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Edward J. Erler

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The Fourteenth Amendment and the Protection of Minority Rights*

*Edward J. Erler***

I. Introduction

The extent of the federal government's power to protect minority rights hinges upon an interpretation of the fourteenth amendment. One can hardly doubt that the framers of the fourteenth amendment intended to change the relationship between the federal and state governments in significant ways. The challenge, however, is to determine the extent of the modifications of this relationship contemplated by the writers of the fourteenth amendment. This is, of course, an issue that has been agitated many times with few convincing results—but it is nevertheless one to which we must frequently recur.

The character of the relationship between federal and state governments has been in dispute since the inception of the Constitution. The principal obstacle to a definitive understanding of this relationship was indicated by James Madison in *The Federalist* where he remarked that in fashioning the federal relationship "the Convention must have been compelled to sacrifice theoretical propriety to the force of extraneous considerations."[1] This sacrifice produced what Madison termed "neither a national nor a federal Constitution, but a composition of both,"[2] and was occasioned by what he delicately described as "the peculiarity of our political situation."[3] The late Martin Diamond, a most perceptive student of *The Federalist*, remarked that in advocating the compound republic, "*The Federalist* . . . [did] not expect the federal elements to predominate. It sees conflict be-

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** Professor of Political Science, California State University, San Bernardino.

1. The Federalist No. 37, at 230 (J. Madison)(Mentor ed. 1961).
2. The Federalist No. 39, at 246 (J. Madison)(Mentor ed. 1961).
3. The Federalist No. 37, at 230 (J. Madison)(Mentor ed. 1961).

tween the national and federal principles in the 'composition' created by the Constitution, and, when read carefully, shows the reason why the national principle may be expected and may be hoped to predominate."[4]

II. The Fourteenth Amendment Was Intended to Bring the Constitution in Harmony With the Natural Rights Principles of the Declaration of Independence

A theme frequently repeated in the thirty-ninth Congress was that the fourteenth amendment would provide the completion of the regime of the founding. In the view of many who participated in the fourteenth amendment debates, the founding was incomplete because the Constitution had allowed for the continued existence of slavery and therefore stood in opposition to the founding principles that "all men are created equal" and its necessary concomitant that all legitimate government must be derived from "the consent of the governed." Thaddeus Stevens, a leading radical Republican, made this ringing declaration before the House on May 8, 1866:

> I beg gentlemen to consider the magnitude of the task which was imposed upon the [members of the Joint Committee on Reconstruction]. They were expected to suggest a plan for rebuilding a shattered nation—a nation which though not dissevered was yet shaken and riven . . . through four years of bloody war. It cannot be denied that this terrible struggle sprang from the vicious principles incorporated into the institutions of our country. Our fathers had been compelled to postpone the principles of their great Declaration, and wait for their full establishment till a more propitious time. That time ought to be present now.[5]

Representative Newell argued in the same vein, noting that the explicit purpose of the framers was to devise a constitution that would set into motion the principles of the Declaration of Independence. It was the political expediency, he asserted, that led the framers to depart from those principles in the toleration of slavery:

> The combined wisdom of these patriotic men produced our present Constitution. It is a noble monument to their abil-

4. Diamond, *The Federalist's View of Federalism*, in Essays in Federalism 21, 50-51 (1961).

5. Cong. Globe, 39th Cong., 1st Sess. 2459 (1866).

> ity; but, unfortunately, like all human instruments, it was imperfectly constructed, not because the theory was wrong, but because of the existence in the country of an institution so contrary to the genius of free government, and to the very principles upon which the Constitution itself was founded. . . .The framers of the Constitution did what they considered best under the circumstances. They made freedom the rule and slavery the exception in the organization of the Government. They declared in favor of the former in language the most emphatic and sublime in history, while they placed the latter, as they fondly hoped, in a position favorable for ultimate extinct extinction.[6]

And in a rhetorical burst of enthusiasm that was not uncharacteristic of the fourteenth amendment debates, Senator Lane of Indiana remarked that

> to-day we have come back to the proud standpoint where our ancestors stood when they gave utterance to that proud, that noble enunciation which shook the despotisms of the world, that "all men are created equal" and have inalienable rights. After making the whole circle of history—it has taken us seventy-five years—we come back to the proud position of the fathers, and we stand upon that principle, and there may stand with safety. . . . [L]et us stand not upon expediency, but upon that grand principle enunciated by the fathers in the Declaration of Independence.[7]

These quotations—and many others that could be assembled—indicate that the Reconstruction Congress understood the fourteenth amendment to be grounded in natural rights theory. [8] Most importantly, natural rights—life, liberty, and property—were seen as personal rights, the exclusive possession of individuals, the irrefragable dictate of natural human equality, not the epiphenomenon of one's class status, racial or otherwise.[9] References to the Declaration of Independence as the "organic law" were so frequent throughout the debates that one can hardly doubt that the Reconstruction Congress was, in some sense, self-consciously attempting to restore the Declaration of

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6. *Id.* at 866.

7. *Id.* at 739.

8. R. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876, 4-11 (1985).

9. *See, e.g.*, CONG. GLOBE, 1st Sess. 1071, 1073, 1075 (Feb. 28, 1866) (remarks of Sen. Nye); E. ERLER, EQUALITY, NATURAL RIGHTS AND THE RULE OF LAW: THE VIEW FROM THE AMERICAN FOUNDING 20-32 (1984).

Independence as the authoritative source of the Constitution's principles.[10]

President Andrew Johnson's State of the Union message in December of 1865 accurately reflected the sentiments of a majority of the legislators who were about to embark upon the task of reconstructing the Union:

> Our Government springs from and was made for the people—not the people for the Government. To them it owes allegiance; from them it must derive its courage, strength, and wisdom. But while the Government is thus bound to defer to the people, from whom it derives its existence, it should, from the very consideration of its origin, be strong in its power of resistance to the establishment of inequalities. Monopolies, perpetuities, and class legislation are contrary to the genius of free government, and ought not to be allowed. Here there is no room for favored classes or monopolies; the principle of our Government is that of equal laws and freedom of industry. . . . We shall but fulfill our duties as legislators by according "equal and exact justice to all men," special privileges to none. The Government is subordinate to the people; but, as the agent and representative of the people, it must be held superior to monopolies, which in themselves ought never to be granted, and which where they exist, must be subordinate and yield to the Government.[11]

Congress readily agreed with Johnson's standard of "equal and exact justice to all men." Nevertheless, as Johnson's veto of the Freedmen Bureau Bill (among other things) indicated, there were considerable differences of opinion as to how this goal of "equal and exact justice to all men" was to be achieved. What stood in the way of the nationalization of the principles of the Declaration of Independence more than anything else was the debate over the federal relationship. The great question concerned the extent to which the federal relationship should be modified in order to bring the Constitution into harmony with the natural right principles of the Declaration of Independence.[12]

The immediate purpose of the fourteenth amendment was

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10. Farber & Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENTARY 235, 259, 272 (1984).

11. State of the Union Address by Andrew Johnson (Dec. 4, 1865), *reprinted in* 8 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3559-60 (J. Richardson ed. 1897).

12. H. HYMAN & W. WIECEK, EQUAL JUSTICE UNDER LAW 401-07 (1982).

to secure the citizenship of the newly freed slaves. The Civil Rights Act of 1866[13] had already granted citizenship to all persons born in the United States, but many legislators wanted to go further and put the question of citizenship out of the reach of ordinary legislation. Although certainly moribund, the *Dred Scott*[14] decision was still good law and the elimination of its bar to citizenship for those of African descent demanded a constitutional amendment.

III. The Fourteenth Amendment Was Intended to Give the Federal Government Broad Powers to Protect Individual Rights

Prior to 1868, federal citizenship derived from state citizenship—every citizen of a state was automatically a citizen of the United States by virtue of his state citizenship. Had this relationship subsisted, the states could have withheld state citizenship from the newly freed slaves and defeated any attempt by the federal government to bestow the former slaves with United States citizenship and its guaranteed rights. The fourteenth amendment resolved this problem by changing "the origin and character of American citizenship."[15] Federal citizenship became primary and state citizenship derivative. As James G. Blaine, a leading member of the thirty-ninth Congress, explained: "Instead of a man being a citizen of the United States because he was a citizen of one of the States, he was now made a citizen of any State in which he might choose to reside, because he was antecedently a citizen of the United States."[16]

To most members of the Reconstruction Congress, this change in the status of federal citizenship inescapably worked a fundamental change in the federal relationship. Their understanding was that the natural rights principles set forth in the Declaration of Independence had been nationalized by the fourteenth amendment. Scarcely five years before the thirty-ninth Congress took up the issue of the fourteenth amendment, Abraham Lincoln, in his special message to Congress on July 4, 1861, had remarked that "[t]he Union is older than any of the States;

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13. The Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).

14. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

15. W. Gutherie, Lectures on the Fourteenth Article of Amendment to the Constitution of the United States 19 (1898).

16. *Id.* at 19 (quoting J. Blaine, 2 Twenty Years of Congress, 1861-1881 189 (1884)).

and, in fact, it created them as States."[17] It was, Lincoln noted, in the Declaration of Independence that "the 'United Colonies' were declared to be 'Free and Independent States'; but, . . . the object plainly was not to declare their independence of *one another,* or of the *Union;* but directly the contrary, as their mutual pledge, and their mutual action, before, at the time, and afterwards, abundantly show."[18] Here, Lincoln was echoing the leading members of the Constitutional Convention. James Wilson, for example, with the concurrence of Madison, Hamilton, and Gerry, argued that it was the Declaration of Independence that established "the United Colonies [as] free & independent States."[19] He also inferred, Madison reports, "that they were independent, not *Individually* but *Unitedly* and that they were confederated as they were independent, States."[20]

Early federal cases took an expansive view of the federal government's power to act under the fourteenth amendment. The case of first impression was *United States v. Hall,*[21] decided in 1871. This case concerned section six of the Enforcement Act of 1870,[22] which made it unlawful for any person to deprive a citizen of the United States or any other person within the jurisdiction of any State or Territory of "any right or privilege granted or secured to him by the Constitution or laws of the United States."[23] In *Hall,* several citizens of Alabama had been charged with conspiring and banding together to deprive citizens of the right to freedom of speech and peaceable assembly. The defendants argued that Congress had exceeded its constitutional authority in passing the Enforcement Act. The Constitution, it was alleged, recognized the rights in question, but did not secure

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17. 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 434 (Basler ed. 1953).

18. *Id.* at 433 (emphasis in original).

19. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 324, 467 (M. Farrand ed. 1966). Less than four months before Lincoln's special message to Congress, the Supreme Court had handed down its opinion in Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861). Chief Justice Taney, writing for a unanimous Court declared that the "colonies had . . . by the Declaration of Independence, become separate and independent sovereignties." *Id.* at 101. *Cf.* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316-17 (1936).

20. *Id.* (emphasis in original).

21. 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282). *See* McCurdy, *William B. Woods,* 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 2075-76 (Levy, Karst & Mahoney eds. 1986).

22. Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 141 (1870).

23. *Id.*

them.[24] The gist of the argument was that while Congress is prohibited from interfering with a right by legislation—as it is in the case of the first amendment—this does not imply that Congress is authorized to protect that right by positive legislation.

Judge Woods in *Hall* replied that, as a logical proposition, Congress is not precluded from enacting laws designed to *secure* rights it is prohibited from *impairing*. Thus, the first amendment prohibits Congress from passing laws abridging the right of the people peaceably to assemble and to petition the government for a redress of grievances. Does this mean that Congress is also prohibited from passing laws designed to secure and facilitate the right of peaceable assembly and petition? Logic, Judge Woods maintained, would answer in the negative.

However, Judge Woods noted that the history of the debates surrounding the framing and ratification of the Bill of Rights left no doubt that its provisions were meant to be *limitations* on the power of the federal government, and not grants of power. Thus, the conclusion is inescapable that the first eight amendments were designed to reserve to the states and to the people "the power to secure the rights enumerated therein against the action of congress, and not give congress power to enforce them as against the states."[25] This was, Judge Woods laconically notes, the result of *Barron v. Baltimore*[26] in 1833, and its progeny.

The question that remained was to what extent this scheme had been altered by the adoption of the fourteenth amendment. Judge Woods began his response to that question by pointing out the change in the status of Federal citizenship:

> By the original constitution citizenship in the United States was a consequence of citizenship in a state. By [the first] 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.[27]

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24. *Hall*, 26 F. Cas. at 80.
25. *Id.* at 81.
26. 32 U.S. (7 Pet.) 243 (1833).
27. *Hall*, 26 F. Cas. at 81.

Judge Woods did not think that this question was a question of any peculiar delicacy to determine what the privileges and immunities incident to federal citizenship were: "They are undoubtedly those which may be denominated fundamental; which belong of right to the citizens of all free states, and which have at all times been enjoyed by the citizens of the several states . . . ."[28]

These fundamental rights comprehended not only freedom of speech, but "the other rights enumerated in the first eight articles of amendment to the constitution."[29] And in terms of the fourteenth amendment's section five, Judge Woods remarked that "congress has the power, by appropriate legislation, to protect the fundamental rights of citizens of the United States against unfriendly or insufficient state legislation."[30] As he explained, this type of inadequate state law included "omission to protect, as well as the omission to pass laws for protection."[31]

In exercising its section five powers, Congress could not, of course, "interfere directly with state enactments [nor] compel the activity of state officials."[32] Judge Woods concluded that the "only appropriate legislation [is] that which will operate directly on offenders and offenses."[33] Thus, in Judge Woods' view, the privileges and immunities of federal citizenship extended to the whole panoply of rights recognized in the Bill of Rights; therefore, Congress' power to enforce them through its section five powers extended to individuals.

Two years later, in 1873, these same questions were addressed in a more elaborate and sophisticated manner by Justice William Strong sitting on circuit in Delaware. The case, *United States v. Given*,[34] was an appeal from a conviction under section two of the Enforcement Act of 1870,[35] which made it unlawful for any state officer to refuse "to give to all citizens of the United States the same and equal opportunity . . . to become qualified to vote without distinction of race, color, or previous

28. *Id.*
29. *Id.* at 82.
30. *Id.* at 81.
31. *Id.*
32. *Id.*
33. *Id.*
34. 25 F. Cas. 1324 (C.C.D. Del. 1873) (No. 15,210).
35. Enforcement Act of 1870, ch. 2, § 2, 16 Stat. 140 (1870).

condition of servitude."[36] Convictions under this section carried misdemeanor criminal penalties. The principal challenge to the conviction on appeal was that the statute under which the indictment was framed was not authorized by the Constitution.

Justice Strong began his analysis by remarking as follows:

> The powers of [the Federal Government] are limited in number, but not in their nature. If, therefore, the grant of power can be found in the constitution, the validity of a law enacted under it is not dependent upon the extent to which the exercise of the power has been carried.[37]

The question here, as in *Hall*, was two-fold: (1) whether the Constitution's mere recognition of a right necessarily implied that the federal government had positive power to protect that right; and (2) whether a prohibition upon the federal government necessarily implied a right that attached to federal citizenship.

In regard to the Reconstruction Amendments in general, Strong noted that "[t]he thirteenth, fourteenth, and fifteenth amendments of the constitution have confessedly extended civil and political rights, and, I think, they have enlarged the powers of congress."[38] The thirteenth amendment, Strong argued, "made the right of personal liberty a constitutional right."[39] In the literal terms of the thirteenth amendment, this personal liberty attached to federal citizenship, which citizenship was "assured" by the fourteenth amendment. As to the fifteenth amendment, Strong noted that

> it defined partially that which constitutes citizenship and which belongs to citizenship as such. It recognizes, as a right of citizenship, exemption from disability on account of race, color, or previous condition of servitude, in the determination of a right to vote. It practically declares that citizenship, irrespective of color or race, confers a right to vote on equal terms or conditions with those that are required for voters of another race of color.[40]

In answering the second part of the question—whether a

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36. *Id.*
37. United States v. Given, 25 F. Cas. 1324, 1325 (C.C.D. Del. 1873) (No. 15,210).
38. *Id.*
39. *Id.*
40. *Id.*

prohibition upon the federal government established a federal right—Strong replied as follows:

> There are very many instances to be found in the constitution as it was before the recent amendments, in which rights of persons have been recognized and secured without any express grant. It is not uncommon to speak of them as existing, and to prohibit their infringement. The prohibition is itself an acknowledgment of the right.[41]

Strong mentions the provision of article I, section 9, which prohibits the suspension of the writ of habeas corpus "unless when in cases of rebellion or invasion the public safety may require it."[42] This prohibition, Strong contended, "is a constitutional recognition that such a privilege does exist."[43]

As Judge Bradford, who sat with Strong in hearing the case, expressed in a separate opinion, "[t]his clause comprehends the constitutional grant of the writ of habeas corpus under the form of an expression of denial of its suspension except in certain cases."[44] Bradford argued that the same interpretation would apply to the first amendment where freedom of religion, free press, and speech "are granted under a form of expression denying their abridgment," and it would be impossible, he implied, to account for the existence of the prohibition if there were no rights involved—indeed the prohibition itself was proof of the existence of rights attached to federal citizenship.[45]

But Justice Strong's main argument in *Given* for an expansive view of Congress' power under section five rested on an analysis of the Supreme Court's famous 1842 decision in *Prigg v. Pennsylvania*.[46] Strong pointed out that *Prigg* had overturned Pennsylvania's personal liberty law, upholding Congress' power to secure "the right of a master to the return of his fugitive servant, . . . [even though the Constitution] gives no express power to congress to legislate upon the subject."[47] *Prigg* was an important ruling, according to Strong, because "it [bore] directly upon the question of how far Congress could, under the constitution, as it was before its recent amendments, interfere to protect

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41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 1329 (Bradford, J., concurring).
45. *Id.*
46. 41 U.S. (16 Pet.) 539 (1842).
47. *Given*, 25 F. Cas. at 1325.

rights recognized by it."[48] As Strong pointed out, the principle of constitutional construction established by Justice Story in *Prigg* was that the end to be secured was the measure of "the extent of the power existing to secure it."[49] Even though Congress had no express power to secure the right in question, the Court in *Prigg* upheld the 1793 fugitive slave law as an appropriate power inferred from the ends or purposes recognized in the Constitution.[50] But the Reconstruction amendments, Strong contended, "have introduced great changes."[51] Power was conferred by these amendments upon the federal Congress "to enforce the articles conferring the right, and [this power must be] construed as to confer some effective power."[52]

The opinions of Judge Woods in *Hall* and Justice Strong in *Given* both argued that the primary purpose of the Reconstruction amendments was to enlarge and extend the rights of private persons. As Strong stated:

> It was well known when [the fifteenth amendment] was adopted that in many quarters it was regarded with great disfavor. It might well have been anticipated that it would meet with evasion and hindrances, not from state legislatures, for their affirmative action was rendered powerless by it, or not from a state's judiciary, for their judgments denying the right[s] were reviewable by federal courts, but by private persons and ministerial officers. . . . It was not intended to leave the right without full and adequate protection. Earlier prohibitions to the states were left without any express power of interference by congress; but these later, encountering as they did so much popular prejudice and working changes so radical, were fortified by grants to congress of power to carry them into full effect—that is, to enact any laws appropriate to give reality to the rights declared.[53]

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48. *Id.* at 1326.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* During the debates over the passage of the fourteenth amendment in Congress, frequent references were made to the *Prigg* case. For example, on March 9, 1866, Congressman Wilson, Chairman of the House Judiciary Committee, remarked that

> we are not without light as to the power of Congress in relation to the protection of [the rights contained in section one of the proposed amendment]. In the case of *Prigg v. Commonwealth*—and this it will be remembered was uttered in behalf of slavery—I find this doctrine, and it is perfectly applicable to this case.

CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866).

53. *Given*, 25 F. Cas. at 1327.

Thus, Strong concluded, "[i]t is . . . an exploded heresy that the national government cannot reach all individuals in the states."[54] Both Woods and Strong argued that the "privileges and immunities" clause of the fourteenth amendment contained the principal substantive protections that were the necessary incidents of federal citizenship. But these two opinions were too simple and straightforward to survive the subsequent political maneuvering that took place between Congress, the President, and the Supreme Court in the years of reconstruction.

Some scholars have argued that the passage of the Enforcement Acts of 1870 and 1871[55] "amount to an almost contemporaneous construction of the [reconstruction] amendment[s] by its authors."[56] These two bills were enacted within a scant three years of the ratification of the fourteenth amendment and by Congresses still heavily populated by those who had participated in the debates over the reconstruction amendments. Michael Zuckert has argued recently that the debate over the Enforcement Act of 1871 provides an important insight into the original intention of the framers of the fourteenth amendment.[57] Much of the debate centered on precisely the issue of the framers' intent. Zuckert concludes that the 1871 debate reveals that congressional power under section five was intended to provide remedies for state failure, as opposed to state action, and that the remedies were intended to extend to the protection of individual or private rights.[58]

Zuckert points to a particularly revealing argument by John Bingham of Ohio, the man often described by historians as "the James Madison of the fourteenth amendment." Bingham enlisted the aid of the French political philosopher Alexis de Tocqueville to describe the theory of federalism that was embodied in the fourteenth amendment:

> The nation cannot be without that Constitution, which made us "one people"; the nation cannot be without the State governments to localize and enforce the rights of the people

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54. *Id.* at 1328.

55. Enforcement Act of 1871, ch. 99, 16 Stat. 433 (1873).

56. Franz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1357 (1964); *see* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 96-97 (1872) (Field, J., dissenting).

57. Zuckert, *Congressional Power Under The Fourteenth Amendment—the Original Understanding of Section Five*, 3 CONST. COMMENTARY 123 (1986).

58. *Id.* at 142-43.

> under the Constitution. No right reserved by the Constitution to the States should be impaired, no right vested by it in the Government of the United States, or in any Department or officer thereof, should be challenged or violated. "Centralized power, decentralized administration," expresses the whole philosophy of the American system.[59]

What made America a great nation, according to Bingham, was the declaration of rights contained in the Constitution. The Constitution "nationalized" the principles of the Declaration of Independence and established national standards of action even before the fourteenth amendment. Yet those standards depended in practice on the good will of the states, for the original Constitution neither proscribed the states from violating them nor gave the Congress complete or even adequate powers to secure them. That omission, made necessary by the presence of slavery in the states, Bingham argued, was the tragic flaw of the original Constitution—a flaw that was remedied by the passage of the fourteenth amendment:

> Nothing can be plainer to thoughtful men than that if the grant of power had been originally conferred upon the Congress of the nation, and legislation had been upon your statute-books to enforce these requirements of the Constitution in every State, that rebellion, which has scarred and blasted the land, would have been an impossibility.[60]

The grant of power to the federal government for the enforcement of the principles of the Declaration of Independence was made impossible by the presence of slavery. Had the fifth amendment's command that "no person . . . be deprived of life, liberty, or property, without due process of law" been held to be binding upon the states, slavery would have been instantly abolished. For, although a state could have denied that slaves were citizens, they could hardly pretend that they were not persons. After the abolition of slavery, the Constitution would bear a different relationship to the principles of the regime.

The fourteenth amendment thus nationalized the natural rights principles of the Declaration of Independence while allowing the states effective power to supply the primary security

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59. CONG. GLOBE, 42nd Cong., 1st Sess. app. at 85 (1871). *See* Diamond, *On the Relationship of Federalism and Decentralization*, in COOPERATION AND CONFLICT: READINGS IN AMERICAN FEDERALISM 72, 76-79 (1969).

60. CONG. GLOBE, 42nd Cong., 1st Sess. app. 85 (1871).

for the rights which were part and parcel of those principles. As Zuckert comments:

> Bingham did not, however, believe that the national power must supplant the states in their ordinary custody of these national principles. The states need not cease making the laws that secure and regulate the privileges and immunities of citizens, the life, liberty, and property of persons. The states, then, although retaining the primary care for all these matters, yet are to be subject to the national standards as defined in the Constitution and applied by courts and Congress.[61]

It is certain, however, that the majority of those congressmen who supported the passage of the reconstruction amendments "regarded Congress as the primary organ for the implementation of the guarantees of privileges and immunities, due process, and equal protection."[62] Congress did not intend "to preclude judicial action to apply provisions condemning discrimination by their own force; they did not. However, the Radicals did not trust the judiciary in general and the Supreme Court in particular, either before or after the passage of the resolution submitting the proposed amendment to the states."[63]

According to Bingham, Congress was now armed with power to ensure that the great national principles would be the effective standards of state action. National standards, local action, according to Bingham—following Tocqueville—is the genius of the American federal system; it was the principle of that system both before and after the fourteenth amendment. The fourteenth amendment merely made those national principles the effective basis for state action by no longer relying upon the good will of the state governments. The fourteenth amendment was not intended to invade or displace the municipal legislation of the states, but only accorded Congress the power to act in those instances where the states refused to enforce its own laws for the protection of the newly enfranchised blacks. Any system that depended upon the subordinate parts—the states—for the vindication of national principles, as opposed to the local administration of those principles, would produce that "political mon-

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61. Zuckert, *supra* note 57, at 141.
62. R. HARRIS, THE QUEST FOR EQUALITY 53 (1960).
63. *Id.* at 53-54.

ster of an '*imperium in imperio*' " that Hamilton warned against in *The Federalist*.[64]

IV. CONGRESS' POWER TO PROTECT INDIVIDUAL RIGHTS WAS LIMITED BY THE SUPREME COURT

Bingham's view of the fourteenth amendment's effect on the federal relationship was, of course, vitiated by the Supreme Court's decision in the *Slaughter-House Cases*[65] in 1872, and the tangled web of decisions that were handed down between *Slaughter-House* and the *Civil Rights Cases*[66] in 1883. There is little doubt that the "state action" doctrine of the *Civil Rights Cases* limited the role of Congress in enforcing the fourteenth amendment and provided the basis for a new kind of judicial activism. As Franz remarked:

> A "state action" concept of congressional enforcement power is almost automatically limited to punishing abuses of power by state officials; even here, it can operate only in very extreme instances, since it could seldom be appropriate, or even practical, for Congress to prescribe in detail the duties and functions of state officials. So the traditional "state action" interpretation pulls inevitably toward producing an amendment which confers new power primarily on the federal judiciary, while granting only minimal power to the Congress.[67]

After the Compromise of 1877[68] and the *Civil Rights Cases*, Congress was no longer in the position to attempt to exercise its section five powers. These powers were effectively assumed by the federal judiciary, although one could hardly agree with Justice William Brennan when he asserts that "Congress left primarily to the federal judiciary the tasks of defining what consti-

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64. THE FEDERALIST No. 15, at 157 (A. Hamilton) (B. Wright ed. 1961). In a passage remarkable for its prescience, Hamilton stated:

> It is a singular instance of the capriciousness of the human mind that after all the admonitions we have had from experience on this head, there should still be found men who object to the new Constitution for deviating from a principle which has been found the bane of the old and which is in itself evidently incompatible with the idea of GOVERNMENT; a principle, in short, which, if it is to be executed at all, must substitute the violent and sanguinary agency of the sword to the mild influence of the magistracy.

Id. at 158.

65. Slaughter-House Cases, 83 U.S. (16 Wall) 36 (1872).

66. Civil Rights Cases, 109 U.S. 3 (1883).

67. Franz, *supra* note 56, at 1356. *Accord* 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1051-53 (1953).

68. *See generally* C. WOODWARD, REUNION AND REACTION (1966).

tutes a denial of 'due process of law' or 'equal protection of the laws' and of applying the amendment's prohibitions as so defined."[69] Brennan does, however, clearly indicate the extent to which the amendment, as reformulated by the Supreme Court, came to serve as the ground for a militant judicial activism, whether expressed as "substantive due process" or "substantive equal protection." Brennan contends that:

> Congress did not use its section five powers to define the amendment's guarantees, but confined its role to the adoption of measures to enforce the guarantees as interpreted by the judiciary. And, of course, section five grants Congress no power to restrict, abrogate or dilute the guarantees as judicially construed.[70]

As authority for this last remark, Brennan cites his own infamous footnote ten in *Katzenbach v. Morgan*[71] to the effect that section five gave Congress no power to narrow or restrict the Court's interpretations of the fourteenth amendment, although it does have the power—under the Court's direct supervision—to extend equal protection and due process guarantees. It does not require even a nodding acquaintance with American constitutional history to realize that nothing could have been further from the minds of the framers of the fourteenth amendment or from the minds of those Congressmen who provided the "contemporaneous construction of the amendment" in the Enforcement Acts of 1870 and 1871 and the Civil Rights Act of 1875.[72]

It was singularly unfortunate that the *Slaughter-House Cases* provided the first instance for the Supreme Court to interpret the fourteenth amendment. As the Supreme Court admitted, the case did not present typical reconstruction issues—and not merely because it was a test of state legislation rather than congressional power. The cases did, however, provide the Supreme Court the opportunity of acting "in a statesmanlike manner . . . [that] render[ed] the [privileges and immunities] clause innocuous."[73]

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69. Address by Supreme Court Justice William Brennan, entitled "The Fourteenth Amendment," given to the Section on Individual Rights and Responsibilities of the American Bar Association, New York University Law School (Aug. 8, 1986).

70. *Id.*

71. 384 U.S. 641, 651 n.10 (1966).

72. Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875).

73. McGovney, *Privileges or Immunities Clause: Fourteenth Amendment*, 4 IOWA L.

Justice Miller, writing the majority opinion for a highly divided Court in *Slaughter-House*,[74] noted that it was not the intention of the fourteenth amendment "to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States."[75] Any other interpretation, Miller maintained, would represent "so great a departure from the structure and spirit of our institutions . . . [as] to 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."[76]

Since Justice Miller admitted that the Louisiana statute under consideration granted "exclusive privileges,"[77] the question to be answered in *Slaughter-House* was whether such a grant violated any provision of the thirteenth or fourteenth amendments. With respect to the thirteenth amendment, Justice Miller noted it was a "grand yet simple declaration of personal freedom of all the human race within the jurisdiction of this government."[78] Yet, no one could argue that the State's grant of an exclusive monopoly could amount to a type of "involuntary servitude." In any case, Justice Miller noted, it is difficult to believe that the amendment was intended to apply to anyone other than the newly freed slaves. Justice Miller, however, made no speculations about whether the passage of the thirteenth amend-

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BULL. 219, 240 (1918).

74. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). Justice Strong joined the majority opinion written by Miller. In light of his opinion in *Given* earlier in the same year, this appears somewhat surprising. As his later decision in Strauder v. West Virginia, 100 U.S. (10 Otto) 303 (1879), clearly indicated, Strong apparently believed that although the reach of Congress' authority under section five was extensive, it could only be directed at the relief of the condition of blacks as a class. No doubt some of the passages in Miller's majority opinion were included at the urging of Strong, such as those indicating the "pervading purpose" of the reconstruction amendments to be directed at establishing the freedom of the "newly made freedman and citizen" as a class. This was the first round of the judicial politics of the reconstruction Court which was to culminate in Justice Bradley's *volte face* in the *Civil Rights Cases* in 1883, a change that no doubt was precipitated, in part, by his service on the electoral commission that helped bring about the infamous Compromise of 1877. In addition to *Strauder*, Strong wrote a number of important opinions of the Supreme Court in fourteenth amendment cases: Tennessee v. Davis, 100 U.S. (10 Otto) 257 (1879); Virginia v. Rives, 100 U.S. (10 Otto) 313 (1879); *Ex Parte* Virginia, 100 U.S. (10 Otto) 339 (1879).

75. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 77 (1873).

76. *Id.* at 78.

77. *Id.* at 60.

78. *Id.* at 69.

ment had trenched upon the federal relationship as it had existed before 1865. The answer was only too obvious that it had.

With respect to the fourteenth amendment, the decisive consideration was whether any privilege or immunity of federal citizenship had been invaded. For as Justice Miller pointed out, the fourteenth amendment protected only the privileges and immunities incident to federal citizenship, and these were of a scope that included only the necessary rights that attached to "the great purposes for which the Federal government was established."[79] All other privileges and immunities were within the province of the states. Justice Miller began his consideration of the issue with an analysis of the privileges and immunities clause of article IV, section two of the Constitution. Here Justice Miller relied on the much cited opinion of Justice Bushrod Washington in the federal case of *Corfield v. Coryell*,[80] decided in the district court of Pennsylvania in 1823. *Corfield* was perhaps the case most frequently cited in the congressional debates as indicative of the privileges and immunities that were contemplated to be within the protection of the fourteenth amendment and therefore insulated from state encroachment. Justice Miller and the four other members of the *Slaughter-House* majority saw the matter differently.

Justice Miller maintained that the privileges and immunities of state citizenship did not receive any additional protection from the first section of the fourteenth amendment. The intent of that section was solely to prevent state deprivations of federal privileges and immunities. But, Justice Miller continued, the fourteenth amendment did not pretend to enlarge the privileges and immunities of federal citizenship. The great bulk of privileges and immunities that "belong to citizens of all free governments" are still the incidents of state, as opposed to federal, citizenship.

Justice Miller refused to recognize that even though the privileges and immunities of state citizenship derived from the states, the guarantee of privileges and immunities "in the several states" could not be an incident of state citizenship but must be attributed to federal citizenship.[81] Since the privileges and im-

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79. *Id.* at 79.

80. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

81. Miller misquotes both the Constitution and Justice Washington's opinion in *Corfield*. Both speak of privileges and immunities of citizens *in* the several states, *id.* at 550, whereas Miller wrote privileges and immunities "of citizens *of* the several states."

munities clause appears in the same section as the fugitive slave clause, the implication, following *Prigg v. Pennsylvania,*[82] is that the federal government could act to secure privileges and immunities "in the several states."

In any case, in *Slaughter-House* Justice Miller provided a very narrow list of those privileges and immunities that belonged to federal citizenship. These included, among other things, the right to travel to the seat of government, the right to have one's life, liberty, and property protected while on the high seas and within the jurisdiction of foreign governments, the right to peaceable assembly, and the right to petition for redress of grievances.[83] Any more expansive interpretation of the reach of the privileges and immunities clause would "constitute . . . a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment."[84]

Justice Miller gave short shrift to the arguments of the plaintiffs based on the equal protection and due process clauses. If, as Justice Miller admitted, the Louisiana statute created privileges and immunities of state citizenship then, as it would seem, there was a federal guarantee that the laws upon which the privileges or immunities rested must work to provide to all persons "equal protection of the laws." This was the gist of Justice Field's dissent. He argued that the purpose of the sanitary regulation was accomplished by the landing and slaughtering regulations and that the addition of exclusive monopoly privileges were unnecessary to the accomplishment of the state's legitimate police powers. As he noted, the fourteenth amendment was explicitly passed to obviate such class legislation, placing "the common rights of American citizens under the protection of the National government."[85] He further noted:

Slaughter-House Cases, 83 U.S. (16 Wall.) at 75.

82. 41 U.S. (16 Pet.) 539 (1842).

83. *Slaughter-House,* 83 U.S. (16 Wall.) at 79. It is difficult to understand why Miller included the right of assembly and petition among those privileges and immunities incident to federal citizenship. This constituted a recognition—quite inconsistent with the rest of the opinion—that the prohibition upon the federal government contained in the first amendment created a right of federal citizenship. This lapse was corrected by Chief Justice Waite's opinion in United States v. Cruikshank, 92 U.S. (2 Otto) 542, 553-54 (1875).

84. *Slaughter-House,* 83 U.S. (16 Wall.) at 78.

85. *Id.* at 93 (Field, J., dissenting).

> [A] citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State.[86]

For Justice Field, the great defect of Justice Miller's majority opinion was the fact that he had analyzed the status of federal privileges and immunities without any acknowledgment of the fundamental change in the status of federal citizenship.

The question still remained, however, as to whether section five of the fourteenth amendment contemplated Congress to be the censor of the states for the vindication of the newly nationalized principles of the federal union. Since no congressional statute was involved in *Slaughter-House,* the question of Congress' section five powers did not explicitly arise, although the implication was clear that Congress could act only to secure those privileges and immunities fundamental to federal—as opposed to state—citizenship. Later decisions, particularly *United States v. Cruikshank,*[87] decided in 1876, and *United States v. Harris,*[88] decided in 1883, would confirm this implication beyond any shadow of doubt.

In a bitter dissent in *Slaughter-House,* Justice Bradley argued that there could be no doubt that the principal purpose of the fourteenth amendment was to assert the primacy of federal citizenship over state citizenship.[89] The rights that adhere to federal citizenship, he stated, are extensive, comprehending nothing less than those personal rights enunciated in the Declaration of Independence (which he described as "the first political act of the American people in their independent sovereign capacity.")[90] This statement of rights, he continued, provided the "foundation of our national existence."[91] Thus, Bradley took the position of many of the framers of the fourteenth amendment, who expressed the view that the amendment was intended to complete the regime of the founding by bringing the Constitution finally into harmony with the principles of the Declaration.

Bradley later retreated from his *Slaughter-House* dissent,

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86. *Id.* at 95.
87. 92 U.S. (2 Otto) 542 (1876).
88. 106 U.S. (16 Otto) 629 (1883).
89. *Slaughter-House,* 83 U.S. (16 Wall.) at 116 (Bradley, J., dissenting).
90. *Id.* at 116.
91. *Id.*

joining the Court's unanimous opinion in *Cruikshank*, which reaffirmed the theory of citizenship advanced by the five member *Slaughter-House* majority. Chief Justice Waite, writing for the majority, directed his argument explicitly at Justice Bradley's earlier *Slaughter-House* dissent. He stated:

> The rights of life and personal liberty are natural rights of man. "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the governed." The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these "unalienable rights with which they were endowed by their Creator." Sovereignty, for this purpose rests alone with the States. . . . The Fourteenth Amendment . . . adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society." [92]

As Bingham pointed out in the passages already quoted, the primary responsibility for the protection of life, liberty, and property had devolved upon the states in the Constitution. This responsibility was left to the states not from any considerations of principle, but out of political expediency; the necessity of defending a Constitution that allowed for the protection and continued existence of chattel slavery. This was the greatest bar, according to Bingham, to the nationalization of those rights that belong to all citizens as members of society[93]

United States v. Harris,[94] (which signaled the retreat of Justice Woods, who had been elevated to the Supreme Court in 1880, from his earlier decision in *United States v. Hall*,[95]) and the *Civil Rights Cases*[96] mark the end of Congress' power to act under section five of the fourteenth amendment.

The *Civil Rights Cases*, in an opinion written by Justice Bradley (who had been a member of the electoral commission that decided the outcome of the election of 1876 and laid the

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92. United States v. Cruikshank, 92 U.S. (2 Otto) at 553-54. This statement is at odds with Lincoln's earlier declaration in an 1861 message to Congress to the effect that the Union is older than the states. *See generally* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 434 (Basler ed. 1953).

93. *See generally* CONG. GLOBE, 42nd Cong., 1st Sess. app. at 81-86 (1871).

94. 106 U.S. (16 Otto) 629 (1883).

95. 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282).

96. 109 U.S. 3 (1883).

foundation for the Compromise of 1877) invalidated Congress' last great attempt to use its section five powers to enforce the fourteenth amendment. The attempt to regulate those activities that exist between man and man, the Court said, was beyond the purview of Congress' power. The positive grant of power contained in section five was intended to allow Congress to enforce the negative or proscriptive clauses contained in section one. This means that Congress may only react to correct breaches of the first section's guarantees when undertaken by an official action of the state. The *Civil Rights Cases* thus effectively marked the end of Congress' attempt to exercise its section five powers.

It was not until the Civil Rights Act of 1964[97] that Congress again attempted to enact civil rights legislation on the scale of the 1876 Act invalidated in the *Civil Rights Cases*. But in 1964 the ground had already been prepared for such legislation by the Court's decision in *Brown v. Board of Education*.[98] Between the *Civil Rights Cases* and *Brown*, the Supreme Court had firmly ensconced itself in the role that had been envisioned for the Congress in section five of the fourteenth amendment.

In his dissenting opinion in *Slaughter-House*, Justice Swayne remarked that "fairly construed, [the Reconstruction] amendments may be said to rise to the dignity of a new Magna Carta."[99] We may wonder about Justice Swayne's hyperbole. But it is clear that the *Slaughter-House* Court's truncation of the privileges and immunities clause forced later courts to see a "new Magna Carta" in the due process and equal protection clauses. Constitutional decisions are always decisions regarding substantive issues, even though they might be disguised as merely procedural issues. The Court has thus been forced into the attempt to recreate through the equal protection and due process clauses those substantive rights that the framers of the fourteenth amendment intended to be included in the privileges and immunities clause. After Congress had been driven from the field, so to speak, it was inevitable that the Supreme Court would move to fill the vacuum to become itself the "perpetual censor" of the legislation of the states. "Substantive due pro-

97. 28 U.S.C. § 1447 (1982).

98. 347 U.S. 483 (1954).

99. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 125 (1873) (Swayne, J., dissenting).

cess" became the basis for the Court's new-found judicial activism.

When substantive due process had run it course, the Supreme Court devised a new basis for its judicial activism—"substantive equal protection." The case that represents the epitome of "substantive equal protection" is, of course, *Brown v. Board of Education.*[100] The radical defect of *Brown* was its conception of fourteenth amendment rights as class rights. The attendant necessity of fashioning class-wide remedies was the origin of the Court's new-found judicial activism under the guise of equal protection.[101]

When Congress passed the Civil Rights Act in 1964, it couched the language of that Act purely in terms of individual rights. The Court, however, in subsequent decisions has intimated that the 1964 Act was intended to provide class remedies for historic discrimination against various "discrete and insular minorities."

V. The More Important Question is Not Who Will Protect Individual Rights, but the Extent to Which Individual Rights Will Be Protected

Today, the ultimate question is not whether the Court or Congress had principal responsibility for the enforcement of civil rights. The appropriate question is whether decisions are reflective of constitutional principles.

One could hardly argue that the principles of equal protection have been vindicated in the Court's recent affirmative action cases, with their clear implication that equal protection rights do not adhere to individuals but to the racial class one happens to inhabit. On the other hand, it would be possible to argue that the Civil Rights Act of 1964 was precisely the kind of legislation contemplated by section five of the fourteenth amendment. Its simple principle—the one I believe rests at the heart of the equal protection clause and the natural rights jurisprudence of the Declaration of Independence—is that no individual can be made to bear the burden of an arbitrary racial

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100. 347 U.S. 483 (1954).

101. *See* Erler, *Judicial Legislation,* 3 The Encyclopedia of the American Constitution 1040-43 (Levy, Karst & Mahoney eds. 1986); Erler, *Sowing the Wind: Judicial Oligarchy and the Legacy of* Brown v. Board of Education, 8 Harv. J.L. & Pub. Pol'y 399 (1985).

classification. This notion, which finds expression in the Court's use of "strict scrutiny" to test racial classifications, was used assiduously by the Warren Court to invalidate a variety of discriminatory legislation but was conspicuously absent in the *Brown* case. "Strict scrutiny" represents the core of equal protection analysis—the *a priori* assumption that in constitutional government racial classifications can never play a legitimate role in the absence of some compelling necessity. This principle was, until most recent years, the guiding principle of equal protection analysis. But the Court has—whenever it finds it convenient—chosen to ignore strict scrutiny when the racial classification is said to be "benign"—that is, when no racial class stigma is implied in the classification.

And, in light of more than 110 years of judicial interpretation, Congress seems unable or unwilling to act. In any case, if it does choose to act, it will be, as we have already indicated, under the restriction of Justice Brennan's footnote ten in *Katzenbach v. Morgan,*[102] which forbids Congress to "restrict, abrogate or dilute these guarantees"[103] of the equal protection clause *as judicially construed.*

Would the situation be materially different if incorporation were repealed and the primary responsibility for protecting civil liberties was returned to the states? Can we depend upon the good will of the states to vindicate constitutional principles in the era of state court activism? Justice Brennan, for one, advocates state court activism.[104]

The principal concern is not so much where the decisions are made, but what the decisions are. And neither is it a question of judicial activism or judicial restraint. Rather, the appropriate question is whether constitutional principles are vindicated.

VI. Conclusion

The framers of the fourteenth amendment attempted to complete the regime of the founding by vindicating the founding principles. This required that, within the system of federalism, the principles of individual rights in the Declaration of Independence were to become nationalized. The reason that this had not

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102. 384 U.S. 641, 651 n.10 (1966).
103. *Id.*
104. *See* Erler, *Editor's Introduction,* 2 *Benchmark* 113-15 (1986).

been done in 1787 was because of the existence of slavery, the continued existence of which became the tragic flaw of the American policy. It was well understood by the thirty-ninth Congress that the purpose of the fourteenth amendment was to extend the protection of individual rights to all people. In all our debates over who has power to enforce these rights, it seems that we have forgotten this simple purpose.