, in light of the weaknesses which the Civil War revealed. Thus, my concern is not simply to reiterate the intentions of Congress, but to demonstrate the soundness of its strategy.

II. FEDERALISM AND FUNDAMENTAL RIGHTS: THE FRAMERS' INTENT

A. *Protection of Fundamental Rights and the Constitution of 1789.*

Justice Miller was surely correct, in his majority opinion for the *Slaughter-House Cases*, that allocating the definition and protection of fundamental rights to the Constitution represented a substantial reallocation of power from the original scheme of federalism. Whether the effect was to "fetter and degrade the State governments" or whether it "radically change[d] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people"⁹⁶ is the subject of these sections. But what is not controversial is that both the Constitution of 1788 and the Bill of Rights three years later left to the states the definition and protection of most fundamental rights of citizenship. By a fundamental right of citizenship rights I mean in this context possessed by every citizen which were to be protected against infringement by anyone, the state or another private party. According to the natural law theory of the time, these were the rights for whose protection governments were formed.

95. See Chemerinsky, *supra* note 22.

96. The *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78 (1873).

The protection of such rights in the Constitution of 1789 might have taken any of at least five forms. First, the Constitution might have enumerated such rights and given jurisdiction to the federal courts to hear cases brought by private parties against anyone alleged to have violated one of the enumerated rights. This would have been the strongest protection possible. As guardian of the Constitution, the Supreme Court would play the central role in the definition and enforcement of these rights.

Second, somewhat short of this level of protection, the Constitution might have enumerated fundamental rights, but enjoined the states to protect them. The actions of the states would then be reviewable by the United States Supreme Court. The Court's role would again be paramount.

Third, the Constitution might have protected these rights only against infringement by initiatives of the new federal government and the state governments, and not against the initiatives of private persons. The protection of fundamental interests against infringement by private parties would have been left by default to the discretion of the state governments or perhaps to the state constitutions.

Fourth, the Constitution might simply have empowered Congress to define fundamental rights of citizenship and authorized the federal courts to hear actions involving allegations of infringement by anyone. This would be both more and less protection than the third alternative. More protection because at the federal level there would have been protection for fundamental interests against infringement by anyone. But also less protection, because the creation of federal rights would have been within the discretion of Congress and Congress might be more or less capacious than the framers in its conception of fundamental interests.

Finally, the Constitution might have done no more than constrain the new government from exercising its own powers in ways that infringed fundamental interests. This again would have left to the states the discretion to create rights that might be enforced ubiquitously, but it would also have left persons with no protection against initiatives of the states themselves.

In fact, the original Constitution and the Bill of Rights adopted a hybrid strategy in between the third and fifth approaches. In the Articles, but nowhere else,⁹⁷ the Constitution constrained initiatives of the states in violation of some fundamental interests. Separately from provisions addressed to Congress in Article I, the states were prohibited from passing "any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Con-

97. In *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), the Supreme Court confirmed that the Bill of Rights, as well as the Fifth Amendment, were limitations only on the national government, and neither empowered the national government to protect fundamental rights nor limited the states.

tracts.¹⁹⁸ While the Privileges and Immunities Clause of Article IV⁹⁹ may well have been premised upon, and even limited to a set of fundamental rights of citizenship, it also assumed that the states would protect those rights for their own citizens. Consequently, it merely assured the citizens of the United States of treatment in a foreign state equal to that accorded to citizens of the foreign state.¹⁰⁰ The emphasis by far, however, was on initiatives of the new federal government.¹⁰¹ The new Constitution, including the Bill of Rights, addressed the possibility of abusive initiatives in two ways. First, under the careful guidance of James Madison, the seven Articles of the Constitution organized the institutions of the government to minimize the possibility of radical usurpations. It largely limited the powers of the new government to the conduct of foreign affairs and the promotion and regulation of commerce. In the exercise of those powers, the government was further limited by the prohibitions of Article I, Section 9, against, for instance, the suspension of habeas corpus, bills of attainder and discrimination in the regulation of the ports of the various states. Famously, too, the powers of the new government were separated and assigned to different branches of the government, and within the Congress, between two distinct houses.¹⁰² Finally, representation was so arranged, by keeping the ratio of representatives to citizens large, to "refine" democracy and ensure that only the wisest held positions of responsibility in the new governments. Madison explained the operation of this refinement in Federalist No. 10:

The effect of the first difference [between direct democracy and a representative republic] is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.¹⁰³

98. U.S. CONST. art. I, § 10, cl. 1.

99. U.S. CONST. art. IV, § 2, cl. 1.

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

101. The lack of any further constraints on the states is due in part to that fact that most of the states at the time of the convention had bills of rights within their own constitutions, thus obviating the need for further constraints at the national level. See HELEN E. VEIT, ET AL., *CREATING THE BILL OF RIGHTS*, ix-x (1991). In addition, and perhaps because of the state bills of rights, some also felt that further constraints represented an undue interference with the powers of the states. *Id.* at 180.

102. See Garry Wills, *Introduction*, *THE FEDERALIST PAPERS* xvi (Garry Wills, ed., 1982).

103. *THE FEDERALIST NO. 10*, at 134 (James Madison) (Benjamin F. Wright ed., 1961). See also Wills, *supra* note 102, at xxi.

Because these representatives would largely be men of property, their presence in greater numbers would also assure protection of private property, at least against actions of the federal government.¹⁰⁴

The second way in which the Constitution constrained the new government was through the direct limitations of the Bill of Rights. Like the prohibitions of Article I, Section 9, the guarantees of the Bill of Rights further delimited the already limited powers of Congress.

What is most noteworthy about this scheme for the purposes of this essay is not what protections were granted but what were left out. The Constitution, in the Articles and the Bill of Rights, bestowed on the citizens of this country no legal rights that might be vindicated directly in the federal courts against private infringement. Nor did the Constitution charge the states with the protection of fundamental rights against private infringement. Finally, nowhere did the Constitution give Congress any power through legislation to define fundamental rights which might be vindicated against private or public bodies in the federal courts or elsewhere. Fundamental rights, if they were to be guaranteed, would have to be guaranteed by the states in their constitutions or by their legislatures.

It would be a serious mistake, though, to regard the Constitution's silence as reflecting in any way a lack of national commitment to the ideal of fundamental interests or ambivalence about the role of government in securing these rights, even if there may not have been a consensus on precisely which interests were fundamental.¹⁰⁵ Only thirteen years earlier, the Declaration of Independence had proclaimed that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That *to secure these rights, Governments are instituted among Men . . .*"¹⁰⁶ The Declaration echoed the arguments of John Locke's Second Treatise on Government:

[A]nd it is not without reason, that [man] seeks out, and is willing to join in society with others, who are already united, or

104. See generally JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987) (book review).

105. See, e.g., Andrew J. Reck, *Moral Philosophy and the Framing of the Constitution*, in LIBERTY, PROPERTY, AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION 23 (Ellen Frankel Paul and Howard Dickman eds., 1989) [hereinafter FOUNDATIONS]; Michael Kammen, "The Rights of Property, and the Property in Rights": The Problematic Nature of 'Property' in the Political Thought of the Founders and the Early Republic, in FOUNDATIONS, *supra*, at 1.

106. THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776) (emphasis added).

have a mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name, property.

. . . .

But though men, when they enter into society, give up the equality, liberty, and executive power they had in the state of nature, into the hands of the society, to be so far disposed of by the legislative, as the good of the society shall require; yet it being only with an intention in every one the better to preserve himself, his liberty and property; . . . the power of the society, or legislative constituted by them, can never be supposed to extend farther, than the common good; but is obliged to secure every man's property¹⁰⁷

A belief in the existence of natural moral rights that preceded the existence of the state and the paramount responsibility of government in securing and even promoting natural rights, nurtured in large measure by Locke, was common currency among the delegates to the convention of 1787.¹⁰⁸ Three years after the adoption of the Constitution, and expanding only on the range of rights that he had earlier discussed in Federalist No. 54,¹⁰⁹ James Madison wrote:

Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. *This being the end of government*, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*¹¹⁰

James Wilson, an ally of James Madison and among the most influential of the delegates to the 1787 convention, had earlier explained in 1790: "Government, in my humble opinion, should be formed to secure and to enlarge the exercise of the natural rights of its members; and every

107. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 123, 131.

108. On John Locke's influence among the framers, see GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 8, 283-84 (1969); MORTON WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION (1978).

109. "Government is instituted no less for protection of the property, than of the persons, of individuals." THE FEDERALIST NO. 54, at 372 (James Madison) (Benjamin F. Wright ed., 1961).

110. James Madison, NATIONAL GAZETTE (March 29, 1792), *quoted in* Kammen, *supra* note 105, at 12 (first emphasis added). While the definition of property is expanded the role of government is the same. Madison's views here resonate of the earlier view of John Locke.

government, which has not this in view, as its principal object, is not a government of the legitimate kind."¹¹¹

The absence of ubiquitous protection for fundamental rights in the Constitution reflected, rather, both the limited purposes of the federal government and more importantly, as this essay will explore in more detail later,¹¹² the abiding, and in this case influential, desire of the anti-federalists to preserve the states as the bulwarks of liberty and natural right. The result of these intentional omissions was to leave completely to the constitutions of the states and the discretion of the state legislatures the definition of fundamental rights and their protection. The anti-federalist Luther Martin, for example, argued at the Philadelphia convention:

At the separation from the British Empire, the people of America preferred the Establishment of themselves into thirteen separate sovereignties instead of incorporating themselves into one: to these they look up for the security of their lives, liberties, & properties: to these they must look up—The federal Govt. they formed, to defend the whole agst. foreign nations, in case of war, and to defend the lesser States agst. the ambition of the larger¹¹³

It was the states that were to do "the primary business that governments are supposed to do."¹¹⁴ Gordon Wood, too, has noted that "[e]ven to some eager Federalists, the new central government, as much of a consolidation as it may have been, still seemed to be concerned with 'objects of a general nature' and calculated to leave the preservation of individual rights to the states."¹¹⁵ With the relatively few exceptions noted above, and those dealing with the treatment of foreign citizens, the framers by and large assumed that the states would sufficiently guaranty individual liberties against all violations.¹¹⁶

111. THE WORKS OF JAMES WILSON 592 (Robert Green McCloskey ed., 1967). See also NEDELSKY, *supra* note 104, at 103 n.39.

112. *Infra*, part III.

113. See 1 THE COMPLETE ANTI-FEDERALIST 15 (Herbert J. Storing ed., 1981).

114. *Id.* at 15.

115. WOOD, *supra* note 108, at 536.

116. See Reck, *supra* note 105, at 30; Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 293 (1988).

*B. Fundamental Rights and the
Antebellum Debates*¹¹⁷

The conduct of the southern states, however, leading to secession, during the Civil War and following it into reconstruction, strained credulity. For many in the North, including both the radical abolitionists and more moderate antislavery Republicans, the continued existence of slavery itself belied the integrity of the southern states to protect the natural rights of persons. Some located the source of a natural human right to freedom in religion. The Rockford Register, for example, declared that the equality of man was "a truth not obvious to the senses, but one that is hidden in God, and revealed to those only who in all sincerity approach Him."¹¹⁸ Joshua Giddings, abolitionist congressman from Ohio, held that certain rights are "an element of the human soul; they cannot be alienated by the individual; nor can any association of

117. The arguments of this section and the next rely greatly on and generally follow the work of Daniel Farber and John Muench, Robert Kaczorowski, James Kettner and Eric Foner. See Daniel A. Farber and John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMM. 235 (1984) [hereinafter Farber and Muench]; Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986) [hereinafter Kaczorowski]; JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870* (1978) [hereinafter KETTNER]; ERIC FONER, *RECONSTRUCTION, AMERICA'S UNFINISHED REVOLUTION, 1863-1877* (1988) [hereinafter FONER].

My own conclusions from the historical record differ from theirs, however, in a number of important respects. Professor Farber and Mr. Muench correctly understand that the intent of the Fourteenth Amendment was to empower the federal government to protect the fundamental rights of citizens. They incorrectly assume, as Professor Kaczorowski notes, that those rights were directed only to initiatives of the states. Kaczorowski, *supra*, at 867 n.12 (citing Farber and Muench, *supra*, at 271 and n.138). The great value of Professor Kaczorowski's work is to show that the intent was much broader: it was to reallocate from the states to the federal government the power to define and protect fundamental rights against invasion by anyone.

Professor Kaczorowski, however, fails to give due regard to desire of the Republican Congress, arrived at only late in the debates, to place fundamental rights even beyond the discretion of Congress. He thus incorrectly views the purpose of the Fourteenth Amendment as securing principally Congress's authority to protect fundamental rights. Kaczorowski, *supra*, at 867. It is one purpose of this article to show that the definition and protection of fundamental rights is principally in the hands of the Supreme Court, through the review of state decisions implementing fundamental rights, with Congress playing a supporting, though nonetheless critical, role.

118. H. PERKINS, *NORTHERN EDITORIALS ON SECESSION* 505 (1942), *quoted in* Farber and Muench, *supra* note 117, at 248.

men, or any earthly power, separate the humblest of the human race from them."¹¹⁹

Others worked heroically to find equal natural rights for slaves among the convictions of the founding fathers.¹²⁰ Still others, Lincoln among them, looked to the Declaration of Independence as the place and time when natural law principles were secured in the nation's fundamental positive law. In the campaign of 1858 Lincoln repeatedly attacked Douglas with the high principles of the Declaration:

I adhere to the Declaration of Independence. If Judge Douglas and his friends are not willing to stand by it, let them come up and amend it. Let them make it read that all men are created equal except negroes. Let us have it decided whether the Declaration of Independence, in this blessed year of 1858, shall be thus amended.¹²¹

Whatever the source of their belief, however, all agreed that the institution of slavery was a violation of natural law and a violation of the essential obligations of the southern states to protect the natural rights of all persons. At the same time as he insisted that slaves shared the same God-given rights as all humans, Giddings argued that governments were "authorized to legislate only for the protection of the rights which God has conferred on mankind."¹²² John Bingham, later to play a central role in giving the Fourteenth Amendment its final shape, agreed: "[Government's] primal object must be to protect each human being within its jurisdiction in the free and full enjoyment of his natural rights."¹²³

Concern for the protection of fundamental interests was not limited to slaves, however. Robert Kaczorowski has observed:

Republicans perceived the South as having rejected natural rights in its assault upon human rights and democratic government. They

119. CONG. GLOBE, 35th Cong., 1st Sess. app. 65 (1858), *quoted in* Farber and Muench, *supra* note 117, at 248 n.43.

120. *See* Farber and Muench, *supra* note 117, at 248-49.

121. THE POLITICAL DEBATES BETWEEN ABRAHAM LINCOLN AND STEPHEN A. DOUGLAS (Part I) (G. Putnam ed., 1913) 175, *quoted in* Farber and Muench, *supra* note 117, at 250.

122. CONG. GLOBE, 35th Cong., 1st Sess. app. 65 (1858), *quoted in* Farber and Muench, *supra* note 117, at 252.

123. CONG. GLOBE, 34th Cong., 3d Sess., app. 139 (1857).

saw the rejection as a threat to American freedom generally, not merely the freedom of the former slaves.¹²⁴

Antebellum debates in Congress and the debates that presaged passage of the Thirteenth Amendment are replete with condemnations of Southern violations of free speech and press and attacks and economic intimidation directed at abolitionists and federal officers.¹²⁵ The Republicans in Congress loudly denounced the efforts of the proslavery government of Kansas to stifle antislavery debate. William Seward indicted the Kansas legislature for making it "a crime to think what one pleased, and to write and print what one thought."¹²⁶ Bingham, too, challenged the Kansas legislature: "Before you hold this enactment to be law, burn our immortal Declaration and our free-written Constitution, fetter our free press, and . . . put out the light of that understanding which the breath of the Almighty hath kindled."¹²⁷ Senator Wilson included among the evils of slavery violent attacks on abolitionists, gag orders in Congress, seizure of colored seamen in the South and assaults on those who attempted to defend them.¹²⁸ To the Republicans, the battle for the South was no less than "a struggle . . . that pitted nationalism and individual liberty against states' rights and tyranny."¹²⁹

The struggle of North and South, crystallized over slavery and secession, implicated constitutional issues at the level of its very warp and woof. Did Congress have the authority to protect southern slaves? Did it have the authority to intervene between states and their citizens, or between citizens themselves? These questions were of obvious fundamental relevance when Lincoln issued the Emancipation Proclamation in 1863¹³⁰ and when Congress passed the Civil Rights Act of 1866.¹³¹ But the debates over slavery were not conceptually separate from the battle over secession. In the minds of both sides, these constitutional issues were philosophically framed in the terms of even more fundamental questions about sovereignty and allegiance. The power of a government to determine and defend fundamental rights went

124. Kaczorowski, *supra* note 117, at 879 (citation omitted).

125. See Farber and Muench, *supra* note 117, at 253, 257; Kaczorowski, *supra* note 117, at 875, 877-78, and sources cited therein.

126. CONG. GLOBE, 35th Cong., 1st Sess. 941 (1858), *quoted in* Farber and Muench, *supra* note 117, at 253.

127. CONG. GLOBE, 34th Cong., 1st Sess. App. 124 (1856), *quoted in* Farber and Muench, *supra* note 117, at 253.

128. CONG. GLOBE, 38th Cong., 1st Sess. 1320-21 (1864). See also Farber and Muench, *supra* note 117, at 257 and n.94.

129. Kaczorowski, *supra* note 117, at 879.

130. 12 Stat. app. ii (1863).

131. Act of Apr. 9, 1866, 14 Stat. 27.

hand in hand with the right to expect the allegiance of the citizenry and both of those issues were aspects of a government which represented a sovereign people.¹³² If that sovereign people were the people within their states, then that government had the duty and the necessary power to define and protect fundamental interests. It followed too, that those people, through their governments could determine for themselves whether the conditions of their confederation had been violated and that they were entitled to depart the union.¹³³

The resolution of this issue to those involved was a matter of historical fact: Was the Constitution adopted by one sovereign people, or by thirteen sovereign peoples? Southern apologists, heirs to the states-rights philosophy of the Anti-Federalists and the early Republicans, insisted that the Constitution retained the orientation of the earlier Articles of Confederation. The citizens of each state, within their states,¹³⁴ retained their sovereignty and Independence under the new Constitution. The Constitution created no more than a federation of the several sovereign states. The federal government was their agent with limited powers adapted strictly to its narrow purposes.¹³⁵ From the peculiar metaphysics of the time, this view entailed the power in the people of each state, through their governments, to determine when the compact had been violated and when a state was therefore justified in withdrawing from the union.¹³⁶ On this view too, because the citizens of the states also owed their principle allegiance to the states as the government of a sovereign people, it was the states, and not the federal government, which in turn had the power, and indeed duty, to protect the rights of their citizens.¹³⁷ The Southern ideal of citizens sovereign within their states was reflected unequivocally in the preamble to the Constitution of the Confederacy framed soon after secession: "We, the people of the Confederate States, each State acting in its sovereign and independent character, in order to form a permanent federal government, establish justice, insure domestic tranquillity,

132. See Kaczorowski, *supra* note 117, at 872-73; KETTNER, *supra* note 117, at 334-51. Sovereignty itself was understood as the preeminent and comprehensive political power, not just within the scope of particular powers. Lincoln, reflecting the common understanding, defined sovereignty "as "a political community without a political superior.'" Kaczorowski, *supra* note 117, at 873 (citation omitted).

133. KETTNER, *supra* note 117, at 334-35; Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1452-54 (1987); Kaczorowski, *supra* note 117, at 873.

134. See KETTNER, *supra* note 117, at 335-51; Amar, *supra* note 133, at 1452-55.

135. See Amar, *supra* note 133, at 1452; Kaczorowski, *supra* note 117, at 873 and sources cited therein.

136. KETTNER, *supra* note 117, at 338.

137. KETTNER, *supra* note 117, at 338 and sources cited therein; Kaczorowski, *supra* note 117, at 873.

and secure the blessings of liberty to ourselves and our posterity—invoking the favor and guidance of Almighty God—do ordain and establish this Constitution for the Confederate States of America."¹³⁸

Adhering to the same metaphysical view of sovereignty as entailing certain necessary features, President Lincoln and northern Republicans differed from their southern antagonists principally in insisting that sovereignty lay in the people of the nation as a whole. Indeed, many, including Lincoln, argued that after 1788, the states had no status outside of the Constitution: "The States have their status in the Union, and they have no other legal status. If they break from this, they can do so only against law and by revolution."¹³⁹ The position of the northern Republicans was succinctly summarized by James Kettner: "Under the Constitution southerners were citizens of the United States, receiving protection from the national government, owing allegiance to the supreme law of the land, and legally obliged to submit to the will of the majority."¹⁴⁰

The terms of this debate, particularly the linkage of sovereignty with allegiance and allegiance with an obligation to offer protection, may sound odd to modern ears. We have become inured to legal positivism¹⁴¹ and skeptical of arguments from naturally necessary features of abstract legal notions, notions which are the product of our imaginations and subject to being reimagined whenever we realize a more useful way of thinking about our problems. We are less likely to talk in terms of some preeminent sovereignty and its correlative allegiance and more likely to talk in terms of particular enumerated or penumbral rights and powers with any conflicts

138. THE CONSTITUTION OF THE CONFEDERATE STATES OF AMERICA, Preamble. See also KETTNER, *supra* note 117, at 335-36.

139. KETTNER, *supra* note 117, at 339 (quoting Message to Congress, July 4, 1861).

140. KETTNER, *supra* note 117, at 340.

141. Even at the time, Antebellum courts were treating natural law claims with growing caution. See Farber and Muench, *supra* note 117, at 245-46. Lincoln and more moderate Republicans embraced natural law merely as interstitial to the law on the books. *Id.* at 247 ("For [Lincoln], natural law was like the law of nations, interstitial and capable of being displaced by positive law."). That belief in part accounted for the ability of moderate Republicans, like Lincoln, to countenance the legitimacy of slavery in the South while arguing for its exclusion from the territories. See also *id.* at 237, 240. The evolution of the reconstruction amendments itself, culminating with the adoption of the Fourteenth Amendment, illustrates the tension between the strong claims of natural lawyers for inherent national powers and the recognition that the country's positive fundamental law, the Constitution, did not authorize Congress or the Supreme Court to protect fundamental interests. See *supra* text accompanying notes 97-105.

between exercises of overlapping jurisdiction determined by the supremacy clause.

The debates, though clearly conducted by reference to historical understanding, were shockingly devoid of apparent familiarity, in more than the vaguest sense, with the discussions of the framers of 1789 on matters of federalism.¹⁴² Those framers, sensitive to, indeed embroiled in, the demands of federalism, carefully and intentionally left to the states the principal authority for determining and defending fundamental rights.¹⁴³

Nonetheless, despite their terms, these debates reveal a real and practical preoccupation with the ability and willingness of the southern states to protect the fundamental interests of all persons and the necessity, in light of their failure, to locate such a power in the federal government. On this score, Robert Kaczorowski has observed that "[t]he most important question for the framers was whether the national or the state governments possessed primary authority to determine and secure the status and rights of American citizens."¹⁴⁴ While the outcome of the Civil War, as a practical matter, settled for the time being the power of the southern states to secede, the debate over the constitutional authority of the federal government to protect fundamental interests had only begun.

*C. The Reallocation of Power over Fundamental Rights:
The Reconstruction Amendments and the Civil Rights Act of 1866*

Even before Lee's surrender at Richmond on April 9, 1865, Republicans began to lay the foundation for exercising their claimed powers and responsibilities of national sovereignty. In 1864, the Senate approved the Thirteenth Amendment abolishing slavery.¹⁴⁵ It failed to win the necessary two-thirds majority in the House and Lincoln made the Amendment a principle issue in the presidential campaign of that year. Following his reelection, on January 31, 1865, by a margin of slightly over two to one, the House approved the amendment and it was sent to the states for ratification, which it finally won in December, 1865. Many Republicans believed that the Thirteenth Amendment alone was sufficient to permit them fully to protect the natural rights denied to Blacks under slavery. In the Republican linkage of protective power with allegiance, citizenship was the linchpin. But it was precisely citizenship, indeed the mere possibility of citizenship, that Justice Taney earlier had denied

142. See Farber and Meunch, *supra* note 117, at 241 and n.10.

143. See *infra* text accompanying notes 278-80.

144. Kaczorowski, *supra* note 117, at 866-67.

145. "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." U.S. CONST. amend. XIII, § 1.

to the black race in his infamous opinion in *Scott v. Sanford*.¹⁴⁶ Were freed Blacks to be made citizens of the United States, Taney reasoned, "they would be entitled to all of these privileges and immunities in every State, and the State could not restrict them; for they would hold these privileges under the paramount authority of the Federal Government" ¹⁴⁷ Taney, however, could not believe that the founders had intended the possibility of Blacks becoming citizens. He wrote that Blacks were "not included, and were not intended to be included, under the word 'citizens' in the Constitution, and [could] therefore, claim none of the rights and privileges which that instrument provides for and secures to the citizens of the United States."¹⁴⁸ He concluded that Blacks "had no rights which the white man was bound to respect; and . . . the negro might justly and lawfully be reduced to slavery for his benefit."¹⁴⁹

Though the Thirteenth Amendment by its terms did not grant citizenship to the slaves freed by its ratification, many in the Republican party felt it was unnecessary. Citizenship was entailed by the grant of freedom. In the first federal court decision interpreting the force of the Thirteenth Amendment,¹⁵⁰ for example, Supreme Court Justice Noah Swayne, relying on many of the same sources cited by Republican law makers, summarized the Republican theory of national citizenship incorporated in the amendment. He wrote that the Thirteenth Amendment "trenches directly upon the power of the states and of the people of the states."¹⁵¹

Before the Amendment was adopted, "the power [to define the status and rights of citizenship] belonged entirely to the states."¹⁵² "The Thirteenth Amendment 'reversed and annulled the original policy of the Constitution.'¹⁵³ Looking to English treatises and the common law of both England and the United States, he reasoned that "[t]he term 'citizen,' as understood in our law, is precisely analogous to the term subject, in the [English]

146. 60 U.S. (19 How.) 393, 404 (1857). For a more thorough discussion of *Dred Scott* on these points see Kaczorowski, *supra* note 117, at 886-87, 894-95.

147. *Dred Scott*, 60 U.S. (19 How.) at 423.

148. *Id.* at 404.

149. *Id.* at 407.

150. *United States v. Rhodes*, 27 F. Cas. 785 (C.C.D. Ky. 1867) (No. 16,151). *Rhodes* concerned the validity and interpretation of the Civil Rights Act of 1866, enacted on the basis of the power granted congress in the second section of the Thirteenth Amendment. For a more thorough discussion of *Rhodes* and its consideration of the Civil Rights Act of 1866, see Kaczorowski, *supra* note 117, at 900-02.

151. *Rhodes*, 27 F. Cas. at 788.

152. *Id.* at 790.

153. Kaczorowski, *supra* note 117, at 901 (quoting *Rhodes*, 27 F. Cas. at 794).

common law"¹⁵⁴ and, as "[a]ll persons born in the allegiance of the King are natural born subjects, . . . [so] all persons born in the allegiance of the United States are natural born citizens."¹⁵⁵ He concluded, therefore, "that the emancipation of a native born slave by removing the disability of slavery made him a citizen."¹⁵⁶

Events following the end of hostilities only reinforced the already dire necessity of federal action if civil rights were to be established in the South. Eric Foner has written that "[v]irtually from the moment the Civil War ended, the search began for legal means of subordinating a volatile black population that regarded economic Independence as a corollary of freedom and the old labor discipline as a badge of slavery."¹⁵⁷ Local governments adopted ordinances intended to limit the mobility of blacks and segregate them outside of towns, except as servants. Calls for state-wide control of black labor culminated in the enactment of the Black Codes. These laws defined the rights and powers of the freed slaves. They empowered blacks to acquire property, marry, enter into contracts, sue and be sued and testify in legal actions involving other blacks. Their hallmark, however, was the limitations they placed on the economic options of Blacks. Mississippi required all Blacks to have, in January of each year, written evidence of employment for the upcoming year. Any Black who left a job before the expiration of his or her contract, forfeited wages already earned and was subject to arrest by any white citizen. South Carolina prohibited Blacks from following any occupation but that of farmer or servant except by paying a substantial annual tax. Blacks were required to sign annual contracts that provided for labor from sunup to sundown and a ban on leaving the plantation without the

154. *Rhodes*, 27 F. Cas. at 788 (quoting *State v. Manuel*, 20 N.C (4 Dev. & Bat.) 20, 26 (1839)), cited in Kaczorowski, *supra* note 117, at 901.

155. *Rhodes*, 27 F. Cas. at 789, cited in Kaczorowski, *supra* note 117, at 901.

156. *Id.* Based on his interpretation of the Thirteenth Amendment, Justice Swayne went so far as to nullify the provision of the Civil Rights Act of 1866 granting citizenship to the newly freed slaves. He held: "the provision of the [Civil Rights Act of 1866] conferring citizenship was unnecessary, and is inoperative." *Id.* Senator Trumbull, who was later to be a principle proponent of the Civil Rights Act, explained in a speech following passage of the Act that "[i]t was the generally received opinion that, after the adoption of the constitutional amendment abolishing slavery, all native-born persons were citizens. . . . [Therefore,] every inhabitant of the land has secured to him all the rights pertaining to citizenship." Collected in *Scrapbook in the Civil Rights Bill 79* (E. McPherson ed., n.d.), in EDWARD MCPHERSON PAPERS container 99 (collection available in the Library of Congress), quoted in Kaczorowski, *supra* note 117, at 897 n.153.

157. FONER, *supra* note 117, at 198.

permission of the employer. Vagrancy laws applied to unemployed Blacks and permitted as punishment involuntary labor on the plantations.¹⁵⁸

At about this same time the Ku Klux Klan emerged as a loosely-knit "military force serving the interests of the Democratic party, the planter class, and all those who desired the restoration of white supremacy."¹⁵⁹ Its goal was to reverse the changes wrought by Reconstruction: "to destroy the Republican party's infrastructure, undermine the Reconstruction state, reestablish control of the black labor force, and restore racial subordination in every aspect of Southern life."¹⁶⁰ Though often indiscriminate in its viciousness,¹⁶¹ the Klan particularly selected as its targets blacks who had achieved a semblance of success, either economic or political, as well as the institutions that promoted black economic and political development. The Republican party was a common target, but so were schools, churches and even individuals who treated blacks as ordinary citizens. Typical of the thousands of Klan attacks on black and white citizens, in Jackson County, Florida, the Klan murdered 150 people, among them black leaders and a Jewish merchant named Samuel Fleischman, who was "resented for his Republican views and reputation for dealing fairly with black customers."¹⁶² The Klan conducted its reign of terror virtually beyond the control of local or state governments.¹⁶³ Indeed, the very point of Klan activity, to many, was "to defy the reconstructed State Governments, to treat them with contempt, and show that they have no real existence."¹⁶⁴ Professor Foner observes that only where southern governors were able to draw on large populations of white Republicans were they able to take forceful actions against the Klan.¹⁶⁵

Relying on the newly-ratified Thirteenth Amendment and the expansive Republican theory of national citizenship and national civil rights power that informed it, the Thirty-Ninth Congress assumed as its foremost and immediate task the establishment of federal protections for fundamental civil rights.¹⁶⁶

158. *Id.* at 198-200.

159. *Id.* at 425.

160. *Id.* at 426.

161. In South Carolina, for instance, the day after Republicans won substantial political power in Laurens County, bands of whites drove 150 freedmen from their homes and murdered thirteen people. Among the victims were the newly elected white probate judge, a black legislator and others prominently connected with politics. *Id.* at 427-28.

162. *Id.* at 431.

163. *See id.* at 438.

164. *Id.* at 444 (quoting a former Confederate officer).

165. *Id.* at 439-40.

166. *See Kaczorowski, supra* note 117, at 893 (citing remarks of Shuyler Colfax, Speaker of the House of Representatives opening the Thirty-ninth Congress).

Soon after Congress convened in January, 1886, Lyman Trumbull, chair of the Senate Judiciary Committee introduced two bills. The first was intended to extend the life of the Freedman's Bureau. It would have provided for direct federal funding of the Bureau and permitted agents of the Bureau to assume jurisdiction of cases involving blacks as well as to punish state officials who denied Blacks equal civil rights.

The second, and by far the more important of the two, was the Civil Rights bill.¹⁶⁷ The language of the bill was a clear reaffirmation of the broad Republican principles of national citizenship and the rights that attend it:

All persons born in the United States, and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property as is enjoyed by white citizens . . .¹⁶⁸

Many Republican proponents of the bill believed that the it did no more than restate what was implicit in the Thirteenth Amendment. Justice Noah Swayne went so far in his opinion in *United States v. Rhodes*,¹⁶⁹ discussed earlier, as to hold the citizenship provision redundant and of no effect.¹⁷⁰

All parties to the debates, those for and against the Act, were in agreement about the radical nature of its claimed authority.¹⁷¹ The Civil

167. The bill which became the Civil Rights Act, introduced by Senator Trumbull, was presaged by a bill introduced even earlier in the Thirty-Ninth Congress, before final ratification of the Thirteenth Amendment, by Senator Henry Wilson of Massachusetts. See CONG. GLOBE, 39th Cong., 1st Sess. 39 (1865). Senator Wilson's bill was premised on the Emancipation Proclamation and therefore limited to protecting the rights of the former slaves in states that had been in rebellion. Consideration of this bill was postponed until after the ratification of the Thirteenth Amendment when legislation could be adopted to protect all persons in the United States. See Kaczorowski, *supra* note 117, at 895.

168. Ch. 31, § 1, 14 Stat. 27, 27 (1866).

169. 27 F. Cas. 785 (C.C.D. Ky. 1867) (No. 16,151).

170. See *supra* note 156.

171. This is not to suggest that there were no disagreements even within the Republican party. The radical wing of the party differed from the moderates primarily with respect to the rights and benefits to be extended to the freed slaves. The radicals, the much smaller group, would have extended suffrage and made available to the ex-slaves substantial amounts of land. The amount of land finally made available was only a fraction of that proposed and suffrage was forced to await the passage of the

Rights bill took from the states the power to define and protect the fundamental rights of citizenship, now associated with preeminent national citizenship rather than state citizenship. Senator Trumbull, introducing his bill, explained that the bill sought to secure

the liberty which a person enjoys in society [T]he liberty to which every citizen is entitled, that is the liberty which was intended to be secured by the Declaration of Independence and the Constitution of the United States originally, and more especially by the Amendment which has recently been adopted.¹⁷²

Following President Johnson's veto of the Act, Senator Trumbull urged its reenactment by drawing on the familiar Republican connection between allegiance and protection:

How is it that every person born in these United States owes allegiance to the Government? Everything that he is or has, his property and his life, may be taken by the Government of the United States in its defense . . . and can it be that . . . we have got a Government which is all-powerful to command the obedience of the citizen, but has not power to afford him protection? Is that all that this boasted American citizenship amounts to? . . . Sir, it cannot be. Such is not the meaning of our Constitution. Such is not the meaning of American citizenship. This Government, which would go to war to protect its meanest—I will not say citizen—inhabitant . . . in any foreign land whose rights were unjustly encroached upon, has certainly some power to protect its own citizens in their own country. Allegiance and protection are reciprocal rights.¹⁷³

Fifteenth Amendment. See FONER, *supra* note 117, at 239-43. On the points discussed in the text, radicals and moderates were in agreement. See *id.* at 242-43.

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

173. *Id.* at 1757. In a speech made that same year, Senator Trumbull returned to this theme with heart-rending force:

It cannot be that we have constituted a government . . . which is all-powerful to command the obedience of the citizen but has no power to afford him protection. . . . Tell it not, sir, . . . to the father whose son was starved at Andersonville, or the widow whose husband was slain at Mission Ridge, or the little boy who leads his sightless father through the streets of your city, or the thousand other mangled heroes to be seen on every side of us to-day, that this Government, in defense of which the son and the husband fell, the father lost his sight and the others were maimed and crippled, had the right to call these persons to its defense, but now has no power to protect the survivors or their friends in any rights whatever in the

In the House, Representative Broomall struck the same chord:

But throwing aside the letter of the constitution, there are characteristics of Governments that belong to them as such, without which they would cease to be Governments. The rights and duties of allegiance and protection are corresponding rights and duties [Wherever] I owe allegiance to my country, there it owes me protection, and wherever my Government owes me no protection I owe it no allegiance and can commit no treason.¹⁷⁴

Broomall scoffed at the notion that the states were the proper guarantors of such protection, because, he argued, "everybody knows that the rights and immunities of citizens were habitually and systematically denied in certain States to the citizens of other States: the right of speech, the right of transit, the right to domicile, the right to sue, the writ of *habeas corpus*, and the right to petition."¹⁷⁵

Opponents of the bill appreciated the expansiveness of the powers that Republicans were claiming, though they may have exaggerated its affect on federalism for their own purposes.¹⁷⁶ In vetoing the Act, President Johnson warned that it represented

an absorption and assumption of power by the General Government which, if acquiesced in, must sap and destroy our federative system of limited powers, and break down the barriers which preserve the rights of the States. It is another step, or rather stride, toward centralization and the concentration of all legislative powers in the National Government.¹⁷⁷

Senator Garret Davis of Kentucky feared that "[t]he principles involved in this bill, if they are legitimate and constitutional, would authorize Congress to pass

States. Such, sir, is not the meaning of our Constitution; such is not the meaning of American citizenship. Allegiance and protection are reciprocal rights.

2 J. BLAINE, TWENTY YEARS OF CONGRESS 177-178 (1886), *quoted in* Farber and Muench, *supra* note 117, at 269 n.133.

174. CONG. GLOBE, 39th Cong., 1st Sess. 1263 (1866).

175. *Id.*

176. Eric Foner has noted the difficulty of interpreting the scope of the Fourteenth Amendment precisely because the most expansive readings of that Amendment were offered by its opponents and denied by its proponents. FONER, *supra* note 117, at 256.

177. CONG. GLOBE, 39th Cong., 1st Sess. 1681 (1866).

civil and criminal codes for every State of the Union."¹⁷⁸ These fears were repeated by others, including the New York Times which condemned the Republican understanding of Congressional authority under the Thirteenth Amendment as "a principle so pregnant with danger to the rightful authority and jurisdiction of States, that it more than justifies the position assumed by President Johnson."¹⁷⁹

President Johnson's veto of both the Freedmen's Bureau and the Civil Rights bills stunned the Republican majority. Illinois Congressman Shelby Cullom recalled later that "[a] veto at that time was almost unheard of."¹⁸⁰ Both bills were later enacted over the president's veto, the Civil Rights Act in April and a version of the Freedmen's Bureau bill in July.

The veto of these bills brought home to the Republicans the importance of placing national civil rights into the Constitution, beyond the possibility of future presidential vetoes,¹⁸¹ and beyond any doubts as to their connection to national citizenship. In April, 1866, before Congress took up the vetoed Civil Rights bill, Congressman John Bingham of Ohio introduced a proposed constitutional amendment, the precursor to the Fourteenth Amendment. It provided:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.¹⁸²

The majority of Republicans believed that Congress already had the power purportedly granted by the proposed amendment. Bingham disagreed. Bingham earlier had opposed adoption of the Civil Rights bill because he believed that enforcement of civil rights lay with the states. The Thirteenth Amendment, while barring slavery, and embracing the freedmen as citizens, did not change the original allocation of power between the federal government and the states.¹⁸³ For Bingham, another amendment was necessary.

Debate on Bingham's proposed amendment was brief. Its proponents were concerned about the possibility of future presidential vetoes. Many who

178. *Id.* at 1414.

179. N.Y. TIMES, Apr. 7, 1866, at 4, col. 3, *quoted in* Kaczorowski, *supra* note 117, at 905 n.194.

180. SHELBY M. CULLOM, FIFTY YEARS OF PUBLIC SERVICE 150 (1911).

181. *See* FONER, *supra* note 117, at 251.

182. CONG. GLOBE, 39th Cong., 1st Sess. 1033-34 (1866).

183. *See* Kaczorowski, *supra* note 117, at 910; Farber and Muench, *supra* note 117, at 270.

were confident of the legitimacy of the Civil Rights Act, nonetheless, were willing to preclude all doubt by clearly articulating the basis of congressional authority to protect national civil rights. At the same time, Republicans were also beginning to realize that an additional consequence of extending citizenship to the freedman was to increase the number of southern representatives in Congress once the southern states were readmitted. Prior to the war, only three-fifths of the slaves had been counted in calculating Congressional representation. As freedmen, all would be counted. Without suffrage for the freed slaves, a move which seemed unlikely at the time, southern representatives, in league with northern democrats, could control Congress.¹⁸⁴ Congressman Giles Hotchkiss of New York summarized the sentiments of those who foresaw the possibility of southern domination of a not-to-distant Congress:

This amendment provides that Congress may pass laws to enforce these rights. Why not provide by an amendment to the Constitution that no State shall discriminate against any class of its citizens; and let that amendment stand as a part of the organic law of the land, subject only to be defeated by another constitutional amendment. We may pass laws here to-day, and the next Congress may wipe them out.¹⁸⁵

Early in March, the House voted, with nearly all Republicans in favor, including Bingham, to postpone consideration of the proposed amendment. On April 9, 1866, the House overrode the President's veto of the Civil Rights bill and it became law. Near the end of April, the Joint Committee reported the revised, proposed Fourteenth Amendment to Congress.¹⁸⁶ The new amendment contained five sections. The first section was an amended version of Congressman Bingham's original proposal. The second required a reduction in the basis of representation in proportion to the number of males denied the right to vote. The third section excluded from the privilege of voting in federal elections those who participated in the insurrection against the federal government. The fourth prohibited payment of the Confederate debt and the fifth gave Congress the power to enforce the provisions of the amendment through "appropriate" legislation.

184. See FONER, *supra* note 117, at 252-255; Kaczorowski, *supra* note 117, at 910.

185. Cong. Globe, 39th Cong., 1st Sess. 1095 (1866), *quoted in* Farber and Muench, *supra* note 117, at 271.

186. See Farber and Muench, *supra* note 117, at 271-72; FONER, *supra* note 117, at 253.

With the exception of the first clause of section one, added on the floor of the Senate, which explicitly granted citizenship to all native born persons, section one (also drafted by Congressman Bingham) was similar to Bingham's original proposal and passed without change:

No state shall make or enforce any law which shall abridge the privileges or immunities of the 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.

The difference between the earlier version and that adopted by Congress was that the earlier version read as a grant of power to Congress and the revised version as the imposition of a duty on the states, a duty not to abridge the privileges or immunities of citizenship. The effect of the change was to make the rights self-executing and under the protection of the federal courts as well as Congress.

Once again, debate on the substance of section one in both House and Senate was brief and paralleled consideration of Congressman Bingham's original proposal.¹⁸⁷ Thaddeus Stevens, who introduced the Amendment in the House, urged adoption to avoid repeal of the Civil Rights Act when the South was once again represented in Congress.¹⁸⁸ Some urged adoption to remove doubt about the legitimacy of the Act. Congressman Broomall, for instance, who himself had no doubts as to the constitutionality of the Act, explained his support for the amendment:

[t]he fact that all who will vote for the pending measure, or whose votes are asked for it, voted for this proposition in another shape, in the civil rights bill, shows it will meet the favor of the House. It may be asked, why should we put a provision in the Constitution which is already contained in an act of Congress? The gentleman from Ohio [Mr. Bingham] . . . says the act is unconstitutional. . . . [W]hile I differ from him upon the law, yet it is not with that certainty of being right that would justify me in refusing to place the power to enact the law unmistakably in the Constitution. On so vital a point I wish to make assurance doubly sure.¹⁸⁹

187. Most of the discussion focused on sections two and three concerning the basis of representation and eligibility for federal office. *See* Farber and Muench, *supra* note 117, at 272.

188. *See* Kaczorowski, *supra* note 117, at 910.

189. CONG. GLOBE, 39th Cong., 1st Sess. 2498 (1866), *quoted in* Kaczorowski, *supra* note 117, at 911.

Others regretted the absence from the Amendment of suffrage for the freedmen. Representative Garfield summarized the belief of the radical Republicans "that the right to vote, . . . is so necessary to the protection of . . . natural rights as to be indispensable, and therefore equal to natural rights."¹⁹⁰

Discussion of the precise rights that section one was to protect was also brief and conducted in the most general terms. Certainly, as Congressman Broomall's remarks attest, Republicans meant to legitimize the Civil Rights Act and in doing so embraced among the rights secured by the Amendment all those mentioned in the Act: The right to hold and convey property, to enforce contracts, to sue and be sued. It is significant, though, that the Amendment, befitting organic law, speaks in much more general terms than the statute, suggesting that the Amendment included a broader and more dynamic scope than the Act.¹⁹¹

Clearly, too, the Republicans meant to abolish the Black Codes. In opening the House debate, Representative Stevens declared that the first section established the principle that state laws "shall operate *equally* upon all."¹⁹² Similarly, Senator Howard, later introducing the Amendment to the Senate summarily explained that the Equal Protection Clause would abolish all "class legislation in the States and [do] away with the injustice of subjecting one class of persons to a code not applicable to another."¹⁹³

Many proponents of the Amendment understood it to incorporate the first eight Amendments to the Bill of Rights and to make their guarantees applicable against the states. Senator Howard, for instance, acknowledged that the Bill of Rights applied only to Congress and not the states. He declared that under the Amendment, the states could no longer violate the liberties that the Bill of Rights had secured against the federal government; with the ratification of the Amendment, the states would have to respect "the personal rights guaranteed and secured by the first eight Amendments."¹⁹⁴ Senator Bingham, the author of the Amendment explained that the privileges and immunities he had in mind were largely defined by the first eight Amendments to the Constitution.¹⁹⁵

The rights encompassed by the Amendment were not exhausted by the Bill of Rights, however. The Bill of Rights contained no equal protection

190. CONG. GLOBE, 39th Cong., 1st Sess. 2462 (1866), *quoted in* Farber and Muench, *supra* note 117, at 272.

191. *See* FONER, *supra* note 117, at 257-58.

192. *Quoted in id.* at 254 (emphasis in original).

193. CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866).

194. *Quoted in* FONER, *supra* note 117, at 258. *See also* Farber and Muench, *supra* note 117, at 273.

195. *See* Farber and Muench, *supra* note 117, at 271-72.

clause; it did not guarantee rights to own and dispose of property, to contract or to sue and be sued, as did the Civil Rights Act.¹⁹⁶ Senator Howard discussed the Bill of Rights only in addition to the privileges and immunities of citizenship, which, he remarked, "are not and cannot be defined in their entire extent and nature."¹⁹⁷ To "gather some intimation of what probably will be the opinion of the judiciary,"¹⁹⁸ he quoted at length from the opinion in *Corfield v. Coryell*¹⁹⁹ which had given the Comity Clause of Article IV a natural rights interpretation. In *Corfield*, Justice Washington had declared that the Comity Clause protects "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states" Among those rights were "[p]rotection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety"

Professor Foner attributes that brevity of the debate over section one to the fact that these principles had guided the Republicans already for years. "[T]he principle of equal rights," he observed:

was now so widely accepted in Republican circles, and had already been so fully discussed, that compared with the now-forgotten disqualification and representation clauses, the first section inspired relatively little discussion. It was "so just," a moderate congressman declared, "that no member of this House can seriously object to it."²⁰⁰

This is surely the case. Passage of the Fourteenth Amendment represented only the culmination of the long painful struggle to determine the character of national citizenship, a struggle whose terms were laid down as well in the debates over secession. To whom did citizens of the United States owe their primary allegiance, to the states or the national government? The answer to

196. See note 131, *supra*.

197. CONG. GLOBE, 39th Cong., 1st Sess. at 2765-66 (1866).

198. *Id.* at 2765.

199. 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230).

200. FONER, *supra* note 117, at 257 (quotation not attributed). In the same vein see Farber and Muench, *supra* note 117:

The nature and source of [the fundamental rights to be protected by the fourteenth amendment] had been discussed by Republicans since the party was formed in the 1850's, and had received intensive consideration in Congress at least since the debates on the thirteenth amendment. Congressmen felt little need to reiterate what had already been discussed for so many years.

Id. at 269.

that question would determine whether the states could secede and on which government rested the responsibility of protecting fundamental rights of citizenship.

The Northern victory did not settle this question, and could not reasonably have been expected to; no war can ever settle any matter of principle. It required the Thirteenth Amendment to abolish slavery. In the Republican theory of preeminent national sovereignty, the emancipation of the slaves also, without more, extended to the freed slaves the basis of federal protection, federal citizenship. Congress exercised its inherent powers of protection for the first time in the Civil Rights Act. With the Fourteenth Amendment, the evolution was brought to completion. The Republican theory of national citizenship and federal power to protect fundamental rights was enacted into positive law. "Republicans generally believed that fundamental rights already existed, at least as a matter of natural law and the law of nations, and that Congress probably already possessed the power to protect these rights. The fourteenth amendment was merely designed to perfect that protection."²⁰¹ Therefore, despite the brevity of discussion over the character of fundamental rights, the background of Republican thought gives considerable insight into the nature of the rights, at least in broad terms, that Republicans hoped to see secured by the Fourteenth Amendment, and in particular the Privileges or Immunities Clause. Most importantly for the present discussion, the evidence demonstrates that far more was intended than simply protection against state violation of fundamental rights, interference with speech, assembly, the free exercise of one's religion, the sort of protections envisioned by the first eight Amendments of the Bill of Rights. To return to Justice Bradley's distinction in the *Civil Rights Cases*, the Amendment also addressed the *abrogation* of rights, the failure of the state to protect citizens against the violation of their natural rights by other persons.²⁰²

This is evident in the first instance from the commitment of Republican theory to natural law. In natural law theory, at least as far back as John Locke, the very reason that people left the state of nature and entered into civil society was to secure their safety and the safety of their possessions and livelihood: "The great and *chief end*, therefore, of men's uniting into commonwealths, and putting themselves under government, *is the preservation of their [lives, liberties and estates]*. To which in the state of nature there are many things wanting."²⁰³ This idea was echoed repeatedly in the declarations of Republican congressmen, often by reference to the Declaration of

201. Farber and Muench, *supra* note 117, at 269.

202. *See supra* text accompanying notes 72-75.

203. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 124 (C.B. McPherson ed., 1980) (3d ed. 1698) (emphasis in original).

Independence. The Declaration of Independence proclaimed that "to secure these [inalienable] rights, governments are instituted among men" Republicans aggrandized this power and responsibility to the national government. Congressman Wilson, for instance, thus explained his support for the Civil Rights bill:

Before our Constitution was formed, the great fundamental rights which I have mentioned, belonged to every person who became a member of our great national family. No one surrendered a jot or tittle of those rights by consenting to the formation of the Government. . . . Upon this I rest my justification of this bill. I assert that we possess the power to do those things which Governments are organized to do; that we may protect a citizens of the United States against a violation of his right²⁰⁴

For at least a general taxonomy of those rights, Republicans regularly referred to the Supreme Courts opinion in *Corfield v. Coryell*, which gave a natural rights interpretation to the Comity Clause of Article IV. In that opinion, Justice Washington listed first among the natural rights of citizens "[p]rotection by the government."²⁰⁵

That the protection was not simply against initiatives of government is evident from the fact that the Comity Clause refers to the natural rights which the states themselves owe to citizens. Thus each state owes a duty of protection, not logically against itself, but against the actions of other persons.

The debates between Republicans and Democrats, northern and southern, were over the allocation of that basic obligation of government described by Locke and referred to in the Declaration of Independence and *Corfield*: the power to secure citizens in the enjoyment of their lives, liberty and possessions against all invasion. The failure to honor that duty constitutes an abrogation of the privileges and immunities of citizenship.

It is inconceivable that the majority of justices who endorsed the opinion in the *Slaughter-House Cases* were unaware of this history. Until that opinion, federal judges and federal officers widely assumed that the Fourteenth Amendment was informed by the Republican theory of national citizenship

204. CONG. GLOBE, 39th Cong., 1st Sess. 1119 (1866). See also Kaczorowski, *supra* note 117, at 891-93.

205. 6 F. Cas. 546, 551-552 (C.C.E.D. Pa. 1823) (No. 3,230).

and national protection.²⁰⁶ In *United States v. Hall*,²⁰⁷ future Supreme Court Justice William Woods explained at length:

By the original constitution citizenship in the United States was a consequence of citizenship in a state. By [the citizenship clause of the fourteenth amendment] this order of things is reversed. Citizenship in the United States is defined; it is made independent of citizenship in a state, and citizenship in a state is a result of citizenship in the United States. So that a person born or naturalized in the United States, and subject to its jurisdiction, is, without reference to state constitutions or laws, entitled to all the privileges and immunities secured by the constitution of the United States to citizens thereof.²⁰⁸

Only weeks before the Supreme Court issued its opinion in the *Slaughter-House Cases*, sitting on circuit, Supreme Court Justice Strong had declared that the Civil War Amendments were "manifestly intended to secure the right guaranteed by them against infringement from any quarter."²⁰⁹

U.S. courts convicted hundreds of individual Klansmen under the Enforcement Act of 1870²¹⁰ and the Ku Klux Klan Act of 1871²¹¹ "for violating citizen's rights to life and property, to freedom of speech and assembly, to keep and bear arms, to equal protection of the laws, and to vote."²¹² This would have been impossible under *Slaughter-House* yet federal courts upheld the constitutionality of both of these acts. *Slaughter-House* "precluded the national government from protecting citizens in the South during the 1874 revival of political terrorism, and from preventing the establishment of a pattern of domination by Southern Conservative Democrats and white supremacists over Southern blacks and white Republicans."²¹³

206. See generally Kaczorowski, *supra* note 117, 917-22 for an exhaustive discussion. Professor Kaczorowski concludes that "[f]ederal judges and legal officers, like Republican congressman, interpreted the fourteenth amendment as a delegation of primary authority to enforce civil rights, regardless of the source of the infringement." *Id.* at 917.

207. 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282).

208. *Id.* at 81.

209. *United States v. Given*, 25 F. Cas. 1324, 1326 (C.C.D. Del. 1873) (No. 15,210).

210. Ch. 114, 16 Stat. 140 (1870).

211. Ch. 22, 17 Stat. 13 (1871).

212. Kaczorowski, *supra* note 117, at 920-21.

213. *Id.* at 938.

The implication of this history for the contemporary state action doctrine is obvious. It is not the case, as the Court talismanically intones, that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful."²¹⁴ On the contrary, it erects the states as shields against violations of fundamental rights, to be defined and protected ultimately by the Supreme Court. Or as Justice Bradley succinctly explained in the *Civil Rights Cases*, "Positive rights and privileges are undoubtedly secured by the 14th Amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges"²¹⁵

In keeping with the scheme of self-executing rights envisioned in the amended and adopted section 1, at least one mechanism for the protection of fundamental rights against private encroachment presumably was to be Supreme Court review of state court decisions in actions brought by individuals to vindicate their rights. The self-executing rights of section 1 were to be available regardless of the availability of any other legislative protection that Congress might later provide, or more importantly, fail to provide under section 5.²¹⁶ Judicial review of state court decisions was an obvious and simple extension of the long-standing role of the Supreme Court. But it is clear that the 39th Congress intended Congress to play, or at least have the power to play, a substantial role in the protection of fundamental rights. Indeed, as we've seen, one of the purposes for the introduction of the Fourteenth Amendment was to legitimate the Civil Rights Act of 1866, an Act in which the Republican dominated Congress took the unprecedented and presumptuous step of defining in broad detail what it took to be at least some of the fundamental rights of citizenship.

It is fairly clear, in addition, that Congress intended its role and its powers to include opening the federal courts to actions directly against private parties who would violate the fundamental natural rights that the states in the first instance were charged to protect under the privileges or immunities clause. Within three years of the ratification of the Fourteenth Amendment,²¹⁷ Congress adopted the Enforcement Act of 1870²¹⁸ and the Ku

214. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). *See supra* text accompanying notes 16-22.

215. 109 U.S. 3, 11 (1883). *See supra* text accompanying notes 71-84.

216. Section 5 reads in its entirety: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. *See supra* text accompanying notes 182-85.

217. The Fourteenth Amendment was ratified on July 9, 1868, with the ratification by South Carolina.

218. Ch. 114, 16 Stat. 140 (1870).

Klux Klan Act of 1871.²¹⁹ Both statutes criminalized the violation of civil rights and provided the U.S. attorneys with the means to largely cripple the Ku Klux Klan.²²⁰ The Ku Klux Klan Act, in addition, created private causes of action against private defendants to be vindicated by actions in the federal courts. Though moribund for nearly ninety years following *Slaughter-House*, that section, now known as 42 U.S.C. section 1983, with only minor amendments is today the principle vehicle for private civil rights enforcement in the federal courts.²²¹ It provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.²²²

The combination of the powers assumed by Congress in the Civil Rights Act of 1866 and the Enforcement and Ku Klux Klan Acts raised difficult and anxious questions at the time about the scope of Congress's power under the very vague section 5.²²³ The relationship between the power of the Supreme Court and the power of Congress was also unclear. If the rights created by the Fourteenth Amendment were meant to be self-executing, then why was it necessary or even useful to grant to Congress any role at all? If private rights

219. Ch. 22, 17 Stat. 13 (1871).

220. See ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876*, at 79-134 (1985) [hereinafter KACZOROWSKI, *POLITICS*]; Kaczorowski, *supra* note 117, at 920.

221. The reinvigoration of § 1983 had to await the Supreme Court's decision in *Monroe v. Pape*, 365 U.S. 167 (1961), in which the Court permitted an action by the victim of an unreasonable search against the police officers who conducted the search. The Court first permitted a § 1983 action against a purely private defendant in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). It was preceded, however, by *Jones v. Mayer*, 392 U.S. 409 (1968), which permitted an action against a private defendant under the similar provision of the Civil Rights Act of 1866, codified at 42 U.S.C. § 1982. For a thorough discussion of the revival of § 1983 and the contemporary accretions which have engulfed it, see SHELDON H. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, THE LAW OF SECTION 1983* (3d ed. 1991); *A SECTION 1983 CIVIL RIGHTS ANTHOLOGY* (Sheldon H. Nahmod ed., 1993).

222. 42 U.S.C. § 1983 (1988).

223. See *infra* text accompanying notes 235-50.

were intended when necessary to protect natural rights, could not the Supreme Court simply imply a cause of action directly from the guarantees of section 1 as it would later imply a cause of action against federal agents in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*?²²⁴ Looking from the other direction, if Congress reserved for itself some significant role in the protection of civil rights, then what does that mean for the self-executing nature of section 1? These problems were never resolved but were merely mooted by the Court's decision in *Slaughter-House*.

Many of these same issues surface again, however, with the Court's fabrication of the modern state action doctrine and its alchemical transformation of private parties into public agents. Now however, the issues are horribly obscured by the incoherence of the doctrine itself. Many of these problems are therefore greatly clarified, if not perfectly resolved, by considering them in light of the historical background, absent *Slaughter-House* and the befuddlement of contemporary doctrine. Others, however, remain obscure because of the obscurity surrounding the original strategy of enforcement. The following section takes up briefly those concerns and the resolution suggested by the historical context.

III. CONGRESS, THE COURTS, THE STATES AND PRIVATE ACCOUNTABILITY

Contemporary state action doctrine deals as uneasily with the role of Congress under section 5 as it does with the applicability of the Fourteenth Amendment to private initiatives. The most important congressional contribution to civil rights enforcement under the Fourteenth Amendment remains the provision of the Ku Klux Klan Act of 1871 quoted earlier. It generously grants to any party against any person a cause of action in the federal courts for the violation of any right secured by the Constitution.²²⁵ Under contemporary doctrine, however, this generous grant runs head-long into the basic premise that the Fourteenth Amendment erects no shield against merely private conduct. Thus construed, the Fourteenth Amendment creates rights only between the states and persons. Consequently no person can ever be held accountable under section 1983 because no person can ever violate a right secured by the Amendment.

The Court never has confronted this problem directly. The reason is attributable again to the judicial alchemy that transforms private initiatives into state action and private parties into state agents. Once a private defendant is transformed by the alchemy of the state action doctrine, the private, now

224. 403 U.S. 388 (1971).

225. Ch. 22, 17 Stat. 13 (1871).

public defendant fits within any proscription aimed exclusively at public parties.

This is precisely the strategy that the Court adopted in addressing a related issue in *Lugar v. Edmondson Oil Co.*,²²⁶ *Lugar* was a section 1983 action brought by a private debtor against a private creditor alleging a deprivation of due process in the execution of a statutorily permitted prejudgment attachment. The issue in *Lugar* involved the relationship between the requirements of the state action doctrine and the additional condition of section 1983 that the violation be "under color of" state law. The court of appeals had held that a private party acts under color of state law only when the private party usurps or corrupts a public official or where judicial power has been surrendered to the private party.²²⁷ This reading of section 1983 treats private parties more candidly as private parties and requires a greater degree of public character than does the Court's state action doctrine. To read section 1983 in this way, however, obviously introduces a substantial degree of incoherence and arbitrariness into the relationship between section 1983 and state action.

The Supreme Court rejected this approach and instead relied almost completely on the fiction of state action to make private parties into public actors.²²⁸ Absent immunities, public defendants act under color of state law whenever they act in their official capacities, even if the conduct itself is not authorized by state law.²²⁹ Consequently, if a private defendant is transformed into a public agent, the discrepancy created by the court of appeals disappears. The same move resolves the discrepancy in holding private parties liable for violations of public rights.

Apart from the fact that it is infected by the mystery of state action, this strategy also, however, has the effect of making section 1983, indeed any role for Congress, potentially redundant or at best marginal. As public agents, private parties who satisfy the state action requirement presumably should be liable to private plaintiffs in the federal courts, even absent enabling legislation by Congress, under the same theory the Court adopted in *Bivens*.²³⁰ There the Court reasonably permitted a cause of action for damages directly under the Constitution when necessary to vindicate

226. 457 U.S. 922 (1982).

227. *Id.* at 926.

228. *Id.* at 937-38.

229. *Id.* at 929-30 (citing *United States v. Classic*, 313 U.S. 299, 326 (1941): "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.") See generally Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110 (1981).

230. 403 U.S. 388 (1971).

constitutional guarantees. This approach in the context of the Fourteenth Amendment is altogether consistent with the intention of the 39th Congress that the guarantees of section 1 be self-executing, that they provide protection even in the absence of congressional action under section 5.²³¹

Under *Bivens*, the courts are to refrain from a *Bivens*-type action for damages only when Congress has created an alternative remedy.²³² Originally, the Court withheld a *Bivens* damages remedy, because unnecessary, only when the remedy provided by Congress was equally effective. Since *Bivens*, however, the Court has retreated from that principle and now refuses a damages action whenever Congress has made available some relief even if not equal to the damages remedy. If an approach similar to the original strategy of *Bivens* were to be followed in case of the Fourteenth Amendment and private defendants, the role of the Court would be to set minimal standards for a constitutional remedy. Congress could, if it chose, merely create even greater remedies for private plaintiffs. Under this stratagem, the role of Congress would be truly marginal. If the experience with *Bivens* is any indication, Congress would likely not even exercise such a power.²³³

If the Court were to follow the more recent doctrine, then the role of Congress would be substantially greater but the overall affect would be a perversion of constitutional guarantees as serious as under *Bivens* itself.²³⁴ The Court would have permitted the devaluation of constitutional rights and in doing so abdicated its role as the guarantor of those rights. Fortunately, if the Court were to adopt today an interpretation of the Fourteenth Amendment along *Bivens* lines, the extant congressional action would be section 1983 and its open damages remedy. Nonetheless, the constitutional principle of self-executing rights would have been compromised to the extent that Congress had the power to determine the extent of an adequate remedy.

The deliberations of 1866 and the historical concerns and conceptions that motivated the Fourteenth Amendment resolve many of these incoherences. Some, however, remain nonetheless adrift in the failure of the 39th Congress

231. In the context of a revived Privileges or Immunities Clause, actions against private parties may be conditioned upon the unavailability of adequate state remedies. See *infra* text accompanying note 252. This condition is distinct, however, from the condition that Congress as well has failed to provide a remedy for the private violation of rights secured by the constitution. Under current interpretations of § 1983, an adequate state remedy precludes an action under § 1983. See *Parratt v. Taylor*, 451 U.S. 527, 542 (1981).

232. See generally David C. Nutter, Note, *Two Approaches to Determine Whether an Implied Cause of Action under the Constitution is Necessary: The Changing Scope of the Bivens Action*, 19 GA. L. REV. 683 (1985).

233. Though a number of federal statutes provide partial relief, none provides a remedy as effective as a *Bivens* action. See *id.* at 685.

234. See *id.* at 713-16.

to address thoroughly the strategy for federal protection of fundamental rights. The failure of the Republican Congress was not for lack of opportunity. Democratic opponents to the Thirteenth Amendment, the Civil Rights Act of 1866, and the Fourteenth Amendment repeatedly assailed the presumptuousness of Congress and decried the effect of federal enforcement of civil rights on the traditional division of federalism. President Johnson in a memorandum accompanying his veto of the Civil Rights Act warned that the proposed statute would affect

an absorption and assumption of power by the General Government which, if acquiesced in, must sap and destroy our federative system of limited powers and break down the barriers which preserve the rights of the states. It is another step, or rather stride, toward centralization and the concentration of all legislative powers in the National Government.²³⁵

Senator Garrett Davis of Kentucky similarly complained that the Civil Rights Act of 1866 "would wholly absorb all reserved state sovereignty and rights."²³⁶ He insisted that "the ordinary administration of criminal and civil justice, which is the immediate and visible guardianship of life and property . . . belong exclusively to the States."²³⁷ Davis feared that "[t]he principles involved in this bill, if they are legitimate and constitutional, would authorize Congress to pass civil and criminal codes for every State of the Union."²³⁸ Many others, in and out of Congress, echoed these same themes of federal usurpation, destruction of states rights and unlimited powers in Congress.²³⁹

The sincerity of these declarations and the reasonableness of the fears they express are difficult to judge. They were made, after all, by opponents of change who were eager to discredit the Republican proposals.²⁴⁰ Nonetheless, these concerns were not without some basis in Republican theory and action. In the Republican theory of national citizenship, there was no greater attention paid to separation of powers within the federal government than there was paid to the founders' theory of federalism. Declarations that federal citizenship was primary were invariably accompanied by an assumption that

235. CONG. GLOBE, 39th Cong., 1st Sess. 1681 (1866), *quoted in* Kaczorowski, *supra* note 117, at 904.

236. *Id.* at 183-84, *quoted in* Kaczorowski, *supra* note 117, at 904.

237. *Id.*

238. *Id.* at 1414, *quoted in* Kaczorowski, *supra* note 117, at 904-05.

239. *See generally* FONER, *supra* note 117, at 258-60; Farber and Muench, *supra* note 117, at 270-72; Kaczorowski, *supra* note 117, at 905-09.

240. *See* FONER, *supra* note 117, at 256.

Congress had the power and duty to protect the fundamental rights of that citizenship.²⁴¹ Professor Kaczorowski, among the most careful interpreters of the period, endorses the view of some at the time who feared that "the power conferred on Congress by this [thirteenth] constitutional amendment is an indefinite power, unlimited except by the passions or caprice of those who may assume to exercise it."²⁴²

There was other evidence as well. When the Thirteenth Amendment was ratified, Congress followed immediately with the Civil Rights Act of 1866 which, on its face, assumed a large role for Congress. Pressed directly on the point, Representative Bingham was ambivalent about whether the proposed Fourteenth amendment would cloak Congress with the police power or more indirectly a power only to assure that the states treated their citizens equally.²⁴³

Congress's later enactments of the criminal provisions of the Ku Klux Klan Act and the Enforcement Act of 1870 tread a very fine line. Professor Kaczorowski relates that U.S. Attorneys in the South found it difficult to frame indictments under these statutes in ways that avoided supplanting state criminal statutes.²⁴⁴ Lower federal judges openly acknowledged that the Fourteenth Amendment authorized Congress to adopt laws criminalizing conduct normally dealt with in the state courts under state laws.²⁴⁵

Moderate Republicans nonetheless vehemently denied the extreme implications drawn by their Democratic opponents, and their conduct bears out their sincerity. While acknowledging the revolutionary nature of these laws,²⁴⁶ moderate Republicans swore their loyalty to the basic principles of federalism and the autonomy of the states. The Civil Rights Act, in conditioning federal intervention on an acts having been "under color of" state law, honored the traditional understanding that the primary responsibility for the protection of citizens laid with the states. Nevada Senator William Stewart explained, "[w]hen I reflect how easy it is for the states to avoid the operations of this bill . . . , I think that it is robbed of its coercive features."²⁴⁷ The same understanding is even clearer in the language of the

241. See *supra* text accompanying notes 166-79.

242. Kaczorowski, *supra* note 117, at 905 (quoting Congressman Charles A. Eldridge of Wisconsin, CONG. GLOBE, 39th Cong., 1st Sess. 1156 (1866)).

243. *Id.* at 1088-94, *discussed in* Farber and Muench, *supra* note 117, at 270-71.

244. Kaczorowski, *supra* note 117, at 920-22.

245. *Id.* at 920.

246. Maine Senator Lot M. Morrill, for instance, admitted of the Civil Rights Act "that this species of legislation is absolutely revolutionary. But," he added, "are we not in the midst of a revolution?" CONG. GLOBE, 39th Cong., 1st Sess. 1291, *quoted in* FONER, *supra* note 117, at 245. See also Kaczorowski, *supra* note 117, at 916.

247. Foner, *supra* note 117, at 245.

Privileges or Immunities Clause. It enjoins the states in the first instance to protect the fundamental rights of citizens. To some Republicans, the chief evils to be remedied were simply discriminatory state laws. They assumed that the states would protect the fundamental rights of some citizens, at least the politically powerful class of white planters. If the states would extend the same protections to all others there would be no necessity for federal intervention. Federal intervention would be required only to protect fundamental rights of citizenship demanded by natural law and would thus also be limited to the protection of just these rights.²⁴⁸ Even when it dealt specifically with the problem of private violence in the Ku Klux Klan Act of 1871, Congress retained the condition that acts be under color of state law.²⁴⁹

In addition, Congress, the U.S. Attorneys and the Courts faced a legal system in the South that recalcitrant judges and sheriffs had broken down from within and the Ku Klux Klan had assaulted from without.²⁵⁰ Any civil rights enforcement in the South had to come from the federal government, but the government's involvement was conditioned on precisely those circumstances.

This ambivalence in Republican thought plainly complicates interpretation. Republican theory throws out in different contexts three disparate ideas for reconciliation: national citizenship and with it national, and as assumed by the Republicans, Congressional power to protect fundamental rights; self-executing protection of fundamental rights that are not dependant on any act of Congress; and finally, continued regard for the role of the states in securing these same rights. There is no clear intention to be gleaned from a patient or

248. See Farber and Muench, *supra* note 117, at 271 n.138, and FONER, *supra* note 117, at 245. Foner points out correctly that this belief was naive: "freedmen faced rampant violence as well as unequal treatment by sheriffs, judges, and juries, often under color of laws that did not in fact mention race." *Id.* The notion of "under color of" law, however, was flexible enough to embrace actions by these agents, public and private, even when they acted contrary to state laws, as the Supreme Court was to hold much later held in *United States v. Classic*, 313 U.S. 299 (1941) (interpreting identical language in § 1983). See *supra* note 229. Congress itself clearly understood this language to be quite broad when it used it again in the private action provisions of the Ku Klux Klan Act of 1871, Ch. 22, 17 Stat. 13 (1871). That provision, like the whole of the Ku Klux Klan Act, was directed at private violence which the southern states and local governments were impotent to stop. See *supra* text accompanying notes 159-165.

249. It is clear from the conditions to which the Act was addressed and the evil it was to remedy, the activities of the Ku Klux Klan, that the phrase was concerned with the absence of state efforts to control private violence. See *e.g.*, FONER, *supra* note 117 at 454-59.

250. See *supra* text accompanying notes 159-165.

careful perusal of language and history. The ambivalence was never grasped and grappled with.

The task is insurmountable, however, only if we insist that the framers were perfectly rational, though somewhat obscure, and that every expression has significance if we can only discern it, as the canons would have it. What seems more reasonable, where there is obvious and inescapable ambivalence, is to implement the goals of the Fourteenth Amendment, the "ideals" of the framers, to the greatest extent possible; essentially to reconstruct the latent understanding of the framers, that understanding that we can attribute to them had the discrepancies been considered and resolved. Those goals here are fairly clear, what is unclear is largely the institutional arrangements to accomplish them. The goals are national protection of fundamental rights regardless of Congressional action while preserving to the greatest extent possible the traditional role of the states as the first line in securing those rights.

The institutional arrangements that appear best to satisfy these goals would include, in the first instance, recognition of a duty in the states to protect the fundamental rights of persons against invasion by anyone and reliance on Supreme Court review of state decisions regarding private law that affect fundamental rights.²⁵¹ Second, an implied cause of action against private parties who violate fundamental rights, but only when it is relatively clear that the state responsible for securing the rights will fail itself in its obligation, even after review of a state private enforcement action. Third, a

251. In an earlier article I addressed a number of possible policy objections to extending constitutional protection to victims of purely private conduct. The most weighty of these objections included the inappropriateness of holding private parties to the same standards as governments and the possibility that the Supreme Court might become involved in matters best left to the discretion of legislative bodies concerning, for instance, the allocation of scarce funds.

The answer to the first objection is that there is no imperative to apply the same standards to both governments and private parties. In determining what legal rights people should have against other people, as a matter of fundamental law, the Court ought to consider the very different possible opposing claims that private parties and the government bring to a dispute. See Madry, *supra* note 1, at 836-37. See also Chemerinsky, *supra* note 22, at 536-42.

The answer to the second objection is already well established in our constitutional jurisprudence. The Court may, and should, follow the wisdom reflected in the political question doctrine before leaping into areas within the peculiar expertise of legislatures, agencies, and the executives. Madry, *supra* note 1, at 840-42. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962). See also Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991) (arguing that the protection required by the Fourteenth Amendment extends beyond *ex post* causes of action to include *ex ante* protection as well).

power in Congress to establish useful institutions for the enforcement of federal court judgments, and perhaps causes of action and remedies provided that they are no less protective of rights than the Supreme Court's own remedies.²⁵²

Together these arrangements not only satisfy the ideals of the 39th Congress, they do so in a way that leaves little conflict. The role of Congress may be somewhat diminished from the grand claims of the Republican theory of national citizenship; however, there is nothing in the elaboration of that theory that makes Congressional guardianship, as opposed to Supreme Court guardianship, crucial. The regular assumption of Congressional power appears to have been more a function of the fact that Congress was the principle agent of change at the time, rather than any implication or corollary of the theory. Nor do these arrangements alter much the original balance of federalism.²⁵³ The states remain the principle source of civil and criminal law, but backed now by national guarantees of minimal fundamental rights.

It would appear, too, and with no little significance, that this arrangement of powers is precisely what the Court envisioned in the *Civil Rights Cases* of 1883.²⁵⁴ Earlier, this Article described the important distinction that Justice Bradley drew there between the mere "violation" of a right and its "abrogation."²⁵⁵ Bradley elaborated that distinction not just to illuminate the responsibilities of the states to protect fundamental rights. More immediately, he was concerned with identifying the threshold for Congressional power under Section 5. The issue before the Court was the validity of the first and

252. There has been considerable discussion in recent years indicating that Supreme Court guardianship in fact has been ineffective in spurring large-scale social change. See, e.g., LARRY D. BARNETT, *LEGAL CONSTRUCT, SOCIAL CONCEPT* (1993); GERALD N. ROSENBERG, *THE HOLLOW HOPE* (1991); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993). The suggestion might be that the task ought therefore to be left to Congress. However, one partial explanation for the Court's ineffectiveness may be the *Slaughter-House Cases* and the Court's abdication of its role under the Privileges or Immunities Clause to compel state protection of fundamental rights against all invasion. Of course, *Slaughter-House* also stands as a dire reminder of the Court's frequent conservatism and disregard of its duty.

On the other hand, we have to recall that the 39th Congress itself saw the weakness of relying on a Congress packed with returning Southern Democrats and turned to the Supreme Court as a guarantor regardless of Congressional action. The lesson may simply be that there is no institutional arrangement that can guaranty anything. The conduct of those institutions is still a function of the character of the people who inhabit them. Concerning the importance of civic virtue, see WILLIAM A. GALSTON, *LIBERAL PURPOSES* (1991).

253. See *infra* part IV.

254. 109 U.S. 3 (1883).

255. See *supra* text accompanying notes 71-79.

second sections of the Civil Rights Act of 1875. The Court held that those sections were invalid, not because the Fourteenth Amendment was unconcerned with protecting people from other people, as the Court would now have it, but because there was no showing that the States had abrogated the rights sought to be protected by those sections of the Civil Rights Act. Justice Bradley explained:

But where a subject is not submitted to the general legislative power of the Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular State legislation or State action in reference to that subject, the power given is limited by its object, and any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited State laws or proceedings of State officers.²⁵⁶

The advantages of the Court's original understanding of the roles of Congress, the Court and the states over the current state action doctrine are plain. It is in the first instance coherent and quite natural. It rests on straightforward concepts of rights and appropriate governmental roles, without reliance on specious notions like "involvement" and its allied alchemy of private action into state action. Most importantly, of course, it is precisely what the framers of 1868 intended and went to war to secure. It returns to the Fourteenth Amendment the revolutionary power it was meant to carry and in a way that harmonizes the apparently diverse goals of the Amendment's framers.

IV. CONCLUSION: THE EFFECT ON FEDERALISM

To return this discussion to its beginnings, it is worth considering for a moment how the conclusion of the last section bears on the principal concern of the Court in *Slaughter-House*, the impact of the Fourteenth Amendment on the traditional arrangement of federalism. The short answer, of course, is that the Court was simply wrong, and probably disingenuous, in its assessment of the intention of the Amendment's framers. As we have seen, the Republican framers intended to establish at the national level protection for the fundamental rights of United States citizens, not just against violation by the states but against violation by anyone. To accomplish that, they set up another right at the constitutional level between the states and their citizens according to which the states must protect citizen against citizen. Therefore whatever the Court may have feared, its own conduct constituted an even

256. The Civil Rights Cases, 109 U.S. at 18.

more radical departure from the Constitution than anything reflected in the Fourteenth Amendment; Congress and the states, after all, at least had the power to do what they did.

The Court was also wrong, or at least too simplistic, in its appraisal of Congress's powers under section 5. By imposing upon the states the obligation to protect the fundamental rights of citizenship, the Fourteenth Amendment reaffirmed the primary position of the states in securing those rights. In this scheme, the role of Congress comes only after those of the states and the Supreme Court and is subordinate to them. It is the Court, in reviewing the decisions of state courts, and recognizing direct causes of action, that determines the fundamental rights of citizens when the states fail, as they did both before and after the Civil War. There is little opportunity for Congress, as the *Slaughter-House* Court feared, to "fetter and degrade the states."²⁵⁷

There is a more interesting answer to the Court's concerns, one that illuminates the purposes of federalism and how the Fourteenth Amendment might have transformed it, for better or worse. As a preface to that inquiry, it is critical to recognize that to the framers of 1787 federalism was not primarily an end in itself, reflecting the natural rights or limits of either the state or federal governments. It was rather a carefully conceived strategy for the promotion of other valued ends. Neither the Federalists, nor the Anti-Federalists, both of which groups had a hand in the shaping of federalism, claimed for it an inherent goodness, as royal absolutists, for instance, claimed for monarchy in the seventeenth century.²⁵⁸

By the time of the Revolution, the colonists had come to understand their colonial constitutions largely along the lines of corporate charters. They regarded the governments they created as agents of the sovereign people whose structure and limited authority were intended for the achievement of relatively well understood ends.²⁵⁹ The arguments of the Federalist Papers are distinctively instrumental. Madison, in Federalist No. 45, explicitly rejected as a basis for federalism any supposed natural rights in the states. He challenged the Anti-Federalists to offer reasons for a more limited national government that related to the goals of the Revolution:

[I]f . . . the Union be essential to the happiness of the people of America, is it not preposterous, to urge as an objection . . . that such a government may derogate from the importance of the governments of the individual States? Was, then, the American Revolution effected, was the American Confederacy formed, was the precious

257. See *supra* text accompanying note 92.

258. See, e.g., Amar, *supra* note 133, at 1431.

259. See generally *id.*

blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the government of the individual States, that particular municipal establishments, might enjoy a certain extent of power and be arrayed with certain dignities and attributes of sovereignty?²⁶⁰

By the time of the publication of the Federalist Papers between 1787 and 1789, Madison's challenge was to some extent rhetorical. The Anti-Federalists had made their arguments and, as Michael McConnell has noted, even partially converted Madison to their cause.²⁶¹ The proposed Constitution reflected an appreciation for the virtues of decentralization, where decentralization served the larger ends of government, but also the virtues of centralization where centralization better served those ends.

This original, instrumental understanding of federalism constitutes a partial response to those who against the Fourteenth Amendment insisted on the rights of the states.²⁶² The states had no rights that merely inhered in their statehood, or even necessarily in the people as sovereigns within their states. What powers they were delegated were delegated to serve certain ends. The more complete answer then to the opponents of the Fourteenth Amendment is to consider the purposes that the framers imagined for both centralization and decentralization and how those purposes might have been affected by the Amendment.²⁶³

The virtues of centralization, as the authors of the Federalist Papers saw them, were six: a united voice in dealings with foreign nations, both in the

260. THE FEDERALIST NO. 45, at 325 (James Madison) (Benjamin F. Wright ed., 1961).

261. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491-92 (1987) (book review).

262. See, e.g., text accompanying notes 176-179. Indeed, even John Locke, the preeminent philosopher of natural law, regarded the state along instrumental lines, as a means to secure the natural rights of person. See *supra* text accompanying notes 107-08.

263. For a more thorough discussion of the issues of federalism, see STANLEY ELKINS AND ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC* (1993); W. OATES, *FISCAL FEDERALISM* (1972); R. POSNER, *ECONOMIC ANALYSIS OF LAW* 599-614 (3d ed. 1986); Susan Rose-Ackerman, *Does Federalism Matter?*, 89 J. POL. EC. 152 (1981); Gordon Tullock, *Federalism: Problems of Scale*, 6 PUB. CHOICE 19 (Spring, 1969); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDER'S DESIGN* (1987)). The discussion in the text owes much to Professor McConnell's analysis.

nation's defense and to promote trade;²⁶⁴ the conservation of peace among the states, principally by removing barriers to free trade, preventing discrimination against citizens of foreign states, and providing a forum for the settlement of interstate conflicts;²⁶⁵ the promotion of economic prosperity through the creation of national markets;²⁶⁶ the realization of the economies of scale, particularly in matters of common defense;²⁶⁷ and the protection of individual rights and the common good. In Federalist No. 14, Madison summarized these goals as follows:

We have seen the necessity of the Union, as our bulwark against foreign danger, as the conservator of peace among ourselves, as the guardian of our commerce and other common interests, as the only substitute for those military establishments which have subverted the liberties of the Old World and as the proper antidote for the diseases of faction, which have proved fatal to other popular governments, and of which alarming symptoms have been betrayed by our own.²⁶⁸

The first five are related to fundamental rights only indirectly and do not require much discussion in the present context. The sixth, however, bears directly on the federal protection of fundamental interests and an examination of the institutional arrangements for its realization are revealing.

Madison conceived the threat to fundamental rights almost exclusively in terms of factions and the federal role in the protection of fundamental rights as preventing factions from acquiring political power. Though he never precisely defines what he means by a "faction," it is clear that Madison had in mind any group, whether a minority or a majority of any electorate, that might attempt to promote views which endanger fundamental interests and a particular notion of the common good related to those rights. In Federalist No. 10 he explains:

If a faction consists of a less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other

264. THE FEDERALIST NO. 4 (John Jay); NO. 10 (James Madison).

265. *Id.* NOS. 5, 6, 7, 11, 15 (Alexander Hamilton); NO. 39 (James Madison).

266. *Id.* NOS. 11, 12 (Alexander Hamilton).

267. *Id.* NO. 4 (John Jay); NOS. 12, 13 (Alexander Hamilton).

268. *Id.* NO. 14, at 150 (James Madison) (Benjamin F. Wright ed., 1961).

hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add that it is the great desideratum by which alone this form of government can be rescued from the opprobrium under which it has so long labored, and be recommended to the esteem and adoption of mankind.²⁶⁹

Madison's objections to relying on the judiciary to protect fundamental rights are notorious.²⁷⁰ He preferred instead to arrange the institution of government in such a way as to prevent any faction, even a majority faction, from obtaining power. His plan, as he described it in Federalist No. 10 and as it is implemented in the Constitution, was to maintain a fairly high number of electors to each representative. This would help to assure that only the most prominent and, presumably, the wisest legislators would be sent to shape the nation's policies. As Madison explained:

The effect of [this arrangement] is . . . to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice pronounced by the representatives of the people, will be more

269. *Id.* NO. 10, at 132-33 (James Madison) (Benjamin F. Wright ed., 1961). See also NEDELSKY, *supra* note 104 (arguing that the overriding goal of the Constitution was to protect in particular rights of property and a notion of the common good associated with stable rights of property).

270. In his *Remarks on Mr. Jefferson's Draught of a Constitution*, October, 1788, Madison remarked:

In the State Constitutions and indeed in the Federal one also, no provision is made for the case of a disagreement in expounding them; and as the Courts are generally the last in making the decision, it results to them by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Department paramount in fact to the Legislature, which was never intended and can never be proper.

James Madison, *Remarks on Mr. Jefferson's Draught of a Constitution*, October 1788, in *THE MIND OF THE FOUNDER: SOURCES OF POLITICAL THOUGHT OF JAMES MADISON* 65-66 (Marvin Meyers ed., 1973).

consonant to the public good than if pronounced by the people themselves, convened for the purpose.²⁷¹

The measure is more likely to succeed in a large republic than a small because in the larger republic "it will be more difficult for unworthy candidates to practise with success the vicious arts, by which elections are too often carried"²⁷²

To successfully protect rights in a nation where local governments are preserved, however, the electoral arrangements for the national government must also be accompanied by, on the one hand, a delegation to the national government of powers whose improvident exercise is likely to infringe rights, and on the other hand, a corresponding disability in the states.²⁷³ This is the arrangement that we see, for example, with regard to relations between debtors and creditors. Article I, Section 8 empowers Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States" while Section 10 prohibits any state from passing any "Law impairing the Obligation of Contracts."²⁷⁴ Article I contains similar powers and disabilities related to interstate commerce.

Particularly in light of Madison's declaration that the protection of rights was "the great desideratum, by which this government can be rescued from opprobrium," it is remarkable that the protection of rights in this manner, or any other, was limited principally to the protection of creditors and the institutions of interstate trade. As this article discussed earlier, the Constitution contained few other safeguards against the violation of fundamental interests by anyone other than the new government itself.²⁷⁵ Indeed, the Constitution of 1791 did not even assure the existence of private property and the right to contract.²⁷⁶

Madison suggests later in Federalist No. 10 that the various powers of government were divided between the national and the state governments according to the interests that they touched upon, whether the interests were

271. THE FEDERALIST NO. 10, at 134 (James Madison) (Benjamin F. Wright ed., 1961).

272. *Id.* This idea sits uneasily with one of the more important justifications for retaining small political units, which is that in a small unit, the citizens are better able to vigilantly observe and restrain the excesses of self-interested politicians. *See* Storing, *supra* note 113, at 17-18.

273. One alternative, which Madison championed unsuccessfully, was to permit the federal legislature to review every proposed state law and exercise a veto in cases of laws that violated fundamental rights. *See* NEDELSKY, *supra* note 104, at 61-62.

274. U.S. CONST. art. I, § 8, cl. 4; art. I, § 10, cl. 1.

275. *See supra* text accompanying notes 95-99.

276. *See also* McConnell, *supra* note 116.

of a peculiarly local or national character. He said, "The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular, to the State legislatures."²⁷⁷ How horribly ironic then, that the rights which tore this country apart in 1860 and which made reconstruction so difficult almost a decade later were the very rights deemed to be of only local concern and left to the protection of the states. Insofar as it was the intent of the framers to secure rights that were necessary to form an indissoluble union, the Civil War revealed the risks inherent in failing to secure at the national level universal, personal and political, as opposed to merely commercial, interests.

Surely part of the reason for not restricting the states more thoroughly in the Constitution was the fact that the states, as colonies, had long been the trustees of the common law within their jurisdictions. Even if they might not be trusted to uphold the rights of creditors against debtors in all cases, and if they might discriminate against commerce from other states, there was little reason to believe that the states were on the brink of destroying the right to private property or the ability of at least adult free men to enter into binding contracts.²⁷⁸

There was also the attachment that people had developed for their states which the framers as a practical matter were bound to accommodate. Had the framers attempted to strip from the state such basic powers as the administration of the civil and criminal laws, it is unlikely that the new Constitution would ever have been ratified. The authors of the Federalist Papers repeatedly

277. THE FEDERALIST NO. 10, at 135 (James Madison) (Benjamin F. Wright ed., 1961). The same idea is repeated and elaborated on in Federalist No. 14 where Madison reassures his readers that

"[i]n the first place it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any."

THE FEDERALIST NO. 14, at 152 (James Madison) (Benjamin F. Wright ed., 1961).

It is not clear how debtor relief laws fit within this definition of an object which could not "be attained by the separate provisions of any." Certainly each state could easily create effective debtor relief laws that did not require the coordinated efforts of any other state. If the concern was to prevent discriminatory debtor relief laws, that end was already achieved through the Privileges and Immunities Clause of Article IV.

The example of debtor relief laws suggests that the dividing line between national and local issues may have been drawn where the states could currently be trusted to honor and protect interests thought to be important. See *infra* text accompanying note 280.

278. McConnell, *supra* note 116, at 293.

sought to assure their readers that the status of the states was not in jeopardy. On this account Garry Wills observed:

There was a certain ambiguity forced on Publius as a propagandist. He has to argue for a stronger government and at the same time quiet the fears of strong government. When calling the Articles inadequate, Publius was a champion of centralization. When assuring the nervous states that centralization would not mean the obliteration of lesser units, Publius can be quoted as a champion of the dispersion of power out to subordinate parts of the government.²⁷⁹

What was true of Hamilton, Madison and Jay as Publius was certainly true of them as delegates to the Constitutional Convention.

But there was also at least one theoretical and instrumental reason for leaving with the states specifically jurisdiction over the civil and criminal laws, the laws which most immediately secure fundamental interests against invasion by anyone.²⁸⁰ It was a reason not urged by the Anti-Federalists,

279. Garry Wills, *Introduction*, THE FEDERALIST PAPERS (Garry Wills, ed., 1982). See e.g., THE FEDERALIST NO. 17, at 167-68 (Alexander Hamilton) (Benjamin F. Wright ed., 1961) ("The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction.").

280. In addition to whatever value there might be in leaving to the states the administration specifically of the civil and criminal laws, the laws which I consider to be the principal guarantees of fundamental interests against other persons and therefore of universal interest, there were also independently good reasons to leave to the states jurisdiction over matters which truly were of local concern: the provision and financing of public goods, like local roads, libraries, schools and parks; land use control to avoid nuisances; etc. In the first place, these are matters which could not easily be dealt with by a national congress, most of whose members were unfamiliar and unconcerned with much outside of their jurisdictions. See, e.g., THE FEDERALIST NO. 46 (James Madison); 1 STORING, *supra* note 113, at 15; McConnell, *supra* note 116, at 1493-94.

Many of the Anti-Federalists also urged that keeping these matters for local decision permitted citizens to be involved in public deliberations in a way that would not be possible if the principal site of debate were the nation's capital, far removed from most people. Indeed, to the Anti-Federalists, this possibility was the chief and essential mechanism for preserving the public virtue that was the foundation for republican freedom. Herbert Storing summarized the sentiments of the Anti-Federalists as follows: "More often the Anti-Federalists thought of the whole organization of the polity as having an educative function. The small republic was seen as a school of citizenship as much as a scheme for government." 1 STORING, *supra* note 113, at 21.

but recognized by Madison, Hamilton and the Federalists framers. While Madison saw the powers of the new federal government tempered by the institutional arrangements of limited powers, representation, separation of powers and checks and balances; and the Anti-Federalists sought to constrain excesses by the Bill of Rights, Hamilton and Madison also believed that strong states could act as a counterpoise to a too-strong federal government. They believed too that the strength of each state government was a function of the devotion held for it by its citizens. That devotion in turn was the natural response of a citizenry to the role of the government in securing fundamental interests through the civil and criminal laws. Hamilton explained:

But let it be admitted, for argument sake, that mere wantonness and lust of domination would be sufficient to beget [a disposition in the federal government to divest the states of their authority], still it may be safely affirmed, that the sense of the constituent body of the national representatives, or in other words of the people of the several States would control the indulgence of so extravagant an appetite

The superiority of influence in favor of the particular governments would result partly from the diffusive construction of the national government, but chiefly from the nature of the objects to which the attention of the State administrations would be directed.

. . . .

There is one transcendent advantage belonging to the province of the State governments which alone suffices to place the matter in

Michael McConnell has argued that leaving these matters to the local governments also would permit innovations spurred by the competition to attract business to locate within their bounds. *See* McConnell, *supra* note 116, at 1498-1500. McConnell suggests further that the framers might have left to the states the discretion to regulate matters of morals out of a fear that if such power were left to the new federal government, a single universal law would make it more difficult, indeed impossible, to escape to a more congenial jurisdiction where one might freely exercise one's conscience. Given the diversity of opinion within the nation, were the power left to the states, different states would likely regulate these matters differently and a dissident would have a greater possibility of finding freedom in a community more congenial to his or her inclinations. *See id.* at 1506. The difficulty with such a view is that it assumes that the only way in which a matter might be dealt with in a constitution is through the allocation of some power. That is not the case, as the Bill of Rights illustrates. Matters of conscience might have been better protected universally by extending the disabilities of the Bill of Rights to cover the states as well as the federal government. This is the strategy that the framers adopted in Article I, §§ 9, 10. Each prohibits its respective subject from passing bills of attainder and ex post facto laws. U.S. CONST. art. I, § 9, cl. 3; § 10, cl. 1.

a clear and satisfactory light,—I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment. It is that which being the immediate and visible guardian of life and property having its benefits and its terrors in constant activity before the public eye . . . contributes, more than any other circumstance, to impressing upon the minds of the people, affection, esteem, and reverence towards the government. This great cement of society . . . independent of all other causes of influence, would ensure them so decided an empire over their respective citizens as to render them at all times a complete counterpoise, and, not unfrequently, dangerous rivals to the power of the Union.²⁸¹

Had the framers of the Fourteenth Amendment given to Congress the power "to secure to the citizens of each State all privileges and immunities of citizens in the several States," as Congressman Bingham had originally proposed, the Fourteenth Amendment may well have undermined this dimension of federalism by drastically altering the balance of power between the states and the national government. But we have seen that the framers of 1868 declared their allegiance to the traditional presumption that the primary responsibility for enforcing the civil and criminal law would remain with the states.²⁸² Replacing the Congressional grant with a self-executing right institutionalized that presumption and insulated the states against a Congress determined to enact its own national civil and criminal laws.

Nonetheless, by placing the Supreme Court and Congress as potentially coercive forces aimed at the backs of the states, one might argue that their integrity as guardians of fundamental interests had been compromised. Two factors blunt this objection. First, there is no evidence that the discretion of the states over fundamental interests, through their power over the civil and

281. THE FEDERALIST NO. 17, at 168-69 (Alexander Hamilton) (Benjamin F. Wright ed., 1961). See also THE FEDERALIST NO. 51, at 357 (James Madison) (Benjamin F. Wright ed., 1961) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."). The Federalist Papers are vague on the mechanics by which the states might resist a usurpatious federal government. Akhil Reed Amar has identified three possibilities: (1) politically in the ability of the state governments to monitor and inform their constituents of federal actions, (2) militarily through the maintenance of state militias, and (3) legally by creating causes of action against federal officials who violate fundamental interests. See Amar, *supra* note 133, at 1492-1519.

282. See *supra* text accompanying notes 246-264.

criminal law, was ever conceived as a freedom to define these interests as they saw fit. Many, indeed, understood the citizens of the United States to be a united people precisely in their common commitment to common rights and liberties. John Jay appealed to this ideal in urging the adoption of the new Constitution:

This country and this people seem to have been made for each other, and it appears as if it was the design of Providence, that an inheritance so proper and convenient for a band of brethren, united to each other by the strongest ties, should never be split into a number of unsocial, jealous and alien sovereignties.

Similar sentiments have hitherto prevailed among all orders and denominations of men among us. To all general purposes we have uniformly been one people; each individual citizen every where enjoying the same national rights, privileges, and protection.²⁸³

As we have seen, where the states had demonstrated the greatest inclination towards abuse, the framers did not hesitate to protect fundamental interests in the Constitution through the same sorts of rights aimed at the new federal government.

This ideal prevailed still following the Civil War. Defending his original draft of the Fourteenth Amendment, Congressman Bingham denied that the Amendment would deprive any state of its rights on the ground that no state had ever reserved to itself the power to deny the rights protected by the Amendment. He argued that these rights were "universal and independent of all local State legislation" and "belonged, by the gift of God," to all.²⁸⁴

Second, the existence of a higher standard, backed by the threat of coercive enforcement, does not in itself deprive a state of dignity and the right to respect and loyalty any more than the civil and criminal laws deprive a virtuous citizen of dignity and the right to respect. The allegiance on which Hamilton relied to fortify the states was not a reaction to unbridled power; it was rather the response accorded to a state actually "being the immediate and visible guardian of life and property."²⁸⁵

We might hold a neighbor in low regard if we felt that that neighbor refrained from a hundred injustices only out of fear of the law. If the same were true of a state, that it refrained from abusing its citizens only because of the Fourteenth Amendment, that state would already have forfeited the respect of its citizens and proven the virtue of the Amendment. Another, and even

283. THE FEDERALIST NO. 2, at 94 (John Jay) (Benjamin F. Wright ed., 1961).

284. Farber and Muench, *supra* note 117, at 270.

285. The Federalist No. 17, at 169 (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

more likely possibility is that a majority of the citizens of the state might demand the injustice, since it would be levied against the minority of citizens. In that case, the citizens might resent the acquiescence of the state and even form themselves into vigilante groups opposed to the states, as some citizens in the South formed themselves into the Ku Klux Klan during reconstruction. That very possibility, however, and the example of the factitious Klan, is only further evidence for the wisdom of federal protection of fundamental interests. We value strong states, after all, to oppose a usurpatious federal government, not to permit it disregard the values and liberties that unite us into a nation and whose protection, as Madison observed, is "the great desideratum" by which the virtue of the government would be judged.

It may be too strong to claim that the Fourteenth Amendment perfected federalism, as if any human institution administered by beings as imperfect as we could ever be perfected.²⁸⁶ But it is fair to say that the Fourteenth Amendment, as conceived by its framers, rather than destroying federalism, as the majority in *Slaughter-House* feared, improved upon the original arrangements of federalism. By checking the excesses of the states, it better secured rights regarded as universal and fundamental by the founding fathers but left precariously, as the Civil War demonstrated, wholly to the guardianship of the states.

286. See *supra* note 253.