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January 2014

## Safeguarding Fundamental Rights: Judicial Incursion into Legislative Authority

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### Recommended Citation

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*Social Justice*. 41.

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## Abstract

### *Safeguarding Fundamental Rights: Judicial Incursion into Legislative Authority*

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The Supreme Court recently limited Congress's ability to pass civil rights statutes for the protection of fundamental rights. Decisions striking sections of the Violence Against Women Act and the Americans with Disabilities Act focused on states' sovereign immunity. These holdings inadequately analyzed how the Reconstruction Amendments altered federalism by making the federal government primarily responsible for protecting civil rights. The Supreme Court also overlooked principles of liberty and equality lying at the foundation of American governance. The Court's restrictions on legislative authority to identify fundamental rights and to safeguard them runs counter to the central credo of American governance that all three branches of government are responsible for protecting individual rights for the general welfare.

This article examines the central principles of American governance. It first analyzes the role of liberty and equality in the founding generation's legal thought. It then reflects on how abolitionists adopted these principles and argued for their universal applicability. Abolitionist theories then entered the Constitution through the Reconstruction Amendments, which granted Congress the power to secure the privileges and immunities of national citizenship against arbitrary abuses. From the late nineteenth century the Court has diminished the potential uses of those amendments. Several Rehnquist Court decisions, such as *United States v. Morrison* and *Board of Trustees v. Garrett*, are indicative of the continuing constraint on legislative civil rights authority.

# Safeguarding Fundamental Rights: Judicial Incursion into Legislative Authority

Professor Alexander Tsesis<sup>1</sup>

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## I. Introduction

The Supreme Court recently invalidated several federal civil rights statutes, including a private cause of action section of the Violence Against Women Act<sup>2</sup> and a state-suit provision of the Americans with Disabilities Act.<sup>3</sup> Its decisions rested on the premise that Section Five of the Fourteenth Amendment does not empower Congress to independently identify substantive constitutional rights. Legislators can pass prophylactic legislation, but only when they are responding to infringements against court defined fundamental interests.<sup>4</sup> The Court, in *City of Boerne v. Flores*, explained that Congress’s power to enforce the Fourteenth Amendment is

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<sup>1</sup> Loyola University of Chicago, School of Law. I am deeply indebted to Mark Tushnet, Sanford Levinson, Herbert Hovenkamp, Gregory Shaffer, Robert Kaczorowski, Margaret L. Moses, and Charmaine Stanislaw for their advice.

<sup>2</sup> *United States v. Morrison*, 529 U.S. 598, 620-21 (2000).

<sup>3</sup> *Board of Trustees v. Garrett*, 531 U.S. 356, 374 (2001).

<sup>4</sup> *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (finding the Religious Freedom Restoration Act unconstitutional, in part, because the statute was “so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent unconstitutional behavior”); *Kimel v. Florida Board of Regents*, 528 U.S. 62, 86 (2000) (denying Congress the power to apply the Age Discrimination in Employment Act to state actors).

limited to the passage of “remedial” statutes.<sup>5</sup> That prophylactic understanding of congressional power means that, unlike the judiciary, the legislature lacks “the power to decree the substance of the Fourteenth Amendment’s restrictions on the States.”<sup>6</sup>

This jurisprudential approach emphasizes the Supreme Court’s lone authority to identify fundamental rights.<sup>7</sup> That judicial exclusivity gives inadequate weight to the role of public input during the legislative process for elaborating on the nature of fundamental rights. Elected officials, like their judicial counterparts, have a duty to accurately characterize the quality of core American interests.<sup>8</sup> From the nation’s founding, the people, not judges, have been regarded as the source of inalienable rights. A historical analysis of how rights have been regarded in the United States provides a starting point for evaluating the extent to which the people have granted Congress the power to protect their vital interests.

Many constitutionally recognized civil rights, such as the rights to privacy<sup>9</sup> and travel<sup>10</sup> are never mentioned in the Constitution. Despite its silence, those rights have long been recognized to be so much at the core of citizenship that they cannot be abridged without a compelling state reason.<sup>11</sup>

The Ninth Amendment explicitly states that the Bill of Rights is a non-exhaustive list of interests that the people retain against governmental interference.<sup>12</sup> While the Reconstruction Amendments expanded federal power to secure all Americans’ liberties, they retained state

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<sup>5</sup> *Boerne*, 521 U.S. at 519.

<sup>6</sup> *Id.*

<sup>7</sup> See Rebecca Zietlow, *Juriscentrism and the Original Meaning of Section Five*, 13 TEMP. POL. & CIV. RTS. L. REV. 485, 487 (2004) (“[t]he Rehnquist Court’s approach to Section Five leaves no room for Congress to independently interpret the Fourteenth Amendment”).

<sup>8</sup> U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); Frank B. Cross, *Institutions & Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1536 (2000) (arguing that there is a lack of “very strong case for exclusive or even primary reliance on judicial enforcement of the Bill of Rights”); Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 241 (2002) (“While the courts remained responsible for declaring the boundaries, it was recognized that the Constitution contemplated room for the political actors to give substantive meaning within those boundaries.”).

<sup>9</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965) (establishing that it is an unconstitutional invasion of privacy to intrude into marital contraceptive decisions); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending *Griswold* to the unmarried); *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing a right to reproductive privacy); *Lawrence v. Texas*, 539 U.S. 558 (2003) (applying sexual privacy right to gays).

<sup>10</sup> *Papachristou v. Jacksonville*, 405 U.S. 156 (1972) (holding that the freedom to wandering and strolling is protected under the Constitution); *Zemel v. Rusk*, 381 U.S. 1, 14 (1965) (finding the right to travel in the Fifth Amendment); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (locating the right in the Fourteenth Amendment); *United States v. Guest*, 383 U.S. 745, 758-59 (1966) (finding that the Commerce Clause protects free movement); and both *Saenz v. Roe*, 526 U.S. 489, 501 (1999) (holding that the right to travel derived from the Privileges and Immunities Clause of Article IV § 2) and *Paul v. Virginia*, 8 Wall. (75 U.S.) 168, 180 (1869) (same).

<sup>11</sup> *Saenz*, 526 U.S. at 502-03 (holding that the Fourteenth Amendment privilege or immunities clause secures the right to travel between states); *Doe v. Bolton*, 410 U.S. 179, 200 (1973) (linking right to privacy to Privileges and Immunities Clause); *Shapiro v. Thompson*, 394 U.S. 618, 643-44 (1969) (determining that “the constitutional right of interstate travel must be shown to reflect a compelling governmental interest”); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 258, 269 (1974) (holding that the state interfered with the right to interstate travel without a compelling reason when it placed a residency requirement on indigent patients seeking non-emergency medical care). Privacy, like travel, is a fundamental right but it is not absolute: *Roe v. Wade*, 410 U.S. 113, 163-64 (1973) (a woman’s right to reproductive privacy may only be limited for compelling reasons).

<sup>12</sup> U.S. CONST. amend. IX.

control over most internal matters, such as tort and contract law.<sup>13</sup> Just like the Ninth Amendment, the Fourteenth Amendments did not include a full list of interests protected under the Equal Protection, Due Process, and Privileges and Immunities Clauses. These ambiguous sounding provisions were to be defined by later generations. As Justice Felix Frankfurter pointed out, “great concepts” like the “due process of law,” “liberty,” and “property” were “purposely left to gather meaning from experience.”<sup>14</sup> The evolution of constitutional doctrine can fill in the ambiguous gaps, but it cannot violate those “great concepts.” The dispute addressed in this article is whether only judges can use precedents to decide the nature of a core citizenship interest or whether Congress can sometimes rely on task forces, committee hearings, or any other legislative tool to identify its constituents’ substantive interest in just treatment.

Multiple perspectives on the nature of rights were available at all stages of American history.<sup>15</sup> And not all interpretations of the Constitution were egalitarian. Arbitrary and repressive doctrines predominated decisionmaking at many points of U.S. history. Prior to the Civil War, a property-oriented notion of rights supported the institution of slavery. However, even before the ratification of the Thirteenth and Fourteenth Amendments, many groups and individuals recognized that the South’s “peculiar institution” violated principles of the Declaration of Independence and the Preamble to the Constitution. Abolitionists and their supporters were inspired by the assertion that “all men are created equal” and the obligation of government to act for the people’s “general welfare.” As early as the eighteenth century, many of the nation’s founders anticipated that statements of national purpose would gradually bring about the end of slavery.<sup>16</sup> The early-nineteenth century abolitionists radicalized this strand of thought. They called on the nation to immediately fulfill its core governmental function through unbiased legislation. The abolitionists refused to abide by the previous generation’s compromises of civil rights in the name of states’ rights.<sup>17</sup>

The protections of civil and political rights contained in the Declaration, Preamble, Reconstruction Amendments and other constitutional provisions arose from a rights-based tradition that is trace to the country’s founding. Unlike a number of contemporary legal thinkers,<sup>18</sup> I believe that there is a fairly stable American Creed that all three branches of government must follow.<sup>19</sup> That is not to deny the multiplicity of values that animate various groups and

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<sup>13</sup> U.S. CONST. amend. XIII, XIV, and XV.

<sup>14</sup> *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., concurring).

<sup>15</sup> MICHAEL FOLEY, *AMERICAN CREDO: THE PLACE OF IDEAS IN US POLITICS* 6-9 (2007).

<sup>16</sup> Alexander Tsesis, *A Civil Rights Approach*, 39 U.C. DAVIS L. REV. 1773, 1783-90 (2006).

<sup>17</sup> See, e.g., American Anti-Slavery Society, *Declaration of the Anti-Slavery Convention*, Dec. 4, 1833, PROCEEDINGS OF THE ANTI-SLAVERY CONVENTION, ASSEMBLED AT PHILADELPHIA 12, 12-13 (1833); WILLIAM LLOYD GARRISON, AN ADDRESS DELIVERED BEFORE THE OLD COLONY ANTI-SLAVERY SOCIETY . . . , July 4, 1839, at 17 (1839); ELIZABETH HEYRICK, IMMEDIATE, NOT GRADUAL ABOLITIONISM 13, 16 (1824).

<sup>18</sup> See *infra* text accompanying notes ----.

<sup>19</sup> My understanding of the American Creed is similar to Gunnar Myrdal’s in *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 3 (1944). As he put it, “there is evidently a strong unity in this nation and a basic homogeneity in its valuations. Americans of all national origins, classes, regions, creeds and colors have something in common: a social *ethos*, a political creed. It is difficult to avoid the judgment that this ‘American Creed’ is the cement in the structure of this great and disparate nation.” *Id.* The difference between our approaches is that Myrdal is focused on race, while I think the American Creed of civic equality extends to any groups, including gender, nationality, and religious groups. Further, while he speaks in terms of social *ethos*, I think it is also instrumental to constitutional and legislative progress. See Nahum Z. Medalia, *Myrdal’s Assumptions on Race Relations: A Conceptual Commentary*, 40 SOC. FORCES 223, 224 (1962).

individuals in a pluralistic society. Rather, I mean to say that the nation has retained a civil rights ethos that can be traced to its founding documents against which governmental conduct can be judged.

Even though the American Creed has often been violated by gender, nationality, religious, and racial discrimination, it provides an ideological cornerstone for civil rights reforms. Likewise Abraham Lincoln believed that “the equality of men” has been a “central idea” permeating American “public opinion” from the Revolutionary Period.<sup>20</sup> While manifold inequalities have plagued the U.S., they have not halted the “steady progress toward the practical equality of all men.”<sup>21</sup> Human equality “is the great fundamental principle upon which our free institutions rest.”<sup>22</sup> A great American sociologist, W. E. B. DuBois, explained that for the “clique of political philosophers to which Jefferson belonged” slavery was irreconcilable with the country’s claim of independence.<sup>23</sup> E. B. Reuter, writing in DuBois’s *Phylon* journal, explained that the “American Creed” is a “body of ideals, held alike by members of all races, classes, and creeds, that makes America great. But the creed is not lived up to; it is put in the laws that are ignored. This conflict between status and ideals is central in all phases of the Negro problem,”<sup>24</sup> and, it should be added, the same failure to achieve explicit governmental goals harms other groups facing systematic discrimination. Martin Luther King, Jr. adopted this understanding in his world famous 1963 speech at the Lincoln Memorial. There, he affirmed that his hope for an equitable society was “deeply rooted in the American dream that one day this nation will rise up and live out the true meaning of its creed—we hold these truths to be self-evident, that all men are created equal.”<sup>25</sup>

To the contrary, Rogers M. Smith recently popularized the view that prejudicial, “ascriptive” systems of governance were as much part of the American tradition as the liberal democratic model.<sup>26</sup> He is undoubtedly correct that U.S. history is riddled with the unequal treatment of women, blacks, Native Americans, Jews, Catholics, Irish, Japanese, and others. On my account, however, these were deviations from but not manifestations of American commitments to secure the general welfare. Racism, chauvinism, and other forms of intolerance can be found at all stages of American history. Reformers have often linked their efforts to the Declaration’s and Preamble’s statements on universal rights. This article argues that the founding principle of civic equality has repeatedly forced the nation to look inwardly at its shortcomings, inspired resistance movements, and forced constitutional change. The Fourteenth Amendment’s

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<sup>20</sup> Abraham Lincoln, *Speech in Chicago, Republican Banquet* ( Dec. 10, 1856), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 385 (Roy P. Basler ed., 1953).

<sup>21</sup> *Id.*

<sup>22</sup> Letter from Abraham Lincoln to James N. Brown (Oct. 18, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 327, 327 (Roy P. Basler ed. 1953).

<sup>23</sup> W. E. B. DUBOIS, THE SUPPRESSION OF THE AFRICAN SLAVE-TRADE 48 (The Social Science Press 1954) (1896).

<sup>24</sup> E. B. Reuter, *The American Dilemma*, 5 PHYLON 114, 115 (1944) (book review). DuBois’s praise for Myrdal’s book appeared in the pages following Reuter’s article. W. E. B. DuBois, *The American Dilemma*, 5 PHYLON 118 (1944).

<sup>25</sup> Martin Luther King, Jr., *Lincoln Memorial Speech*, available at <<http://www.nps.gov/history/nr/travel/civilrights/dcl.htm>>.

<sup>26</sup> ROGERS M. SMITH, CIVIC IDEALS 35- 39 (1997); Rogers M. Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America*, 87 AM. POL. SCI. REV. 549, 549 (1993).

Enforcement Clause grants legislators the power to play an active role in the effort to rectify past harms and avoid new violations.<sup>27</sup>

Each generation reinterprets the principle of liberal equality through the “stream of history” identified by Justice Frankfurter.<sup>28</sup> In the words of Justice Ruth Bader Ginsburg, progress comes because “[a] prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored and excluded.”<sup>29</sup> Franklin D. Roosevelt explained that the Declaration of Independence is a contract with the people who consented to be governed in exchange for protections of those rights: “The task of statesmanship has always been the re-definition of these rights in terms of a changing and growing social order.”<sup>30</sup> The continuing development of nationally recognized fundamental rights, I believe, is not predicated on John Hart Ely’s “neutral and durable principle.”<sup>31</sup> Neither are “substantive federal constitutional rights drawn . . . exclusively from the great body of relevant Supreme Court decision,” as Larry Yackle would have it.<sup>32</sup>

This article seeks to demonstrate that the government’s duty to provide for the overall welfare of the people is based on inclusive and universal concepts. Accordingly civil rights statutes, which like the Civil Rights Act of 1964, the Age Discrimination Employment Act, and the Americans with Disabilities Act grant federal government jurisdiction over discriminatory conduct, are in accord with the overall structure of American government. Recent Supreme Court cases that have significantly constrained Congress’s ability to identify substantive rights do not give adequate consideration of how the ratification of the Fourteenth Amendment increased legislative power to define and maintain a national standard of liberal equality against arbitrary state discriminations.

Part II of the article discusses the concepts of liberty and equality during the revolutionary period. Emphasis is given to the early understanding of the national statements of purpose in the Declaration of Independence and the Preamble to the Constitution. That part also discusses the constitutional compromises that failed to achieve the stated ends of national government. Part III turns to several abolitionist views on the existence of a national obligation to protect rights. Those constitutional theories became influential during debates on the ratification of the Reconstruction Amendments, which granted Congress the power to pass laws securing rights intrinsic to national citizenship against arbitrary abuses. Debates on the Thirteenth and Fourteenth Amendments, the subjects of Part IV, made the principle of equal rights enforceable through federal statutes. As Part V recounts, the Court variously restrained the reach of new congressional powers. The article concludes, in part VI, with a critique of recent

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<sup>27</sup> See *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966).

<sup>28</sup> *Reid v. Covert*, 354 U.S. 1, 43 (1957) (Frankfurter, J., concurring); FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY & WAITE* 2 (1937).

<sup>29</sup> *United States v. Virginia*, 518 U.S. 515, 557 (1996) (citing RICHARD MORRIS, *THE FORGING OF THE UNION, 1781-1789*, at 193 (1987)).

<sup>30</sup> Franklin D. Roosevelt, 1 *THE PUBLIC PAPERS & ADDRESSES OF FRANKLIN D. ROOSEVELT* 742, 753 (Samuel I. Rosenman, ed., 1938).

<sup>31</sup> John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 949 (1973). Another oft cited article relying on neutral principles is Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1 (1959).

<sup>32</sup> LARRY YACKLE, *REGULATORY RIGHTS: SUPREME COURT ACTIVISM, THE PUBLIC INTEREST, AND THE MAKING OF CONSTITUTIONAL LAW* 1-2 (2007).

Supreme Court decisions, such as *United States v. Morrison*<sup>33</sup> and *Board of Trustees v. Garrett*,<sup>34</sup> which have further limited congressional civil rights authority.

## II. The Status of Rights at the Time of the Nation's Founding

The original Constitution placed limits on Congress's ability to protect individual rights.<sup>35</sup> Several clauses protected the institution of slavery against federal interference. States governed matters of slavery, and the Fugitive Slave Clause in effect forbade Congress from passing any general emancipation law.<sup>36</sup> Another clause required the federal government to protect states from domestic insurrections, including slave uprisings.<sup>37</sup> The Three-Fifths Clause left states with the latitude to exclude large segments of the population from government.<sup>38</sup>

These constitutional provisions undermined the asserted purpose for national independence. While the equitable principles of governmental purpose found in the Declaration of Independence and the Preamble to the Constitution remained unenforceable against the states, they established an abiding, national civil rights ethos for future generations to pursue.

### *A. Declaration of Independence*

Thomas Jefferson's Declaration of Independence resonated the political temperament of the colonies. His statement of the "self-evident" truth 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" distilled the political thought of his day. In drafting the Declaration, Jefferson relied on the contemporary understanding of universal rights.

In separate letters, Richard Henry Lee and John Adams drew attention to the Declaration's lack of originality. Jefferson, in turn, responded that he meant for it to reflect the enervating spirit of the times rather than to express his personal views. Lee, a delegate to the first Continental Congress and a signer of the Declaration, claimed that Jefferson "copied from Locke's treatise on government."<sup>39</sup> John Locke had in fact figured prominently in the pantheon of philosophers whose ideas influenced republican ideals. He insisted that persons "by nature, [are] all free, equal and independent."<sup>40</sup> The erudite Adams, who was the most powerful figure of

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<sup>33</sup> *Morrison*, 529 U.S. at 619 (deciding that Congress overstepped its Commerce Clause and Fourteenth Amendment authority by passing the Violence Against Women Act).

<sup>34</sup> *Garrett*, 531 U.S. at 374 (holding that Congress was not authorized under section 5 of the Fourteenth Amendment to require that states abide by the terms of the Americans with Disabilities Act because it infringed on state sovereign immunity).

<sup>35</sup> See generally Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 319-22 (2004); WILLIAM WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848*, at 62-83 (1977); Frederick Douglass, in *VOICES FROM THE GATHERING STORM: THE COMING OF THE AMERICAN CIVIL WAR* 40-41 (Glenn M. Linden ed., 2001) (reprinted from *THE NORTH STAR*, Apr. 5, 1850); Frederick Douglass, *The Revolution of 1848*, in 1 *FREDERICK DOUGLASS, THE LIFE AND WRITINGS OF FREDERICK DOUGLASS* (Philip S. Foner ed., 1950) (Aug. 1, 1848); Frederick Douglass, *The Constitution & Slavery*, in *id.* (reprinted from *THE NORTH STAR*, Mar. 16, 1849); WENDELL PHILLIPS, *THE CONSTITUTION: A PRO-SLAVERY COMPACT* 3-7 (1969) (1844).

<sup>36</sup> U.S. CONST. art. IV, § 2 cl. 3.

<sup>37</sup> U.S. CONST. art. I, § 8, cl. 15.

<sup>38</sup> U.S. CONST. art. I, § 2. cl. 3.

<sup>39</sup> Jefferson to James Madison, Aug. 30, 1823, in 3 *THE REPUBLIC OF LETTERS 1826* (James M. Smith ed., 1995)

<sup>40</sup> JOHN LOCKE, *AN ESSAY CONCERNING THE TRUE ORIGINAL EXTENT AND END OF CIVIL GOVERNMENT* 51 (1773) (1690). Despite this statement, Locke was not as equalitarian as he seems to be from his *Second Treatise on*



the Continental Congress and later the second president of the United States, wrote to Timothy Pickering with irritation that there “is not an idea in it but what had been hackneyed in Congress for two years before.”<sup>41</sup> Jefferson did not dispute Lee’s and Adams’s assertions. To the contrary, he had not aimed “to find out new principles, . . . to say things that had never been said before, but to place before mankind the common sense of the subject” that reflected the “sentiments of the day, whether expressed in conversation, in letters, printed essays, or the elementary books of public life.”<sup>42</sup>

Jefferson’s accomplishment lay in rendering the readily recognizable commitment to the protection of individual rights in an elegant style that appealed as much to his generation as to future ones.<sup>43</sup> Daniel Webster, one of America’s greatest statesmen of the nineteenth century, extolled Jefferson’s accomplishment: Americans had reason to praise Jefferson for providing “the title-deed of their liberties.”<sup>44</sup> In modern times, Martin Luther King stated that the Constitution and Declaration were “promissory note[s]” to secure life, liberty, and the pursuit of happiness.<sup>45</sup>

The Declaration made clear that the independence from British colonial rule was meant to protect the people against arbitrary infringements of those rights that are intrinsic to humanity.<sup>46</sup> The ideology that inspired future generations to action was itself the product of “an ideological-constitutional struggle.”<sup>47</sup> Historian Bernard Bailyn’s rigorous analysis of nineteenth pamphlets revealed that Americans acted out of “fear of a comprehensive conspiracy against liberty.”<sup>48</sup> Those pamphlets evince “motive and understanding” to create a constitutional system designed to safeguard the “inalienable, indefeasible rights inherent in all people by virtue of their humanity.”<sup>49</sup> The resulting ideas evolved in unpredictable ways throughout the federal and state constitution-making processes.<sup>50</sup>

From the many statements about the value of liberty and the government’s obligation to protect rights emerged a genuinely humanistic, revolutionary purpose that undermines John Hart Ely’s ahistorical claim that the Declaration was “a brief” that harnessed “arguments of every hue,” even those without any support in “positive law.” To the contrary, in an 1825 letter to

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*Government*. In 1669, he drafted a constitution for the colony of South Carolina that prohibited interference with black slavery. See Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMPLE L. REV. 539, 593 n. 498 (2002); Jonathan A. Bush, *Free to Enslave: The Foundations of Colonial American Slave Law*, 5 YALE J.L. & HUMAN. 417, 421(1993); Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2075 (1993).

<sup>41</sup> Adams to Pickering, Aug. 22, 1822, in 2 WORKS OF JOHN ADAMS 514 (Charles Francis Adams ed., 1850).

<sup>42</sup> 7 WRITINGS OF THOMAS JEFFERSON 304, 407 (Ford ed., 1896).

<sup>43</sup> For detail about how Thomas Jefferson became increasingly tolerant of slavery see ALEXANDER TSEISIS, WE SHALL OVERCOME: A HISTORY OF CIVIL RIGHTS AND THE LAW ch. 2 (Yale University Press forthcoming 2008).

<sup>44</sup> Daniel Webster, *Adams and Jefferson: Discourse in Commemoration of the Lives and Services of John and Thomas Jefferson, Delivered in Faneuil Hall, August 2, 1826* at

<<http://etext.virginia.edu/jefferson/grizzard/ellis/eellis09.html>>.

<sup>45</sup> Martin Luther King, *I Have a Dream* (Aug. 28, 1963)

<[http://www.juntosociety.com/hist\\_speeches/mlkihad.html](http://www.juntosociety.com/hist_speeches/mlkihad.html)> .

<sup>46</sup> *But see* RAOUL BERGER, GOVERNMENT BY JUDICIARY 87 (1977) and M. E. BRADFORD, A BETTER GUIDE THAN REASON 41 (1979) for arguments rejecting the constitutional significance of the Declaration.

<sup>47</sup> Bernard Bailyn, *Introduction* to PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-1776, at viii (1965).

<sup>48</sup> *Id.* at x.

<sup>49</sup> BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION x, 184-85 (enlarged ed. 1992).

<sup>50</sup> Gordon S. Wood, *Rhetoric & Reality in the American Revolution*, 23 WM. & MARY Q. 3, 21 (1966).

Thomas Jefferson, James Madison placed the Declaration among three of the “best guides” for ascertaining the “distinctive principles of Government of our own State [Virginia], and of . . . the United States.”<sup>51</sup> In 1794 Samuel Adams, serving as the Acting Governor of Massachusetts after John Hancock’s death, told both branches of the state’s congress that when “the Representatives of the United States of *America*” agreed that “all men are created equal, and are endowed by their Creator with certain unalienable rights,” they proclaimed “the doctrine of liberty and equality” to be the “political creed of the United States.”<sup>52</sup>

As a heuristic device the Declaration was a product of its time and can only be understood within the context of other revolutionary writings. Enlightenment philosophers like Locke, Hugo Grotius, Samuel Pufendorf, and Jean J. Burlamaqui lay at the core of American revolutionary philosophy.<sup>53</sup> Their ideas about inalienable rights were echoed by the Declaration. Grotius, for instance, explained that the well-being of rulers “depends on the happiness of his subjects.”<sup>54</sup> Governors and subjects are interlinked by a common desire to avoid harm. It is “the nature of man,” as Burlamaqui explained, to pursue happiness.<sup>55</sup> Through this intellectual lens, the revolutionaries considered it to be only natural for every individual to seek what is good and agreeable for “preservation, perfection, entertainment, and pleasure.”<sup>56</sup> Locke linked the “foundation of liberty”<sup>57</sup> to the “earnest and constant pursuit of happiness.”<sup>58</sup> Since the “preferable good” might not be immediately gotten, our immediate desires must sometimes be suspended.<sup>59</sup> Individuals willingly relinquish some license to act impetuously in exchange for the long-term benefits of being members of a civil society that is beholden to the “preservation, perfection, entertainment, and pleasure” of the people.<sup>60</sup> A primary role of a representative government, then, is to increase individuals’ happiness and prosperity.<sup>61</sup>

There was a general consensus among natural law philosophers about the purposes of polity. William Wollaston, who wrote a popular treatise on natural religion found that “the end of society is the common welfare and good of the people associated.”<sup>62</sup> In almost identical terms, chemist Joseph Priestley essayed that “[t]he great object of civil society is the happiness of the members of it.”<sup>63</sup> The value of “safety and happiness of society,” to which Madison gave homage in the *Federalist*, was grounded in “the transcendent law of nature and of nature’s

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<sup>51</sup> Letter from James Madison to Thomas Jefferson (Feb. 8, 1825), in 9 THE WRITINGS OF JAMES MADISON 218, 221 (Gaillard Hunt ed. 1910).

<sup>52</sup> Speech of Samuel Adams, *Domestic Occurrences*, MASS. MAG., Jan. 1794, at 59, 62-63.

<sup>53</sup> BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION, *supra*, at 27. Alexander Hamilton recommended that an opponent “addend diligently” to the writings of “Grotius, Pufendorf, Locke, Montesquieu, and Burlamaqui.” Quoted in Jesse S. Reeves, *The Influence of the Law of Nature Upon International Law in the United States*, 3 AM. J. OF INT’L L. 547, 551(1909).

<sup>54</sup> HUGO GROTIUS, THE RIGHTS OF WAR & PEACE (W. Innys & R. Manby, J. & P. Knapton, D. Brown, T Osborn, & E. Wicksteed 1738) (1625).

<sup>55</sup> JEAN J. BURLAMAQUI, THE PRINCIPLES OF NATURAL LAW 39 (5<sup>th</sup> ed., 1791) (1748).

<sup>56</sup> *Id.* at 41.

<sup>57</sup> JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING Book II, ch.21, §51 (1689).

<sup>58</sup> *Id.* at Book II, ch. 21, §44.

<sup>59</sup> *Id.* at II, ch. 21, § 52.

<sup>60</sup> BURLAMAQUI, *supra* note ----, at 41.

<sup>61</sup> BENJAMIN TRUMBULL, A DISCOURSE, DELIVERED AT THE ANNIVERSARY MEETING OF THE FREEMEN OF THE TOWN OF NEW-HAVEN 27 (1773).

<sup>62</sup> WILLIAM WOLLASTON, THE RELIGION OF NATURE DELINEATED 273 (8<sup>th</sup> ed., 1759) (1722).

<sup>63</sup> JOSEPH PRIESTLEY, AN ESSAY ON THE FIRST PRINCIPLES OF GOVERNMENT 94 (2d ed., 1771) (1768).

God.”<sup>64</sup> He was willing to be flexible on the structure of government, so long as it provided “for the safety, liberty, and happiness of the Community.”<sup>65</sup> Government’s role, according to an English polemicist, was to serve the public good since “our happiness” is “dependent on society.”<sup>66</sup> Happiness of the individual members of society came to be linked in colonial America with the good of the whole.

Only a government whose ultimate goal was “the happiness of society” could win the approval of an equally free citizenry.<sup>67</sup> The purpose of creating a union of states, in the words of the Declaration, was “to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.” In very similar terms, from the pulpit, Ebenezer Bridge told the governor of Massachusetts Bay that a compact among natural equals voluntarily bound them to “just regulations” tended to better “promote and secure” the “happiness of men.”<sup>68</sup>

Government’s legitimacy was tied to its protection of these intrinsic interests. John Hancock, who had become governor of Massachusetts in 1780, regarded American federalism to be a system “founded in the ideas of natural equality” that enabled its members “to seek their own happiness as a community.”<sup>69</sup> Samuel Adams believed that the colonists’ “declaration of their Independence” was born of their desire to better protect natural rights, such as those in property and the pursuit of personal happiness.<sup>70</sup> Adams went a step further by recognizing the citizens’ entitlement “to an equal share of all the social rights,” not merely political and civil ones.<sup>71</sup> An anti-Federalist similarly held that persons join to form governments for a “strength of security” needed for “the *greatest acquiring*” of “*benefits*” with the “*least sacrifice*.”<sup>72</sup> Reaping the benefits of living in a community of equals required making some sacrifices for the sake of unity. Without a civil government, wrote an author in 1770, in language similar to Jefferson’s six years later, “clashing interests and violence” would endanger “[i]mportant . . . rights of mankind.”<sup>73</sup> They included the rights to a “safe and unmolested enjoyment of life, liberty and property, and to the best improvement and all their powers, with every reasonable and equitable advantage they have to promote their present and everlasting welfare.”<sup>74</sup> Governments that function against the people’s will become the “public fountains of oppression and injustice.”<sup>75</sup>

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<sup>64</sup> THE FEDERALIST No. 43, at 297 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>65</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 53 (Max Farrand ed., 1911).

<sup>66</sup> HENRY ST. JOHN BOLINGBROKE, LETTERS ON THE SPIRIT OF PATRIOTISM 79 (New ed., 1775).

<sup>67</sup> JAMES WILSON, CONSIDERATIONS ON THE NATURE AND THE EXTENT OF THE LEGISLATIVE AUTHORITY OF THE BRITISH PARLIAMENT 3 (1774). Government by the consent of the government limited the authority of government. JOHN TUCKER, A SERMON PREACHED AT CAMBRIDGE, BEFORE HIS EXCELLENCY THOMAS HUTCHINSON 13-14 (1771).

<sup>68</sup> EBENEZER BRIDGE, A SERMON PREACHED BEFORE HIS EXCELLENCY FRANCIS BERNARD . . . at 14 (1767).

<sup>69</sup> JOHN HANCOCK, RESOLVES OF THE GENERAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS 39 (1792).

<sup>70</sup> Speech of Samuel Adams, *Domestic Occurrences*, MASS. MAG., Jan. 1794, at 59, 62-63. Adams was elected Governor of Massachusetts later that month.

<sup>71</sup> *Id.* at 59, 62-63.

<sup>72</sup> *Essays by The Impartial Examiner* No. 1 (Feb. 20, 1788), in 5 THE COMPLETE ANTI-FEDERALIST 173, 176 (Herbert J. Storing ed. 1981). See also *Letters of Cato* No. 3 in 2 *id.* 109, 109-10 (“The freedom, equality, and independence which you enjoyed by nature induced you to consent to a political power.”).

<sup>73</sup> STEPHEN JOHNSON, INTEGRITY AND PIETY THE BEST PRINCIPLES OF A GOOD ADMINISTRATION OF GOVERNMENT 5-6 (1770).

<sup>74</sup> *Id.*

<sup>75</sup> TRUMBULL, *supra* note -----, at 32.

The Revolution united people through a common cause that broke down the boundaries of “birth, blood, hereditary titles and honours,” making it evident that “nature has made them equal in respect to their rights . . . to liberty, to property, and to safety, to justice, government, laws, religion, and freedom.”<sup>76</sup> The Pilgrims were construed to be the forerunners of the “declaration of independency.”<sup>77</sup> They had sailed to the new world to “be governed by men of their own choice, acting under constitutions which should be prescribed by the community at large.”<sup>78</sup> In the battle against oppression, justice demanded that “all be equally free.”<sup>79</sup> As a professor of moral philosophy saw it, natural equality forbade preferential treatment of any segment of the community because “every member is subject to the whole.”<sup>80</sup> Laws applied to both elected officials and their constituents.<sup>81</sup>

To the advocates of American nationhood, no distinction in life circumstance, official title, talent, wealth, honor, or strength affected an individual’s intrinsic worth.<sup>82</sup> Irrespective of the natural differences, as future Chief Supreme Court Justice Charles Evans Hughes pointed out in the early twentieth century, “the Declaration was an affirmation of political aims and political standards. Whatever our differences in capacities and aptitudes, we are entitled to stand as equals before the law.”<sup>83</sup> Freedom is illusory unless individuals are treated as equals. Writing about 150 years after the document had been signed, Hughes, who was then president of the American Bar Association, wrote that the Declaration continued to be “the essence of Americanism, the reason and purpose of representative government maintained by men and women who believe in equal political rights and who exercise these rights with a sincere appreciation of the dignity and inviolability of the individual.”<sup>84</sup> His view retained the universalistic perspective of the founders. In condemning slavery, one Revolutionary Era pamphleteer spoke of the “universe” possessing “certain rights” of “which no man can divest him without injustice,” except as a punishment for crime.<sup>85</sup>

In 1778, British political philosopher Richard Price expostulated that the maxim “that all men are natural[ly] equal” required that when people were “grown up to maturity” that they be treated as “independent agents, capable of acquiring property, and of directing their own conduct.”<sup>86</sup> The children of both peasants and noblemen deserved a government committed to

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<sup>76</sup> SAMUEL WILLIAMS, *THE NATURAL AND CIVIL HISTORY OF VERMONT* 330 (1794).

<sup>77</sup> *History of the American Revolution*, UNIVERSAL ASYLUM & COLUMBIAN MAG., Mar. 1791, at 169.

<sup>78</sup> *Id.*

<sup>79</sup> RESULT OF THE CONVENTION OF DELEGATES HOLDEN AT IPSWICH IN THE COUNTY OF ESSEX 11 (1778); *see also* JAMES MADISON, *MANIFESTATIONS OF THE BENEFICENCE OF DIVINE PROVIDENCE TOWARDS AMERICA* iv (1795).

<sup>80</sup> WILLIAM L. BROWN, *AN ESSAY ON THE NATURAL EQUALITY OF MEN* 90-91, 113 (1793).

<sup>81</sup> *Letters from the Federal Farmer to the Republican* No. 2 (Oct. 9, 1787), in 2 *THE COMPLETE ANTI-FEDERALIST* 230, 231-32 (Herbert J. Storing ed. 1981).

<sup>82</sup> *See* SAMUEL PUFENDORF, *THE LAW OF NATURE & NATIONS* 224 (5<sup>th</sup> ed., tr. Basil Kennet, 1749) (1672); WILLIAMS, *supra* note ----, at 330. A satirist mocked the concept of natural equality, given that “some are born with beautiful and healthy, bodies, and some with frames distorted and filled with the most deplorable diseases; some with minds fraught with the seeds of wisdom and genius, others with those of idiotism and madness.” SOAME JENYNS, ESQ., *DISQUISITIONS ON SEVERAL SUBJECTS* 64-65 (1790).

<sup>83</sup> Charles E. Hughes, *The Declaration of Independence*, A.B.A. J. 532, 532 (1925).

<sup>84</sup> *Id.* at 533.

<sup>85</sup> THOMAS DAY, *FRAGMENT OF AN ORIGINAL LETTER ON THE SLAVERY OF THE NEGROES* 4-5 (1784).

<sup>86</sup> RICHARD PRICE, *ADDITIONAL OBSERVATIONS ON THE NATURE AND VALUE OF CIVIL LIBERTY, AND THE WAR WITH AMERICA* 11-12 (1778).

“the equal rights of the subjects.”<sup>87</sup> If the “natural equality of mankind” were to mean anything, remarked a future governor of New York, it required the government to mete out the same “measure of justice . . . to all men.”<sup>88</sup> Moral rights arising from the liberty and humanity of “all brethren” are identical for all irrespective of their intellectual and physical differences.<sup>89</sup>

America was to be a bastion against tyranny and despotism,<sup>90</sup> and yet it was plagued by the unequal treatment of blacks, women, religious minorities, foreigners, and Native Americans. Thus the formulated ideology was universal in its application, but the privileged position of landed and money interests kept power in the hands of a few. Living up to their own ideals would have required putting an end to all arbitrary acts of discrimination, the worst of which was slavery, and to any privileges based solely on biological characteristics, such as race and gender.

In fact the Revolutionaries were not blind to the incompatibility of slavery with their stated commitment to equality.<sup>91</sup> Long before the opening salvos between the Minutemen and Redcoats were fired at Lexington and Concord, Samuel Pufendorf rejected the “absurdity . . . of some men’s being slaves by nature.” That opinion was “directly repugnant to . . . *natural Equality*.”<sup>92</sup>

The incompatibility of a revolutionary philosophy predicated on natural equality with slavery was often voiced in the writings of the Revolutionary generation. An American in Algiers, who referred to the Declaration of Independence as “the fabric of the rights of man,” indicted those who had bound Africans to slavery even as they enjoyed “the Rights of Man.”<sup>93</sup> He put the point in verse:

What then, and are all men created free,  
And Afric’s sons continue slave to be,  
And shall that hue our native climates gave,  
Our birthright forfeit, and ourselves enslave?  
Are we not made like you of flesh and blood,  
Like you some wise, some fools, some bad, some good?  
In short, are we not men? and if we be,  
By your own declaration we are free.<sup>94</sup>

Critics of the Revolution drew attention to the incompatibility of the stated national purpose with the institutionalized racial inequality that existed both in the North and South.<sup>95</sup>

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<sup>87</sup> ROBERT CORAM, POLITICAL INQUIRIES 87-88 (1791).

<sup>88</sup> DEWITT CLINTON, AN ADDRESS DELIVERED BEFORE HOLLAND LODGE, DECEMBER 24, 1793, at 8 (1794).

<sup>89</sup> *Id.*

<sup>90</sup> *See, e.g.*, JOHN SHIPPEN, AN ORATION DELIVERED ON THE ANNIVERSARY OF THE SCIENTIFIC SOCIETY . . . , at 11 (1794) (extolling America for having shed the yoke of British oppression and thereby becoming the “happiest nation in the world”).

<sup>91</sup> Few revolutionaries were similarly far sighted about gender inequality. One of the rare tracts of that period advocating women’s rights was MARY WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMEN 247, 335 (Peter Edes for Thomas and Andrews 1792). Jefferson took a more paternalistic perspective. He asserted that civilization safeguarded “women in the enjoyment of their natural equality” by demanding that “the stronger sex” “subdue the selfish passions, and to respect those rights in others which we value in ourselves.” THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 64 (1788). Missing from this statement is any conception of what role the state should take in securing women’s rights.

<sup>92</sup> PUFENDORF, *supra* note ----, at 230.

<sup>93</sup> THE AMERICAN IN ALGIERS, OR THE PATRIOT OF SEVENTY-SIX IN CAPTIVITY 23-24 (1797).

<sup>94</sup> *Id.* at 24.

<sup>95</sup> *Criticism*, THE PORT-FOLIO (1801-1827), Mar. 28, 1801, at 98.

Similarly, many American patriots based their indictment of slavery on what they considered to be American principles. In this vein, New Jersey Quaker leader David Cooper demonstrated the contradiction between principles of equality and slavery by publishing Revolutionary dogma in a left hand column and condemning American practices in the right. For one, the Declaration made much of self-evident truths which must apply to all of humanity; but “the very people who make these pompous declarations are slave-holders.”<sup>96</sup> Cooper also realized that foreigners would hold Americans in low esteem for demanding respect for “their own rights as freemen” while “holding thousands and tens of thousands of their innocent fellow men in the most debasing and abject slavery.”<sup>97</sup> All people, he declared, had the same rights irrespective of race: “By the *immutable laws of nature*, we are equally entitled to life, liberty and property with our lordly masters, and have never *ceded* to any power whatever, a *right* to deprive us thereof.”<sup>98</sup> Cooper further juxtaposed a 1774 Continental Congress resolve, proclaiming the colonies commitment to the “*immutable laws of nature*,” with their treatment of blacks. Just like whites, blacks had never ceded their claim to the immutable rights of life, liberty, and property. The manifold injustices practiced against them undermined the core political foundation of the Revolution.<sup>99</sup>

Cooper was not alone in this penetrating analysis. To the contrary, he was expressing a commonly shared perspective. Noah Webster, the great lexicographer, dubbed slavers “monsters” whose “avarice” was fed by “the torch or treachery.”<sup>100</sup> He indicted them for oppressing the innocent and called on Americans to “admit the whole human species to a participation of your unalienable rights.”<sup>101</sup> During the Constitutional Convention of 1787, Gouverneur Morris mocked the representatives of Georgia and South Carolina for their advocacy of slave importation, denouncing the proposed use of the Three-Fifths Clause to increase their states’ political representation by kidnaping more Africans.<sup>102</sup> “If men would be consistent,” wrote Thomas Day, “they must admit all the consequences of their principles” as they were set out in the Declaration.<sup>103</sup> Claiming that “universal rights” are inviolable logically entailed acknowledging the same “rights of your Negroes.”<sup>104</sup> Similarly, twenty-three years after the Revolution, a newspaper article drew attention to great “zeal . . . displayed for the preservation of these natural and indefeasible rights for ourselves while we overlook the condition of thousands of our fellow creatures held in the most pitiable state of abject Slavery.”<sup>105</sup>

Early abolitionist societies sprang up to achieve America’s stated mission. The New Jersey Society for Promoting Abolition extolled “the principles that animated our forefathers to fly from tyranny and persecution” to protect “life, liberty, and the pursuit of happiness” but criticized them for withholding “those rights from an unfortunate and degraded class of our

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<sup>96</sup> DAVID COOPER, A SERIOUS ADDRESS TO THE RULERS OF AMERICA ON THE INCONSISTENCY OF THEIR CONDUCT RESPECTING SLAVERY 12 (1783).

<sup>97</sup> *Id.* at 5.

<sup>98</sup> *Id.* at 10.

<sup>99</sup> *Id.* at 9.

<sup>100</sup> NOAH WEBSTER, A GRAMMATICAL INSTITUTE OF THE ENGLISH LANGUAGE 318 (1785).

<sup>101</sup> *Id.*

<sup>102</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note ----, at 222.

<sup>103</sup> DAY, *supra* note -----, at 7.

<sup>104</sup> *Id.*

<sup>105</sup> *The Pedlar*, No. VI, EVENING FIRE-SIDE, Aug. 30, 1806, at 274.

fellow creatures.”<sup>106</sup> Meanwhile the Pennsylvania Society for Promoting the Abolition of Slavery also relied on the second paragraph of the Declaration for inspiration in its effort to remove “this evil . . . from the land.”<sup>107</sup> To a college student, who later became acting president of Harvard, it was a “matter of painful astonishment” that during such an “enlightened age,” which had espoused “the principles of natural and civil Liberty,” those “who are so readily disposed to urge the principles of natural equality in defence of their own Liberties, should, with so little reluctance” violate them in their dealings with Africans.<sup>108</sup>

The unequal treatment of persons of African descent denied them their share of rights. The term “rights” was typically subdivided into “natural and unalienable” rights and “constitutional or fundamental” ones. This distinction, however, often broke down. Unalienable or fundamental rights in the United States included property ownership, peaceable worship, individual security, representative taxation, trial by jury, habeas corpus, the right to practice religion peaceably, speedy trial, counsel, cross examination, notice of legal charges, assembly, and freedom of the press.<sup>109</sup> By being members of a representative government, everyone retained “a share in the legislative, taxative, judicial, and the vindictive powers.”<sup>110</sup> A member of the American Philosophical Society writing about slavery deplored that a people who were so “[d]eeply penetrated with a sense of *Equality*” in declaring their independence “became apostates to their principles.”<sup>111</sup>

The widely adopted political creed that a representative government was answerable to the people for the protection of life, liberty, property, and the right to seek and obtain happiness was incorporated into several state constitutions. For example, the New Hampshire Constitution of June 2, 1784, asserted an equal interest in those rights regardless of “race, creed, color, sex or national origin.”<sup>112</sup> In mid-July 1776, Pennsylvania adopted a declaration of rights. The state’s governmental obligation was to “institute for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community.”<sup>113</sup>

The Declaration of Independence’s statement of unalienable rights iterated a widespread colonial belief in the universality of intrinsic human interests. From its inception, the nation failed to live up to its ideals. The notion that government was obligated to safeguard individual rights to benefit the civil community made its way into the Preamble of the Constitution.

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<sup>106</sup> THE CONSTITUTION OF THE NEW-JERSEY SOCIETY, FOR PROMOTING THE ABOLITION OF SLAVERY . . . 3-4 (1793).

<sup>107</sup> CONSTITUTION AND ACT OF INCORPORATION OF THE PENNSYLVANIA SOCIETY, FOR PROMOTING THE ABOLITION OF SLAVERY AND THE RELIEF OF FREE NEGROES . . . 34 (1800)

<sup>108</sup> THEODORE PARSONS AND ELIPHALET PEARSON, FORENSIC DISPUTE ON THE LEGALITY OF ENSLAVING THE AFRICANS 4 (1773). Parsons defended the pro-slavery position, while Pearson advocated against slavery.

<sup>109</sup> [RICHARD HENRY LEE], AN ADDITIONAL NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 51-53 (1788).

<sup>110</sup> [MOSES MATHER], AMERICA’S APPEAL TO THE IMPARTIAL WORLD 7 (1775).

<sup>111</sup> GEORGE BUCHANAN, AN ORATION UPON THE MORAL AND POLITICAL EVIL OF SLAVERY 13 (1791).

<sup>112</sup> N.H. COST. BILL OF RIGHTS (June 2, 1784).

<sup>113</sup> THE CONSTITUTION OF THE COMMON-WEALTH OF PENNSYLVANIA . . . HELD AT PHILADELPHIA, JULY 15TH, 1776, AND CONTINUED . . . TO SEPTEMBER 28, 1776.

## B. Preamble to the Constitution

The Preamble to the Constitution, like the Declaration of Independence, is a statement of national purpose. The significance of establishing “a more perfect Union” that is governed on the basis of “Justice” to “insure domestic Tranquility, provide for the common defence, Promote the general Welfare, and secure the Blessings of Liberty”<sup>114</sup> is as relevant today as it was in 1787. While it has never been recognized as an independent source of rights, it is a key interpretative tool that all three branches of government must use for meeting their responsibilities to the people.<sup>115</sup>

If the judiciary were to limit Congress’s power to provide for the general welfare it would then be overstepping its Article III power. In determining whether the Court’s recent decisions have unconstitutionally limited congressional civil rights authority, which I elaborate on in Part VI, it is important to determine how to understand the Preamble’s statement of legitimate governmental goals.

Following the Preamble’s introduction, the Constitution establishes the structure of government and then, through the Bill of Rights and later Amendments, enumerates some of the nationally recognized individual interests. The Preamble states the overarching purpose of federal government to secure the people’s freedom for the betterment of the whole body politic. An eighteenth century author regarded the “preamble” to be “the key of the Constitution.”<sup>116</sup> He urged the people to reject the exercise of any federal authority that is “contrary to the spirit breathed by this introduction.”<sup>117</sup> While the Preamble lacks an explicit enforcement clause, any legislation, executive action, or judicial decision that runs counter to the Preamble violates the people’s aspirations for tranquility through national unity. What the Preamble lacks in a positive grant of power, it makes up for in channeling the objects of all three branches of government to the achievement of the common good by safeguarding individual liberties.

The Preamble remains one of the least parsed portions of the Constitution.<sup>118</sup> Justice John Marshall Harlan’s statement in *Jacobson v. Massachusetts*, upholding the constitutionality of a Massachusetts vaccination law, proclaimed that the Preamble “has never been regarded as the source of any substantive power. Such powers embrace only those expressly granted in the body of the Constitution, and such as may be implied from those so granted.”<sup>119</sup> Despite this limiting assertion, Harlan recognized the Preamble’s value as an interpretive tool of “the general purposes for which the people ordained and established the Constitution.”<sup>120</sup> Similarly, in his now classic treatise on the constitution, Joseph Story asserted that while the Preamble does not confer explicit powers like the Constitution, lawmakers must look to it for “the nature, and extent, and

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<sup>114</sup> U.S. CONST. Prmb. l.

<sup>115</sup> See *LeFlore v. Robinson*, 434 F.2d 933, 955 (5<sup>th</sup> Cir. 1970) (concurring in part and dissenting in part) (“The preamble to the Constitution does not purport to guarantee individual rights, but it does set forth what this union of states is all about. It does not limit the Bill of Rights but it does serve as a key to an interpretation of the responsibilities involved as well as the rights therein conferred and secured.”).

<sup>116</sup> OBSERVATIONS UPON THE PROPOSED PLAN OF FEDERAL GOVERNMENT 10 (1788).

<sup>117</sup> *Id.*

<sup>118</sup> Robert J. Peaslee, *Our National Constitution: The Preamble*, B. U. L. REV. 2, 13 (1929) (concerning the relatively few mentions of the preamble during the state ratifying conventions).

<sup>119</sup> 197 U.S. 11, 22 (1905).

<sup>120</sup> *Id.*



application of the powers actually conferred by the constitution.”<sup>121</sup> Despite its foundational place in the Constitution, the Preamble has rarely played any substantive role in judicial interpretations.

In a much studied twentieth century case about the procedural rights of welfare recipients, the Court relied on the Preamble for the proposition that: “Public assistance . . . is not mere charity, but a means to ‘promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.’”<sup>122</sup> This rationale was not based merely on welfare recipients’ procedural entitlement to pre-termination hearings but also indigents’ right to enjoy “the same opportunities that are available to others to participate meaningfully in the life of the community.”<sup>123</sup> This formulation not only echoed the language of the Preamble but also the national aims of the Declaration. That is, the government is required to provide certain procedural rights to welfare recipients that safeguard the basic liberty of equals to pursue happiness in their lives.

The dearth of similar judicial expositions of the Preamble,<sup>124</sup> makes a historical review of its constitutional function the most fruitful line of investigation into its significance. Such a study of archival sources needs to extend beyond the Philadelphia Constitutional Convention of 1787 since little was said there about the Preamble. On the other hand, Revolutionary Era publications and the text itself provide a window into what duties the Preamble establishes for national governance.

To begin, “We the People” indicates that individuals rather than state governments are the source of national power. To regard the Preamble as purely rhetorical is to dismiss that the government was established by the people for a common purpose.<sup>125</sup> To the contrary, Supreme Court justices from the eighteenth through the twenty-first centuries have repeatedly recognized the “proposition that the Constitution was ordained and established by the people of the United States.”<sup>126</sup>

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<sup>121</sup> 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 462 (1833).

<sup>122</sup> *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970).

<sup>123</sup> *Id.*

<sup>124</sup> Milton Handler *et al.*, *A Reconsideration of the Relevance & Materiality of the Preamble in Constitutional Interpretation*, 12 CARDOZA L. REV. 117, 120 n.14 (1990).

<sup>125</sup> Not everyone agreed that the Constitution reflected popular will. Patrick Henry, for one, mocked the claim that the Constitution was a product of “We the People”. *Quoted in* HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 12 (1981). For a more recent criticism of the notion that the Revolution was the product of popular will rather than powerful interests see CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

<sup>126</sup> *See, e.g.*, *Cook v. Gralike*, 531 U.S. 510 (2001) (Kennedy, J., concurring) (“The Constitution was ratified by Conventions in the several States, not by the States themselves, U.S. Const., Art. VII, a historical fact and a constitutional imperative which underscore the proposition that the Constitution was ordained and established by the people of the United States.”); *Alden v. Maine*, 527 U.S. 706, 786 (1999) (Souter, J., dissenting), *quoting* *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 466 (1793) (asserting that the “‘Constitution’” was “‘established by the people of the United States’”); *Van Brocklin v. Tennessee*, 117 U.S. 151, 154 (1886) (“‘The United States is a . . . great corporation . . . ordained and established by the American people’”), *quoting* *United States v. Maurice*, 26 F.Cas. 1211, 1216 (C.C. Va. 1823) (opinion by Chief Justice Marshall sitting as designated circuit justice); *Barron v. The Mayor and City Council of Baltimore*, 32 U.S.(7 Pet.) 243, 247-248 (1833) (“The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states.”).

This collective, abstract “people” share a common interest in submitting themselves to a national bond in order to “establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.” The Preamble makes clear that a primary purpose of forming a national government was the vindication of liberty rights, which the founding generation considered to be intrinsic to the general welfare.<sup>127</sup> In 1791, the Attorney General of Massachusetts expressed the reasoning behind “the preamble to frame of government” to be the creation of “a union of individuals, by which the states are deprived of the power to act as sovereign states in certain matters, of like interest to them all.”<sup>128</sup>

“Political honesty,” as a Massachusetts convention on the ratification of the Constitution saw it, was more likely to come from “the body of the people” rather than “a single person, or a very small number.”<sup>129</sup> The states retained independent sovereignty over local matters, but the will of the people, through the federal government, was superior in matters of fundamental justice affecting the welfare of the whole nation.<sup>130</sup> The people could provide for their rights through elected representatives. Larger political entities, as Madison saw it, were less likely to be influenced by the prejudices of factions.<sup>131</sup>

The significance of choosing to promulgate the constitution pursuant to the will of the people rather than the states cannot be overstated. During the Civil War, a historian asserted that secession was unconstitutional since “[t]he Constitution was not drawn up by the States, it was not promulgated in the name of the States, it was not ratified by the States. . . . It was ‘ordained and established’ over the States by a power superior to the States—by the people of the whole land in their aggregate capacity, acting through conventions of delegates expressly chosen for the purpose within each State, independently of the State Governments.”<sup>132</sup> This perspective was grounded in constitutional tradition. The power to dissolve the government, as James Iredell explained in 1788 to the North Carolina ratifying convention, lay in the people alone who could later choose any other form of government that would “be more conducive to their welfare.”<sup>133</sup> Since the people had agreed to the Constitution, only they could alter it.

The gradual process of amending the Constitution began shortly after its ratification, long before Reconstruction. Even before the conclusion of the Philadelphia Convention, the Federalist Party’s contention that a bill of rights would be extraneous became suspect. In support for retaining the original Constitution without amendment, apologists argued that the inclusion of a

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<sup>127</sup> “General welfare” was interchangeable with “happiness of a people” and was achievable in a representative state where the people were “secure” in their “enjoyment of liberty and property.” AMERICAN INDEPENDENCE THE INTEREST AND GLORY OF GREAT BRITAIN 35 (1776).

<sup>128</sup> JAMES SULLIVAN, OBSERVATIONS UPON THE GOVERNMENT OF THE UNITED STATES OF AMERICA 26 (1791).

<sup>129</sup> RESULT OF THE CONVENTION OF DELEGATES HOLDEN AT IPSWICH IN THE COUNTY OF ESSEX 11 (1778).

<sup>130</sup> See AN ENQUIRY INTO THE CONSTITUTIONAL AUTHORITY OF THE SUPREME FEDERAL COURT, OVER THE SEVERAL STATES, IN THEIR POLITICAL CAPACITY 11-12 (1792) (analyzing the people’s capacity to dissolve a government that deviates from the Preamble’s stated purposes and the boundaries of the Constitution’s internal provisions).

<sup>131</sup> Expanding the nation, explained Madison in the tenth *Federalist*, would make it more difficult for economic factions to organize against the interests of politically weaker individuals. Representatives with diverse constituents, he predicted, would more likely act for the public good than be beholden to factions. THE FEDERALIST No. 10 (Jacob E. Cooke ed., 1961).

<sup>132</sup> Quoted in James M. Beck, *The Preamble of the Constitution*, 14 GEO. L.J. 217, 223 (1926).

<sup>133</sup> 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 230 (Jonathan Elliot ed., 1836) (hereinafter “DEBATES IN THE SEVERAL STATE CONVENTIONS”).

bill of rights would be unnecessary. They claimed that the Preamble implicitly obligated the national government to act in the interest of justice for the security of domestic tranquility and the emoluments of liberty.

Hamilton explained, in *The Federalist* No. 84, that in the past bills of rights had been grants from kings to their subjects. Such grants were unnecessary in America where the power of government came from the people, who “surrender nothing” of their inalienable rights and therefore did not need to explicitly reserve any part of them.<sup>134</sup> James Wilson proudly distinguished British citizens’ need for a declaration of rights and the American citizens’ implicit retention of rights against governmental interference: The Magna Charta regarded the declared liberties to be “the gift or grant of the king”; on the other hand, the Constitution was a grant of power to government from the people who would not part with their natural liberties.<sup>135</sup> An individual who had assented to be governed by a representative “surrenders the power of controuling . . . natural alienable rights, ONLY WHEN THE GOOD OF THE WHOLE REQUIRES it.”<sup>136</sup> Thomas Hartley further explained that since the people delegated power to government through the Constitution, “whatever portion of those natural rights we did not transfer to the government was still reserved and retained by the people.”<sup>137</sup>

Many constitutional theorists stressed the inherent risk of enumerating inalienable rights retained by the people against arbitrary governmental intrusion. They believed it would “not only [be] useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one.”<sup>138</sup> Where there was no enumeration of rights, Wilson argued, the people were presumed to retain all rights, but “an imperfect enumeration” threatened to make the government seem like the grantor of implied interests.<sup>139</sup> During the North Carolina ratification convention, a participant argued that “if there be certain rights which never can, nor ought to be given up, these rights cannot be said to be given away, merely because we have omitted to say that we have not given them up.”<sup>140</sup> The real risk was in laying an unreliable foundation for any right that was not specifically mentioned in a bill of rights. Moreover, while the “the law of nature” was thought to be predicated on “immutable . . . principles,” in its “operations and effects” its interpretation was “progressive” and malleable.<sup>141</sup> Meaning that “in the progress of things” future generations might “discover some great and Important [right], which we don’t now think of.”<sup>142</sup>

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<sup>134</sup> THE FEDERALIST, *supra* note —, at 578.

<sup>135</sup> James Wilson, Nov. 28, 1787, in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 383-84 (Merrill Jensen ed., 1976).

<sup>136</sup> RESULT OF THE CONVENTION OF DELEGATES HOLDEN AT IPSWICH IN THE COUNTY OF ESSEX, *supra* note ----, at 14.

<sup>137</sup> Thomas Hartley, Nov. 30, 1787, *in id.* at 430.

<sup>138</sup> 4 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note ----, at 167 (July 29, 1788) (James Iredell at the North Carolina ratifying convention).

<sup>139</sup> 2 *Id.* at 436 (Nov. 26, 1787).

<sup>140</sup> Mr. Maclaine (N.C.) *in 4 id.* at 161 (July 29, 1788).

<sup>141</sup> 1 THE WORKS OF JAMES WILSON 127 (James D. Andrews ed., 1896).

<sup>142</sup> Letter of Edmund Pendleton to Richard Henry Lee (June 14, 1788), in 2 THE LETTERS AND PAPERS OF EDMUND PENDLETON, 1734-1803, at 532-33 (David J. Mays ed., 1967).

In a representative polity, the people can petition elected representatives to fulfill the Preamble's mandate that the federal government provide for the general welfare. While the judiciary can best adjudicate disputes between parties with conflicting liberty interests, groups and individuals who are not involved in justiciable conflicts are more likely to achieve results by petitioning legislators to recognize and protect some essential right. The Preamble places obligations on all three branches of government; hence, it appears before the enumeration of Congress's powers in Article 1, the President's authority in Article 2, and the judiciaries duties in Article 3.

### *C. A Failure of Principle*

The founding generation's decision to adopt constitutional clauses that protected the institution of slavery was a glaring failure to secure the Declaration's and Preamble's universal sounding principles. Many of the framers understood that by retaining slavery, the newly formed states violated the moral norms that lay at the core of colonists' assertion of independence from Great Britain. Patrick Henry even acknowledged his own hypocrisy after he read an abolitionist tract:

Is it not amazing, that at a time when the rights of Humanity are defined & understood with precision in a Country above all others fond of Liberty: that in such an Age and such a Country, we find Men, professing a Religion the most humane, mild, meek, gentle & generous, adopting a Principle as repugnant to humanity . . . . Would any one believe that I am Master of Slaves of my own purchase! I am drawn along by ye general Inconvenience of living without them; I will not, I cannot justify it. . . . I believe a time will come when an opportunity will be offered to abolish this lamentable Evil.<sup>143</sup>

Nevertheless, when the Constitution was ratified it contained clauses for the protection of slavery. For the sake of compromise, even Gouverneur Morris, who was the most outspoken opponent of slavery at the Philadelphia Convention,<sup>144</sup> eventually agreed to the inclusion of the Three-Fifths, Importation, and Fugitive Slave Clauses.<sup>145</sup>

Those clauses made the revolutionaries' egalitarian sounding statements appear to be no more than empty rhetoric. They effectively excluded a large segment of the population from participation in representative self-governance. The theory of government commonly asserted in late eighteenth century America, posited that every member of the political body had reciprocal rights and duties.<sup>146</sup> A "state of society" had to rely on the "common wisdom" of its subjects to achieve the "interest and welfare of the community."<sup>147</sup> The Declaration's philosophical commitment to equal rights remained unrealized because blacks, women, and propertyless white males were unable to participate in any meaningful type of policymaking. By countenancing

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<sup>143</sup> Letter from Patrick Henry to Robert Pleasants (Jan. 18, 1773), *reprinted in* GEORGE S. BROOKES, FRIEND ANTHONY BENEZET 443-44 (1937).

<sup>144</sup> Raymond B. Marcin, "Posterity" in the Preamble and a Positivist Pro-Life Position, 38 AM. J. JURIS. 273, 287 n.46 (1993) (asserting it is commonly accepted that Morris drafted the final version of the Preamble).

<sup>145</sup> Morris's failure to maintain his stance against slavery is brought out in Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 3 (1987) and Glen E. Thurow, "The Form Most Eligible": Liberty in the Constitutional Convention, 20 PUBLIUS 15, 29 (1990).

<sup>146</sup> See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 58 (1969).

<sup>147</sup> SAMUEL WILLIAMS, A DISCOURSE ON THE LOVE OF OUR COUNTRY 9 (1775).

arbitrary state restrictions on political rights, the nation's collective wisdom remained untapped, reducing its ability to provide for the nation's security, defense, and happiness.

Inequitable cultural norms entered the American Constitution, statutes, and customs, but not without fairly widespread resistance. From the time of independence, there were those who believed slavery to be so antithetical to the nation's founding principles that it would wither of its own accord.

During the struggle with England, slavery was the subject of an ever increasing number of polemical publications, which denounced its infringement against the Rights of Man. Benjamin Rush, a physician who had signed the Declaration of Independence, wrote that "it would be useless for us to denounce the servitude to which the *Parliament of Great Britain* wishes to reduce us, while we continue to keep our fellow creatures in slavery just because their color is different from ours."<sup>148</sup> England would not accept the force of revolutionary reasoning, another author wrote in 1774, until Americans ended the cruelty of slavery.<sup>149</sup> John Allen, who lacked Rush's political ambitions, denounced slaveholders in more vitriolic terms, calling them "trifling patriots" and "pretended votaries for Freedom" who trampled on the natural rights and privileges of Africans while they made a "vain parade of being advocates of the liberties of mankind."<sup>150</sup> He further pointed out that a duty on tea was of far smaller consequence to white colonists than the bondage of a captive.<sup>151</sup>

Slavery did not, however, die of its own accord. The abolitionist movement picked up the strands of revolutionary principles and attacked American intransigence in the face of injustices that violated its founding principles. Many of their views universal rights were predicated on the Preamble's and Declaration's statements of governmental purpose. A group of abolitionists argued that the original Constitution granted Congress the authority to end slavery through civil rights legislation. While this argument did not gain many adherents prior to the Civil War, it established the theoretic foundation for post-bellum changes to the Constitution through the Reconstruction Amendments.

### III. Abolitionist Idealism

Through the decades, the revolutionaries' vociferous advocacy for a liberal democracy became increasingly muted. Arguments predicated on America's political creed reemerged conspicuously during the Missouri Compromise debates.<sup>152</sup> Although the abolitionists were politically weak, the steadfast growth of slavery ignited the passions of a committed group of popular activists.

Among the abolitionists was a group that argued the original Constitution perpetuated the institution of slavery and another that argued America's fundamental law gave Congress the power to act against slavery. Both groups believed in the existence of fundamental rights that transcended any written instrument, even the Constitution. The Garrisonians argued that the Constitution was a covenant with death because provisions like the Fugitive Slave Clause

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<sup>148</sup> Quoted in DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770-1823*, at 274 (1975).

<sup>149</sup> RICHARD WELLS, *A FEW POLITICAL REFLECTIONS SUBMITTED TO THE CONSIDERATION OF THE BRITISH COLONIES* 80 (1774).

<sup>150</sup> JOHN ALLEN, *THE WATCHMAN'S ALARM TO LORD -- -H 27* (1774).

<sup>151</sup> *Id.* at 28.

<sup>152</sup> ALEXANDER TSEIS, *WE SHALL OVERCOME*, *supra* note ----, at ch. 4.

violated the equal nature of republican government.<sup>153</sup> Radical constitutional abolitionists, on the other hand, wrote treatises insisting that sections of the original Constitution granted the Congress the authority to either end slavery or, at least, to prevent its spread into the Western territories.<sup>154</sup>

Both groups believed that freedom was the birthright of all Americans. William Lloyd Garrison, who headed the most uncompromising group of abolitionists,<sup>155</sup> regarded immediate abolition to be implicit in the self-evident truths of the Declaration of Independence.<sup>156</sup> He and other nineteenth-century abolitionists relied on the Declaration to develop a republican agenda of national reform. They not only opposed slavery but were also the most progressive feminists, believing that by “all men are created equal” the Declaration was referring to “human beings” of both sexes.<sup>157</sup>

The Preamble to the Constitution also figured prominently in abolitionist writings. The General Welfare Clause, as they saw it, required Congress to act for the betterment of all Americans.<sup>158</sup> Inaction in the face of entrenched slavery hurt the common good of society. Neither slaves nor free blacks fully shared in the blessings of liberty in a racist society.<sup>159</sup> The national government’s protection of slavery, for instance by permitting slavery to continue to flourish in Washington, D.C., violated Congress’s constitutional obligation to institute impartial laws for the general welfare.<sup>160</sup> Abolitionists realized there was a disconnect between the founders’ decision to “separate[] from the mother country” in response to “the attempt of Great Britain to impose on them a political slavery” and the continued despotism against African Americans.<sup>161</sup> The abolitionists understood the Revolution to have been predicated on substantive principles that were violated by policies protecting the interests of slaveholders.

Many abolitionists regarded the Declaration’s statement that the Revolution was waged to secure inalienable rights to translate into the national government’s obligation to protect its

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<sup>153</sup> William Lloyd Garrison, *LIBERATOR*, May 6, 1842, at 3.

<sup>154</sup> See WIECEK, *supra* note ----, at 257-72; LEWIS PERRY, *RADICAL ABOLITIONISM: ANARCHY & THE GOVERNMENT OF GOD IN ANTISLAVERY THOUGHT* (1973).

<sup>155</sup> Radical constitutionalists, such as Lysander Spooner, Frederick Douglass, and Charles Sumner, argued that, read correctly, the Fifth Amendment required immediate abolition. See Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 *HARV. J.L. & PUB. POL’Y* 489, 498 (2004). William Lloyd Garrison, on the other hand, considered the Constitution to be inimical to the principles of the Declaration of Independence. Resolution Adopted by the Antislavery Society, Jan. 27, 1843, *quoted in* WALTER M. MERRILL, *AGAINST WIND AND TIDE: A BIOGRAPHY OF WM. LLOYD GARRISON* 205 (1963).

<sup>156</sup> GARRISON, *AN ADDRESS DELIVERED BEFORE THE OLD COLONY ANTI-SLAVERY SOCIETY. . .*, *supra* note ----, at 17 (“if we advocate gradual abolition, we shall perpetuate what we aim to destroy, and proclaim that the self-evident truths of the Declaration of Independence are self-evident lies”).

<sup>157</sup> WENDELL PHILLIPS *ET AL.*, *WOMAN’S RIGHTS TRACTS* 4 (1854).

<sup>158</sup> See, e.g., GEORGE W. F. MELLEN, *AN ARGUMENT ON THE UNCONSTITUTIONALITY OF SLAVERY* 62 (1841) (asserting that the United States’s compact “is a declaration before the world, and this nation has committed itself, that this country shall be ruled by impartial laws, and that the congress of the United States shall consult in all things the general welfare of the people”).

<sup>159</sup> An example of this line of reasoning is found in CHARLES OLCOTT, *TWO LECTURES ON SLAVERY AND ABOLITION* 88 (1838). Olcott considered slavery to be against “the *whole spirit*” of the Preamble. *Id.*

<sup>160</sup> For a discussion on efforts to abolish slavery in Washington, D.C., see Howard H. Bell, *The American Moral Reform Society, 1836-1841*, 27 *J. NEGRO EDUC.* 34, 35 (1958); John Hope Franklin & Henry Louis Gates, Jr., *Race in America: Looking Back, Looking Forward*, 55 *BULL. OF THE AM. ACAD. OF ARTS AND SCI.* 42, 46 (2001) (listing discriminatory laws in effect even before Washing, D.C. became a city).

<sup>161</sup> MELLEN, *supra* note ----, at 55, 63.

citizens' natural rights. As radical abolitionist Wendell Phillips explained, "I acknowledge the great principles of the Declaration of Independence, that a state exists for the liberty and happiness of the people, that these are the ends of government."<sup>162</sup> To some abolitionists, like Senator Charles Sumner the original Constitution and Bill of rights contained several clauses that obligated Congress to end slavery everywhere, both in the states where slavery existed and in the territories where it had not yet been introduced.<sup>163</sup> Other anti-slavery advocates believed that while Congress lacked the power to end slavery in existing states it could do so in federal territories.<sup>164</sup>

Both groups of abolitionists derived the extent of congressional powers from revolutionary ideology about fundamental rights. Abolitionists adopted a creed that considered fundamental rights to be intrinsic to national citizenship. As an early abolitionist and feminist, Lucretia Mott, reminisced about the first American Anti-Slavery Society meeting of 1833, what stuck out in her mind was the declaration of sentiments, which was based on "the truths of Divine Revelation, and on the Declaration of Independence, as an Everlasting Rock."<sup>165</sup> A female physician, writing in the 1850's, lamented the nation's failure to live up to its founding document:

Is not the time coming when this body will have to analyze the Declaration of Independence, and give it its full and legitimate construction?—"All men are born free and equal;"—"All governments derive their just power from the *consent* of the governed"—"Taxation without representation *is* tyranny." These great axioms uttered by the voice of truth, will be canvassed in connection with woman, and *right*, not *might* . . . . Woman's voice will be heard even in this sanctum sanctorum, not as now in the Senate chamber, petitioning that slavery may not extend its baleful influence but pleading for the "inalienable rights" of all human beings.<sup>166</sup>

In the opinion of these activists, citizenship was the birthright of everyone born in the United States.<sup>167</sup> Their political rhetoric extolled the American project to protect human rights. Natural rights, argued numerous abolitionist publications, are intrinsic to individuals and predate society. In language that would have been familiar to the founders, Unitarian abolitionist William E. Channing asserted that civil societies are organized to protect those rights.<sup>168</sup>

Members of the Reconstruction Congress later expressed a similar perspective of fundamental rights during debates on the proposed Thirteenth Amendment.<sup>169</sup> Slavery was the deprivation of those rights, and, following the ratification of the Thirteenth Amendment,

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<sup>162</sup> WENDELL PHILLIPS, THE WAR FOR THE UNION 153, in GEORGE W. CURTIS, WENDELL PHILLIPS (1886).

<sup>163</sup> See Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CAL. L. REV. 171, 182 (1951); Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEG. HIST. 305 (1988).

<sup>164</sup> See tenBroek, *supra* note -----, at 183 (1951).

<sup>165</sup> Lucretia Mott, *quoted in* JAMES AND LUCRETIA MOTT: LIFE AND LETTERS 115 (1884).

<sup>166</sup> HARRIOT K. HUNT, M.D., GLANCES AND GLIMPSES 318-19 (1856).

<sup>167</sup> See JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 91, 93 (1849).

<sup>168</sup> WILLIAM E. CHANNING, SLAVERY 21 (Edward C. Osborn: reprint 1836).

<sup>169</sup> See *supra* Part IV. Cf. Robert J. Kaczorowski, *Fidelity Through History & to It: An Impossible Dream?*, 65 FORDHAM L. REV. 1663, 1664 (1997) (postulating that the constitutional theory of the Reconstruction Congress guaranteed fundamental rights).

Congress could provide redress against intrusions against civil liberties. Reconstructionists based their understanding of freedom, in large part, on abolitionist views.

As abolitionists before them, the Reconstruction Congress, considered slavery to be the worst of all robberies because it misappropriated a person's toil, talent, and vigor.<sup>170</sup> Not only did it impinge on slaves' vocational choices; it also deprived them of their rights to transit, fair trial, and bodily integrity.<sup>171</sup> The right to own and alienate property was likewise essential to human happiness, but it was denied to the enslaved.<sup>172</sup> Slavery also prevented people in bondage from entering into binding agreements, thereby stymying their economic potentials. According to some antislavery advocates, such as Lysander Spooner, even without an abolition amendment, the Contract Clause of the original Constitution prohibited states from passing slave codes because they infringed on the natural right to contract.<sup>173</sup>

Slavery prevented hundreds of thousands of people from enjoying their inalienable rights.<sup>174</sup> Theodore Parker, like other abolitionist authors, located the right to live a free and happy life in the Declaration of Independence and the Preamble.<sup>175</sup> That right, and any of complementary inalienable rights, was guaranteed equality for all, irrespective of race.<sup>176</sup> It was incumbent on the national government to abolish slavery through laws that would provide for the equal enjoyment of "civil and political rights and privileges."<sup>177</sup>

The abolitionist understanding of national government rested in no small part on the proposition that the United States was duty-bound to protect equal rights. The creed of equal liberty bridged the gap between the Revolutionary Period and the ante-bellum period. The Declaration was the cornerstone of the "temple of freedom" for which "[a]t the sound of their trumpet-call, three millions of people rose up as from the sleep of death, and rushed to the strife of blood; deeming it more glorious to die instantly as freemen, than desirable to live an hour as slaves."<sup>178</sup> According to constitutional attorney Joel Tiffany, when the revolutionary generation denied to Great Britain the right and power to violate the colonists' privilege to enjoy their natural rights, that generation prohibited the newly formed United States government from countenancing enslavement.<sup>179</sup> Radical abolitionists regarded the "principles embodied" in the

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<sup>170</sup> CHANNING, *supra* note ----, at 30-31.

<sup>171</sup> RUSSEL B. NYE, *FETTERED FREEDOM: CIVIL LIBERTIES & THE SLAVERY CONTROVERSY 1830-1860*, at 197 (1949) (discussing an abolitionist concept of rights in the context of the movement against fugitive slave law).

<sup>172</sup> See Brougham, *The Liberator*, Jan. 22, 1831, *LIBERATOR*, at 13, cl. 1 ("talk not of property of the planter in his slaves . . . The principles, the feelings of our common nature, rise in rebellion against it"); American Anti-Slavery Society, *Declaration of the Anti-Slavery Convention*, Dec. 4, 1833, *supra* note ----, at 12, 14 ("man cannot hold property in man"). Abolitionists, like those in Oberlin College and the Noyes Academy, put great effort into helping blacks become educated and prosperous. SAMUEL J. MAY, *SOME RECOLLECTIONS OF OUR ANTI-SLAVERY CONFLICT* 29 (1869).

<sup>173</sup> LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* 98-99 (1845).

<sup>174</sup> *Principles of the Anti-Slavery Society*, in *THE AMERICAN ANTI SLAVERY ALMANAC* 30-31 (1837 ed.) ("*It is for the rights of MAN that we are contending—the rights of ALL men—our own rights—the rights of our neighbor—the liberties of our country—of our posterity—of our fellow men—of all nations, and of all future generations.*").

<sup>175</sup> See Theodore Parker, *The Dangers from Slavery* (July 2, 1854), in 4 *OLD SOUTH LEAFLETS* 1-3 (1897).

<sup>176</sup> See WILLIAM GOODELL, *ADDRESS OF THE MACEDON CONVENTION* 3 (1847).

<sup>177</sup> *Constitution of the New-England Anti-Slavery Society*, in 1 *THE ABOLITIONIST: OR RECORD OF THE NEW ENGLAND ANTI-SLAVERY SOCIETY* 2 (January 1833).

<sup>178</sup> American Anti-Slavery Society, *Declaration of the Anti-Slavery Convention*, Dec. 4, 1833, *PROCEEDINGS OF THE ANTI-SLAVERY CONVENTION, ASSEMBLED AT PHILADELPHIA* 12, 12 (1833).

<sup>179</sup> TIFFANY, *supra* note ----, at 29.



Declaration of Independence to be “in direct antagonism” with the Constitution, with the latter being “no more than the political compromises of a day.”<sup>180</sup> Compromise of principles though it was, only amendments to the Constitution could shift the nation’s fundamental, legal priorities.

To radical constitutionalists, who disagreed with the radical abolitionist indictment of the original Constitution, it appeared that some constitutional provisions did prohibit slavery. Radical constitutionalists relied, in part, on the Guarantee Clause as the source of national obligations to protect life, liberty, and property, regardless of a person’s state of birth or domicile.<sup>181</sup> For them, a government that countenanced slavery succumbed to an oligarchy of arbitrary disenfranchisement and enslavement, neither of which were consistent with a republican form of government.<sup>182</sup> The social order of owning slaves was incompatible with a polity committed to the protection of civil liberties through representation.<sup>183</sup>

Prior to the Civil War, the vehement protestation of abolitionists converted few to their cause. Few Senators believed that slavery could be ended on the basis of the then existing constitution.<sup>184</sup> The abolitionist branch of Congress became increasingly influential as the Civil War took an increasing toll on the nation’s financial and human resources. Those who sought the abolition of slavery through constitutional amendment determined to also add congressional authority over civil rights.

#### IV. Reconstruction Abolitionism

During the late 1860s, many members of the Reconstruction Congress shared the radical abolitionists’ conviction that the Declaration of Independence and Preamble to the Constitution made the federal government responsible for protecting fundamental rights. Following the Civil War, several of the leading congressmen were men who had long been involved in abolitionist causes.<sup>185</sup> They and other congressmen who participated in debates on the passage of the

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<sup>180</sup> 2 WILLIAM H. DIXON, *NEW AMERICA* 354-55 (7<sup>th</sup> ed. 1867).

<sup>181</sup> See, e.g., Alvan Stewart, *Argument, on the Question Whether the New Constitution of 1844 Abolished Slavery in New Jersey*, in *WRITINGS & SPEECHES OF ALVAN STEWART, ON SLAVERY* 272, 336-37 (Luther R. Marsh ed., 1860) (“a republican form of government was born free and equal, and entitled to life, liberty, and the pursuit of happiness. This, we knew, would by force of this provision in the constitution of the United States, if faithfully honored, blot out slavery from every State constitution”).

<sup>182</sup> See SPOONER, *supra* note ----, at 106.

<sup>183</sup> For a more detailed discussion of this point see DANIEL J. MCINERNEY, *THE FORTUNATE HEIRS OF FREEDOM: ABOLITION & REPUBLICAN THOUGHT* 16-17 (1994).

<sup>184</sup> Sumner located the constitutional barriers against slavery in the guarantee of republican government, the Due Process Clause of the Fifth Amendment, and the Common Defense and War Clauses. tenBroek, *supra* note ----, at 182.

<sup>185</sup> Radicals dominated the Senate during debates on the Thirteenth Amendment and the Civil Rights Act of 1866. The Amendment was one of their few opportunities to bring about revolutionary change to race relations. Sumner was the chairman of the coveted Committee on Foreign Relations throughout Radical Reconstruction. Senator Benjamin Wade was the Chairman of both the Joint Committee on the Conduct of the War and the Senate Committee on Territories. Wade also later the President Pro Tempore of the Senate. William Fessenden was the Chairman of the Senate Committee of Finance at the beginning of the Civil War, and he returned to that post after having served as President Lincoln’s Secretary of the Treasury. Senator Henry Wilson, a lifelong abolitionist, was the chairman of the Military Affairs committee from 1863 to 1872. The Chairman of the Senate Public Land Committee until 1865 was James Harlan, who conceived of Congress’s power under the Thirteenth Amendment to extend to a breadth of freedoms including conjugal rights. See *passim* 2 COMMITTEES IN THE U.S. CONGRESS, 1789-1946 (David T. Canon *et al.* ed., 2002). For a listing of congressional radicals and conservatives see MICHAEL LES

Reconstruction Amendments, repeatedly spoke of how changes to the Constitution would allow the legislative branch to pass laws for protecting individual rights.<sup>186</sup> The decision to expand legislative authority into matters that had previously been reserved to the states is evident from many of the congressional speeches that were made in support for the proposed Thirteenth and Fourteenth Amendments and for the Civil Rights Bill of 1866.<sup>187</sup>

#### *A. The Thirteenth Amendment*

Debates on the Thirteenth Amendment repeatedly referred to the ideals of the American Revolution. Radical Republicans, who were the Amendment's most ardent supporters, were filled with "the spirit of '76". John P. Hale, a Senator from New Hampshire, believed that the abolition of slavery was essential to disengage the United States from the patent inconsistencies that tainted its history. He called on fellow citizens to "wake up to the meaning of the sublime truths which" the nation's "fathers asserted years ago and which have slumbered dead letters upon the pages of our Constitution, of our Declaration of Independence, and of our history."<sup>188</sup> Decades of sectional conflicts over the spread of slavery focused Congress's attention on the "great wrong, in a moral and social point of view" that "was admitted into the organic law" at the nation's founding "under a supposed necessity for union."<sup>189</sup> The breach leading to war, said Senator John B. Henderson of Missouri, derived from "[o]ur ancestors" hypocrisy in fighting to safeguard their own "inalienable right of liberty" while denying "it to others" under the guise of "false counsels of expediency."<sup>190</sup> Preserving individual rights for the common good of the nation as a whole required restructuring its organic law. Constitutional amendment was essential for changing national ideals into enforceable rights.

In the aftermath of the Civil War, before President Andrew Johnson began vetoing almost all Reconstruction bills, congressional visionaries held enough power to promulgate parts of a political program that placed Congress at the forefront of civil rights initiatives. Laying down a doctrinal foundation for the rebirth of freedom, proponents of the Thirteenth Amendment interpreted the Declaration of Independence to refer to everyone, irrespective of race. The "effect of such amendment" made the self-evident truth of the Declaration of "practical application," rendering it beyond doubt that everyone was endowed by the inalienable rights of "life, liberty, and the pursuit of happiness."<sup>191</sup> As Representative James S. Rollins of Missouri saw it, American Revolutionaries, from the North and the South, anchored "the great principle . . . in the rights of man, founded in reason," applicable to everyone "without distinction of race or of color" to be "created equal."<sup>192</sup> A Democrat from Maryland, Reverdy Johnson, whose vote for

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BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS & RECONSTRUCTION, 1863-1869, at 339-77 (1974).

<sup>186</sup> See Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War*, 92 AM. HIST. REV. 45, 49 (1987).

<sup>187</sup> On the merging of principles from the Civil Rights Act of 1866 into section 1 of the Fourteenth Amendment see Robert J. Kaczorowski, *Congress's Power To Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 263, 274-75, 280-81 (2005); Pratik A. Shah, *Saving Section 5: Lessons from Consent Decree and Ex Parte Young*, 62 WASH. & LEE L. REV. 1001, 1060 (2005).

<sup>188</sup> CONG. GLOBE, 38th Cong., 1st Sess. 1443 (1864).

<sup>189</sup> *Id.* at 1461.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 142.

<sup>192</sup> CONG. GLOBE, 38th Cong., 2d Sess. 260 (1865).

the Amendment was crucial to its passage, considered the Declaration to be “the Magna Charta of human rights.”<sup>193</sup> Based on the well-spring of American rights, Johnson believed slavery to be “inconsistent with the principles upon which the Government is founded.”<sup>194</sup>

Before the promulgation of the Declaration, added Representative Thaddeus Stevens, who was Chair of the powerful Appropriations Committee, legal privileges were arbitrarily vested on the basis of “families, dynasties, or races”; after it, “equal rights to all the privileges of the Government is innate in every immortal being, no matter what the shape or color of the tabernacle which it inhabits.”<sup>195</sup> Such a perspective might have also been comforting to the supporters of women’s rights, who were often allied with abolitionists. However debates on the Thirteenth Amendment rarely addressed questions of gender inequality. This omission persisted throughout the debates on the Fourteenth Amendment. Women’s Suffragists like Elizabeth Cady Stanton believed this glaring omission left women in “a transition period from slavery to freedom.”<sup>196</sup>

In so far as black males were concerned, congressional leaders unequivocally believed that authentic liberation meant their full enjoyment of natural and citizenship rights.<sup>197</sup> Following the abolitionists’ lead, Congress of the mid-1860s conceived of slavery as violative of the Preamble’s guaranty of tranquility and general welfare.<sup>198</sup>

The emphasis on egalitarian principles was a further indication of the change to the structure of government. The head of the House Judiciary Committee, James F. Wilson of Iowa, drew his inspiration from the revolutionary proclamation of “human equality” as the “sublime creed,” demanding that all be treated as “equals before the law.”<sup>199</sup> The nation would be rebuilt, with the union forever changed where “*equality before the law* is to be the great corner-stone.”<sup>200</sup> After the ratification of the Thirteenth Amendment, its opponents postured that it was not meant

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<sup>193</sup> CONG. GLOBE, 38th Cong., 1st Sess. 1420 (1864).

<sup>194</sup> *Id.* at 1422.

<sup>195</sup> CONG. GLOBE, 39th Cong., 1st Sess. 74 (1865).

<sup>196</sup> Elizabeth B. Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America*, 8 LAW & HIST. REV. 25, 34 (1990) (quoting Stanton). On the post-Civil War debate about whether the Fourteenth Amendment should explicitly protect women’s rights see ALEXANDER TSESIS, *WE SHALL OVERCOME*, *supra* note ---, at 144-53; Louise M. Young, *Women’s Place in American Politics: The Historical Perspective*, 38 J. OF POL. 295, 321-26 (1976). To follow the internal debate about women’s rights among abolitionists see *American Anti-Slavery Society*, NATIONAL ANTI-SLAVERY STANDARD, May 13, 1865, at 2; Barbara Allen Babcock, *A Place in the Palladium: Women’s Rights & Jury Service*, 61 U. CIN. L. REV. 1139, 1164-65 (1993); Letter from Stanton to Phillips, May 25, 1865, in 2 ELIZABETH CADY STANTON AS REVEALED IN HER LETTERS, DIARY & REMINISCENCES 104-05 (Theodore Stanton & Harriot Stanton Blatch eds., 1922); WOMAN’S JOURNAL, Dec. 6, 1879, at 388; 2 HISTORY OF WOMAN SUFFRAGE, 1861-1876, at 91-92 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage eds., photo. reprint 1985) (1881); Letter from Stanton to Smith (Jan. 1, 1866), in ELLEN DUBOIS, FEMINISM & SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN’S MOVEMENT IN AMERICA, 1848-1869, at 61 (1978); CARRIE CHAPMAN CATT AND NETTIE ROGERS SHULER, WOMAN SUFFRAGE AND POLITICS: THE INNER STORY OF THE SUFFRAGE MOVEMENT 37-41 (1923); WILLIAM L. O’NEILL, EVERYONE WAS BRAVE: A HISTORY OF FEMINISM IN AMERICA 17 (1971).

<sup>197</sup> Cong. Globe, 38th Cong., 1st Sess. 2990 (1864) (natural rights); CONG. GLOBE, 39th Cong., 1<sup>st</sup> Sess. 46 (1865) (citizenship rights).

<sup>198</sup> See, e.g., CONG. GLOBE, 38<sup>th</sup> Cong., 1st Sess. 1423 (1864)

<sup>199</sup> *Id.* at 1319.

<sup>200</sup> *Id.* at 2989.

to make blacks equals before the law but only to set them free from the fetters of slavery.<sup>201</sup> That was no more than an attempt to annul the broad applicability of the Amendment's principles.

Part of the uncertainty about the Amendment's wide-ranging grant of congressional authority arose from its cursory language, allowing for a stilted literal, textualist interpretation. In hindsight, the Senate made an error when it refused to adopt Senator Charles Sumner's proposed modification to the amendment. He had sought to add a clause explicitly recognizing that "all persons are equal before the law."<sup>202</sup> Others thought it extraneous because equality was already implicit in constitutional abolition. But the failure to include some mention of it enabled congressmen like Senator Thomas A. Hendricks of Indiana to argue, even after ratification of the Thirteenth Amendment, that blacks were inferiors. "It may be preached; it may be legislated for . . . but there is that difference between the two races that renders it impossible."<sup>203</sup>

The Amendment's supporters consistently expressed a very different point of view. Their speeches often stressed the equality of everyone to enjoy inalienable rights.<sup>204</sup> With the passage of the Thirteenth Amendment, argued a Congressman, "[t]he old starry banner of our country . . . will be grander," because "universal liberty" and "the rights of mankind," will then be protected "without regard to color or race."<sup>205</sup> By passing the Thirteenth Amendment, Senator Lot M. Morrill said a year after its ratification, the nation had "wrought" a "change" that "was in harmony with the fundamental principles of the Government."<sup>206</sup> The Warren Court, at the end of the Civil Rights Era, would make the same point about the extent of legislative power: "This Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its 'burdens and disabilities'—included restraints [*sic*] upon 'those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens'"<sup>207</sup>

### *B. Civil Rights Act of 1866*

The Thirteenth Amendment not only abolished slavery, its second section provided Congress, rather than the Court, with the power to develop a statutory agenda for protecting all fundamental rights—especially those connected to life, liberty, and the pursuit of happiness—that lawmakers might determine to be inalienable to free Americans.<sup>208</sup> Accordingly, shortly after the states ratified the Thirteenth Amendment, Congress proceeded with a bill "to protect all persons in the United States in their civil rights and furnish the means of their vindication."<sup>209</sup> Enacted less than four months after the amendment had been ratified, the Civil Rights Act of 1866 offers

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<sup>201</sup> See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866) (Willard Saulsbury). Oddly, it was Saulsbury's interpretation of the lack of equality principle in the Thirteenth Amendment that became the standard interpretation despite the fact that he voted against the amendment and was among the first to show his disdain for it. CONG. GLOBE, 38th Cong., 1st Sess. 1490 (1864).

<sup>202</sup> *Id.* at 521; *id.* at 1483.

<sup>203</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1457 (1866).

<sup>204</sup> See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 1423 (1864).

<sup>205</sup> *Id.* at 2989.

<sup>206</sup> CONG. GLOBE, 39th Cong., 1st Sess. 570 (1866) (Sen. Morrill).

<sup>207</sup> *Jones v. Alfred H. Mayer*, 392 U.S. 409 (1968), quoting *Civil Rights Cases*, 109 U.S. 3, 22 (1883).

<sup>208</sup> ALEXANDER TESIS, *PROMISES OF LIBERTY: THIRTEENTH AMENDMENT ABOLITIONISM AND ITS CONTEMPORARY VITALITY* (Alexander Tesis ed., Columbia University Press, forthcoming 2009) (hereinafter "PROMISES OF LIBERTY").

<sup>209</sup> CONG. GLOBE, 39th Cong., 1st Sess. 129 (1866).

one of the most telling indicators of the extent to which the reconstruction of the Constitution expanded congressional prerogatives on how best to secure essential freedoms.<sup>210</sup>

Many of the speeches supporting the bill connected it with the country's fundamental tenets. Minnesota Representative William Windom, who later served as the Secretary of the Treasury under Presidents James Garfield and Benjamin Harrison, believed the bill to be "one of the first efforts made since the formation of the Government to give practical effect to the principles of the Declaration of Independence."<sup>211</sup> As the bill's Senate floor leader, Lyman Trumbull, put it, 1776's "immortal declaration" of equal and inalienable rights has "very little importance" as merely a statement of "abstract truths and principles unless they can be carried into effect."<sup>212</sup>

The Civil Rights Act of 1866 was Congress's first use of its Thirteenth Amendment power to promulgate law that was applicable to the "the whole people" throughout the United States; regardless of whether they were "high and low, rich and poor, white and black."<sup>213</sup> From its inception the nation "professed" to be governed by "the absolute equality of rights" but it then "denied to a large portion of the people equality of rights."<sup>214</sup> The newly ratified amendment provided Congress with the authority to make freedom universal.

There was a "logic and a legal connection between" Congress's ability to "exercise power" to pass a law "in fact and equality" to protect the "civil rights, fundamental rights belonging to every man as a free man," including the those "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property."<sup>215</sup>

A super-majority was needed to pass the bill into law over President Andrew Johnson's veto.<sup>216</sup> Many of the speeches supporting its passage argued that prohibiting discrimination was essential for guaranteeing real freedom.<sup>217</sup> Normative arguments during congressional debates relied on the country's founding principles, which the Civil Rights Act's supporters believed were thenceforth enforceable against any contrary state regulation or private conduct. Discrimination was asymmetrical with the stable norms of post-bellum republican governance.

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<sup>210</sup> Ch. 31, 14 Stat. 27 (1866) (Civil Rights Act of 1866). The Act secured the right to "make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property." The statute further provided citizens with the "full and equal benefit of all laws and proceedings for the security of person and property. . . . any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." It prohibited public and private acts of discrimination. Federal courts were authorized to exercise original jurisdiction over cases, but state courts could also hear causes of action arising under the Act. Litigants could remove cases from state to federal courts, if state laws infringed on federal rights. Even state officials who violated the Act could be criminally prosecuted. All violators could be imprisoned for up to a year and fined no more than \$1,000. States retained concurrent authority to pass civil rights laws. *Id.*

<sup>211</sup> CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866) (Rep. Windom).

<sup>212</sup> *Id.* at 474.

<sup>213</sup> *Id.* at 476.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> For Johnson's veto message with its objection to the expansion of federalism at the expense of state rights see *id.* at 1679, 1680-81.

<sup>217</sup> See, e.g. *id.* at 1152 ("The sole purpose of the bill is to secure to that class of persons the fundamental rights of citizenship; those rights which constitute the essence of freedom, and which are common to the citizens of all civilized States; those rights which secure life, liberty, and property, and which make all men equal before the law, as they are equal in the scales of eternal justice").

The second section of the Thirteenth Amendment had granted Congress the dynamic authority to discern and legislate against any abiding and new infringements on fundamental legal freedoms. The Reconstruction broke from “the dogma that this country is of the white man, and that no other man has rights here which a white man is bound to respect.”<sup>218</sup>

Enforcement of the Constitution’s new guarantee of universal freedom was to be “a return to the principles of the founders of the Government.”<sup>219</sup> While the purpose of governance continued to be grounded on early American thought, the Thirteenth Amendment wrought a revolutionary change in the relationship between state and federal governments. Anti-discrimination policy became a national rather than solely a state or local matter.

From the very beginning of the debate, Senator Trumbull reflected on the nature of liberty and equality. He acknowledged that in a civil society absolute freedom was inconceivable, but Congress could secure to all freepersons the rights to travel, bring law suits, to enter into contracts, and to own, inherit and dispose of properties.<sup>220</sup> He relied on William Blackstone’s *Commentaries* to indicate the intersection between individual freedom and the common good: “Civil liberty is no other than natural liberty, so far restrained by human laws and no further, as is necessary and expedient for the general advantage of the public.”<sup>221</sup>

The bill’s opponents voiced concern that it would hinder states from being able to govern internal matter. They believed that its provisions would usurp state sovereignty over ordinary contract and real estate transactions, which had previously been at the sole discretion of the states.

Responding to these concerns, Senator Trumbull asserted that the new law was not meant to destroy federalism but to secure equal rights for each American.<sup>222</sup> Among these essential interests are “the right to life, to liberty, and to avail one’s self of all the laws passed for the benefit of the citizens to . . . enforce those rights.”<sup>223</sup> The newly reconstructed form of federalism emphasized Congress’s role in facilitating individuals’ dignitary interests. It left intact state powers insofar as they dealt with ordinary legal matters, from labor and transactional agreements to tort and criminal laws.<sup>224</sup>

States no longer had the sovereign right to implement discriminatory laws. The Thirteenth Amendment, explained Senator Lot M. Morrill, a former governor of Maine, was predicated on “the high principles of American law.”<sup>225</sup> The civil rights bill was meant to place blacks on “the plane of manhood,” bringing them “within the pale of the Constitution.”<sup>226</sup> Its aim was not merely to be legislative but also to be declarative “of a grand, fundamental principle of law and politics.”<sup>227</sup> The law thereby remained true to the Thirteenth Amendments

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<sup>218</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1262 (1866). For similarly racist comments see *id.* at 530 (Senator Garrett Davis); *id.* at 1263 (Representative Edwin R. V. Wright). Other congressmen rejected the bill because they considered it an over-extension of congressional power *see, e.g., id.* at 1267-68 (Representative Michael C. Kerr).

<sup>219</sup> *Id.* at 1262 (Representative John M. Broomall).

<sup>220</sup> CONG. GLOBE, 39th Cong., 1st Sess. 474-75 (1866).

<sup>221</sup> *Id.* at 474.

<sup>222</sup> *Id.* at 599.

<sup>223</sup> *Id.* at 600.

<sup>224</sup> *Id.* at 600.

<sup>225</sup> *Id.* at 570.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

interconnection between enforceable constitutional law and the Declaration of Independence and the Preamble to the Constitution.

These notions of liberty were understood to be irreconcilable not only with slavery itself but also any forms of discrimination that were associated with it. The Thirteenth Amendment granted the federal government far more powers to protect fundamental rights than it enjoyed prior to the Civil War. The states' variegated policies about interpersonal behavior could no longer undermine congressionally defined civil rights.<sup>228</sup> The Civil Rights Act was born of a determination to establish law that would "carry to its legitimate and just result the great human revolution."<sup>229</sup>

To the great surprise of the Reconstruction Congress, Andrew Johnson vetoed the civil rights bill.<sup>230</sup> During debates following that unexpected outcome, Trumbull, whose Senate Judiciary Committee had fashioned the language of the Thirteenth Amendment, became even clearer about why Congress had the authority to pass a national law prohibiting discrimination in property, contract, and court related matters. The civil rights bill was meant to safeguard "inherent, fundamental rights that belong to free citizens or free men . . . and they belong to them in all the States of the Union."<sup>231</sup> Every citizen, whether born in the U.S. or naturalized, had the right to "go into any State of the Union and to reside there."<sup>232</sup> To further signal the great federalist change initiated by the Thirteenth Amendment, Trumbull relied not on judicial precedents, but classic legal treatises. The Amendment would overturn any precedent violative of fundamental rights and Congress's power to safeguard it.

Trumbull referred to the extremely influential William Blackstone for the proposition that citizens are entitled to "natural liberty" and therefore can only be restrained by law insofar as it "is necessary and expedient to the general advantage of the public."<sup>233</sup> Civil liberties "should be *equal to all*, or as much as the nature of things will admit."<sup>234</sup> These quotes of Blackstone in the context of debates about the civil rights bill reflected an unambiguously national perspective of individual rights and general welfare. Trumbull also quoted James Kent, who like Blackstone wrote a widely cited legal treatise. Kent proffered the premise that among the interests included in "equal rights . . . of a commonwealth" are "the right to personal security, the right of personal liberty, and the right to acquire and enjoy property."<sup>235</sup> In Kent, Trumbull further found the proposition that inalienable rights are not limited to citizens but likewise extend to the inhabitants of the United States.<sup>236</sup>

A review of the congressional record indicates that the civil rights bill was intended to achieve the normative purposes of American government. Congress used its Thirteenth

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<sup>228</sup> For a debate about the effects of state laws legalizing slavery on the citizenship status of blacks in the United States see the withering exchange between Radical Republican Senator Daniel Clark and Unionist Garrett Davis CONG. GLOBE, 39th Cong., 1st Sess. 528, 529 (1866). Clark's ire was peaked by Davis's misstatement, reminiscent of Chief Justice Taney's in *Dred Scott*, that prior to the Revolution blacks had not been citizens in any colony. *Id.* at 523-24, 527.

<sup>229</sup> *Id.* at 1151 (Representative Martin R. Thayer of Pa.).

<sup>230</sup> ALEXANDER TESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM 56 (2004).

<sup>231</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

Amendment Section 2 enforcement authority to identify and protect rights that it perceived to be essential to the privileges of citizenship.

Senator Trumbull further relied on Justice Bushrod Washington’s circuit court dictum, in *Corfield v. Coryell*,<sup>237</sup> to deduce the extent of congressional authority under the Thirteenth Amendment.<sup>238</sup> Washington’s nonexhaustive list of privileges of citizenship included, “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; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise.”<sup>239</sup> The Reconstruction Congress surmised that the Thirteenth Amendment granted it the authority to secure these and other essentials of citizenship, whether or not they were enumerated by the Bill of Rights.<sup>240</sup>

Key supporters of the Civil Rights Act of 1866 expected *Corfield* to be a starting-point for establishing what civil rights Congress was empowered to protect. But that dictum, just like the Bill of Rights itself, was not meant to be the final word on the nature of fundamental rights. The Thirteenth Amendment empowered Congress to identify violations against core American interests, and to pass any laws necessary to put an end to them.

As for the judiciary, the third section of the civil rights bill gave district courts exclusive jurisdiction over criminal and civil offenses arising under the Act.<sup>241</sup> But it was Congress, not the judiciary who was primarily responsible for identifying which rights were fundamental enough to warrant federal protections.<sup>242</sup>

Summing up the significance of the new law, Trumbull concluded that, “If the bill now before us, and which goes no further than to secure civil rights to the freedman, cannot be passed, then the constitutional amendment proclaiming freedom to all the inhabitants of the land is a cheat and a delusion.”<sup>243</sup> Just a few months before, Congressman James Garfield, who would eventually become president of the United States, declared in similar terms that if “freedom” meant no more than the abolition of slavery, then it was “a bitter mockery” and “a cruel delusion.”<sup>244</sup> The provisions of the Civil Rights Act of 1866 indicate that less than half a year after the Thirteenth Amendment’s ratification the dominant political view regarded the amendment’s second section to be a grant of congressional power to identify what rights to protect, to establish a rational policy for combating discrimination, and to promulgate legitimate laws to achieve that end.

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<sup>237</sup> *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823).

<sup>238</sup> *Id.* at 474-45.

<sup>239</sup> *Id.*

<sup>240</sup> See Michael K. Curtis, *Resurrecting the Privilege or Immunities Clause and Revisiting the Slaughter-House Cases without Exhuming Lochner*, 38 B.C. L. Rev. 1, 32 n.122 (1996) (citing primary sources on congressional authority to pass the Civil Rights Act of 1866); MICHAEL K. CURTIS, *NO STATE SHALL ABRIDGE* 80-83 (1986) (discussing the constitutional authority Congress relied on to pass the Civil Rights Act of 1866).

<sup>241</sup> Ch. 31, 14 Stat. 27 § 3 (1866); CONG. GLOBE, 39th Cong., 1st Sess. 1759 (1866).

<sup>242</sup> In a 1968 decision, the Supreme Court asserted that, “Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.” *Jones*, 392 U.S. at 440.

<sup>243</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1761 (1866).

<sup>244</sup> Congressman James A. Garfield, *Oration Delivered At Ravenna, Ohio July 4, 1865*, in *THE WORKS OF JAMES ABRAM GARFIELD* 86 (Burke A. Hinsdale ed., 1882).



Opponents of the bill repeatedly attacked the extent to which the amendment would augment congressional power. Their most expositive voice, Senator Reverdy Johnson, claimed that a bill that would protect civil rights throughout the United States violated the Tenth Amendment's guarantee that "everything not granted was to be considered as remaining with the States unless the Constitution contained some particular prohibition of any power before belonging to the State."<sup>245</sup> Johnson's rhetoric denied that the Thirteenth Amendment enabled Congress to act against perceived violations of fundamental rights.

Given that a super-majority was needed to override President Andrew Johnson's veto—indeed—in fact, this was the first veto override of any major law in United State history—Reverdy Johnson's view was only shared by a relatively small minority.<sup>246</sup> Most congressmen believed that the Amendment had dramatically altered the federal-state relationship. The Civil Rights Act of 1866 went so far as to provide criminal penalties for the abridgment of core American rights, a step that indicated that Congress, immediately after ratification of the Thirteenth Amendment, conceived itself to no longer to be hamstrung by the federalism of a bygone era, when the racist administration of criminal law was a state prerogative. The new federalism placed Congress in the forefront of identifying the meaning of the Constitution and passing laws to protect fundamental rights.

### C. Fourteenth Amendment

Many of the congressmen who voted against the Civil Rights Act of 1866 were Democrats who claimed that it posed a threat to state authority. The most prominent Republican to vote against it was Representative John A. Bingham.<sup>247</sup> Before the final vote, he explained that he was unwilling to support a statute purporting to grant Congress the authority to affect rights that in *Barron v. Mayor and City Council of Baltimore* the Supreme Court had left at the sole discretion of the states.<sup>248</sup> In his mind, only a constitutional amendment could extend congressional power over civil rights and citizenship.<sup>249</sup> To this end, even before the passage of the Civil Rights Act, Bingham had begun advocating for the passage of the Fourteenth Amendment.<sup>250</sup>

In May 1866, Congress formally started its debate on the language of the Fourteenth Amendment, which was meant, in significant part, to constitutionalize the federal authority over citizenship rights codified in the Civil Rights Act of 1866.<sup>251</sup> The general presumption was that

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<sup>245</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1777 (1866).

<sup>246</sup> See Aviam Soifer, *Protecting Full and Equal Rights: The Floor and More, in PROMISES OF LIBERTY*”, *supra* note -----.

<sup>247</sup> For the final House vote on the bill see CONG. GLOBE, 39th Cong., 1st Sess. 1367 (1866). When the House overrode President Johnson's veto, Bingham abstained from voting on the bill. 39th Cong., 1st Sess. 1866 (1866).

<sup>248</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866); *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pct.) 243 (1833). Despite Bingham's misgivings, the Supreme Court has never found the Civil Rights Act of 1866 to be unconstitutional. To the contrary, the Court has relied on it to find private housing discrimination, *Jones*, 392 U.S. at 440-41, and private school segregation to be punishable under its provisions. *Runyon v. McCrary*, 427 U.S. 160 (1976).

<sup>249</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866).

<sup>250</sup> Interestingly Bingham made his first mention of the Fourteenth Amendment on January 9, 1866, *id.* at 157-58, three days before Trumbull introduced the civil rights bill, *id.* at 211.

<sup>251</sup> See Jay S. Bybee, *Taking Liberties with the First Amendment*, 48 VAND. L. REV. 1539, 1584-85 (1995). For a couple of examples of statements connecting the Fourteenth Amendment with the Civil Rights Act of 1866 see

the pre- and post-veto debates about the statute had adequately articulated the federal government's role in protecting civil rights, requiring little further elaboration. Accordingly when Senator Jacob M. Howard proposed the Citizenship Clause to the future Fourteenth Amendment, he decided to say nothing "on that subject except that the subject of citizenship has been so fully discussed in this body [during the civil rights bill debates] as not to need any further elucidation."<sup>252</sup>

Members of the Joint Committee of Fifteen on Reconstruction, like Howard, Thaddeus Stevens, John A. Bingham, and William P. Fessenden, wanted to extend national power over civil rights beyond the protections that were enumerated by the 1866 statute. In Howard's words, the Committee of Fifteen "desired to put this question of citizenship and the right of citizens and freedmen under the civil rights bill beyond the legislative power of such gentlemen as the Senator from Wisconsin [James R. Doolittle], who would pull the whole system up by the roots and destroy it." The Committee's aim was to clarify the grant of congressional enforcement authority in the Thirteenth Amendment by adding nationally applicable equal protection, due process, and privileges and immunities clauses to the Constitution.

The Committee incorporated phrases into its drafts with unmistakably abolitionist overtones. Like the Declaration of Independence, the Fourteenth Amendment directed the nation to examine its practices against an ideal government that protected individual rights and worked for the general welfare. Inclusion of the Citizenship Clause seemed to foreclose any future judicial decision that tied citizenship rights to any particular race, as *Dred Scott* had done.<sup>253</sup> The terms of the Amendment's first section were broad enough to provide for contemporary and future federal protections for fundamental rights. Through Supreme Court interpretation and statutory enactment, twentieth and twenty-first century judges interpreted the Due Process and Equal Protection Clauses to cover the rights of women,<sup>254</sup> racial minorities,<sup>255</sup> and disabled persons.<sup>256</sup>

Back in 1866, the Fourteenth Amendment passed from Congress to the states for final ratification, its opponents often invoked the pre-Civil War framework of state exclusivity in civil

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CONG. GLOBE, 39th Cong., 1st Sess. 2511 (1866) (statement of Representative Eliot) and *id.* at 2462 (statement of Representative Garfield).

<sup>252</sup> *Id.* at 2890. To the extent that the debates on the proposed Fourteenth Amendment concentrated on defining citizenship, many of the statements reflected period prejudices against including anyone of Chinese, Gypsy, African, and Indian ancestry. *See, e.g., id.* at 2890-96 *passim* (1866); *id.* at 2939. The primary focus of the Fourteenth Amendment debates was on representation and voting rights, in the second section, and the disenfranchisement of Confederate-participants, in the third section.

<sup>253</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403-04, 407-08 (1856) (holding that blacks cannot be citizens of the United States: "[Negroes were] beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . ."). *See* Alexander Tsesis, *Undercutting Inalienable Rights: From Dred Scott to the Rehnquist Court*, 39 ARIZ. ST. L.J. \* Part III (2008).

<sup>254</sup> *United States v. Virginia*, 518 U.S. 515 (1996); 20 U.S.C. § 1681(a) (2005) (prohibiting, with some exceptions, that "on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance").

<sup>255</sup> *Brown v. Board of Ed.*, 347 U.S. 483 (1954); Title VII of the Civil Rights Act of 1964, Pub. L. No. 95-555 (codified as amended 42 U.S.C.A. s 2000 (e)) (prohibiting employers, labor organizations, and employment agencies engaging in race, sex, color, religion, or nation origin discrimination).

<sup>256</sup> *Tennessee v. Lane*, 541 U.S. 509 (2004); The Americans with Disabilities Act of 1990 (ADA) 42 U.S.C. §§ 12101-12213 (1994).

matters. During debates on the Fourteenth Amendment a representative from New Jersey attacked the first section as an “attempt to consolidate the power of the States and to take away from them the elementary principles that lie at their foundation.”<sup>257</sup> Representative Andrew J. Rogers denounced the first section of the Fourteenth Amendment for granting Congress authority over the privileges and immunities of U.S. citizens. He worried that congressional authority to enforce the Amendment would extend to all unenumerated liberties such as the rights to marry, serve on a jury, and run for the office of President of the United States.<sup>258</sup> Rogers cautioned that the Amendment threatened to diminish states’ powers.<sup>259</sup>

In fact, the aims of the proposed amendment were revolutionary. Section 5 would overhaul federalism by more clearly granting Congress the authority to safeguard core American interests against any state encroachment. The Fourteenth Amendment, as centrist Ohio Representative William Lawrence saw it, forbade the states from passing or enforcing any laws that arbitrarily “invade . . . [against] fundamental equality.”<sup>260</sup>

Radical congressmen were about as optimistic as Lawrence. Radical Representative John F. Farnsworth of Illinois was among those who hoped “that Congress and the people of the several States may yet rise above a mean prejudice and do equal and exact justice to all men, by putting in practice that ‘self-evident truth’ of the Declaration of Independence.”<sup>261</sup> Those “self-evident” truths had proven inadequate in the ante-bellum years for preventing the spread of slavery. The Fourteenth Amendment was meant to provide federal legislators with the means to protect citizens’ life, liberty, and ability to pursue happiness to create uniform civil rights standards.

The possibility that the Supreme Court might overturn legislation passed pursuant to Section 5 of the Fourteenth Amendment did not even arise during the floor debate possibly because prior to 1866 the justices had only twice found federal laws to be unconstitutional.<sup>262</sup> And it seemed inconceivable that the Court could meddle with an explicit congressional enforcement power.

Supporters of the Fourteenth Amendment had no doubt “as to the power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States.”<sup>263</sup> Senator Luke P. Poland of Vermont believed that the “Declaration of Independence” and the Constitution had inspired the first clause of the Fourteenth Amendment.<sup>264</sup> The practical significance of the national ethos of equality that was subsumed into the Fourteenth Amendment was to allow Congress to protect more than the interests enumerated in the Bill of Rights. An Illinois Congressman also linked the new constitutional safeguard to the Declaration, asking rhetorically how anyone can “have and enjoy equal rights of ‘life, liberty, and the pursuit of happiness’ without ‘equal protection of law?’”<sup>265</sup>

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<sup>257</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2538 (1866) (Rep. Andrew J. Rogers).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 1836.

<sup>261</sup> *Id.* at 2539.

<sup>262</sup> *United States v. Rhodes*, 27 F.Cas. 785, 793 (C.C. Ky. 1866). The two cases were *Marbury v. Madison*, 5 U. S. (1 Cranch) 137 (1803) and *Dred Scott v. Sanford*, 60 U. S. (19 How.) 393 (1857). In 1866, *Ex Parte Garland* held that an *ex post facto* law meant to debar many souther attorneys was unconstitutional. 71 U. S. (4 Wall.) 334.

<sup>263</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866).

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 2539 (Representative Farnsworth).

Even after the adoption of the Fourteenth Amendment, blacks' legal disabilities persisted. Women's rights were explicitly not even on the agenda.<sup>266</sup> Those "great principles on which our government is based," which in 1883 the renowned woman's suffragist Lucy Stone located in the Declaration and the Bill of Rights, "vainly" call "for equal rights," but were "not respected in their application to women."<sup>267</sup> Furthermore, the Fourteenth Amendment was an imperfect achievement to combat centuries of despotism in the name of a free republic.<sup>268</sup> During the congressional debates, Thaddeus Stevens stated his dissatisfaction with a partial solution that did not contain any protection for suffrage:

In my youth, in my manhood, in my old age, I had fondly dreamed that when any fortunate chance should have broken up for awhile the foundation of our institutions, and released us from obligations . . . that the intelligent . . . and just men of this Republic, true to their professions and their consciences, would have so remodeled all our institutions as to have freed them from every vestige of human oppression, of inequality of rights, of the recognized degradation of the poor, and the superior caste of the rich. In short, that no distinction would be tolerated in this purified Republic but what arose from merit and conduct. This bright dream has vanished . . . I find that we shall be obliged to be content with patching up the worst portions of the ancient edifice, and leaving it, in many of its parts, to be swept through by the tempests, the frosts, and the storms of despotism.<sup>269</sup>

To make up for Congressmen's inability to achieve complete liberal democracy immediately, the fifth section of the Fourteenth Amendment granted Congress the enforcement authority for future legal progress. All that was needed to match national ideals was the legislative initiative to press

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<sup>266</sup> Susan B. Anthony and Stanton unsuccessfully petitioned Congress to add a provision to the Fourteenth Amendment guaranteeing women's suffrage rights. Feminist aspirations were also offended because the Amendment's second section, for the first time, introduced the word "male" into the Constitution. It provided that a states' congressional representation would be diminished proportionately to the number of males older than twenty-one who were arbitrarily excluded from voting. The provision meant to prevent local prejudices from denying black males' voting rights, but its use of "male" retained the longstanding federal policy of non-interference with state disenfranchisement of women. 2 HISTORY OF WOMAN SUFFRAGE, 1861-1876, at 91-92 (Elizabeth Cady Stanton *et al.* eds., photo. reprint 1985) (1881). Knowing how difficult it was to change the Constitution, Stanton warned her cousin and ally Gerrit Smith that the second section could "take us a century at least to get it out." Letter from Stanton to Smith (Jan. 1, 1866), in ELLEN DUBOIS, FEMINISM & SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848-1869, at 61 (1978). An unsuccessful petition drive gathered about ten thousand signatures to keep "male" out of the constitution. CARRIE CHAPMAN CATT AND NETTIE ROGERS SHULER, WOMAN SUFFRAGE AND POLITICS: THE INNER STORY OF THE SUFFRAGE MOVEMENT 37-41 (1923). Anthony demanded that the clause be excised because enfranchising only black men meant that women were "left outside with lunatics, idiots and criminals." See WILLIAM L. O'NEILL, EVERYONE WAS BRAVE: A HISTORY OF FEMINISM IN AMERICA 17 (1971).

<sup>267</sup> *A Woman Suffrage Catechism in Part*, in LEWIS FORD, THE VARIETY BOOK 155 (1892).

<sup>268</sup> Stevens would have been satisfied with the Joint Committee of Fifteen's initial proposal provided that "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." CONG. GLOBE, 39th Cong., 1st Sess. 1033-34 (1866). It placed power in Congress to decide what laws were necessary for prohibiting unequal treatment of U.S. citizens. Had it passed, this proposal would have ended the persistent debate about whether federal or state governments would have the ultimate responsibility to safeguard equal rights against local prejudices.

<sup>269</sup> CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866).

for statutory reform. However, in shot order the Supreme Court would so restrain congressional power as to render the Amendment virtually unrecognizable to the participants of the 1866 debate.

#### V. Supreme Court Retrenchment

The first judicial interpretations of Reconstruction laws recognized that the Thirteenth and Fourteenth Amendments had eliminated the state-oriented civil rights federalism of *Dred Scott*. This early trend first appeared when designated circuit court justice Noah Swayne upheld Congress's authority to pass the Civil Rights Act of 1866 in *United States v. Rhodes*.<sup>270</sup> Swayne found that the Thirteenth Amendment enabled Congress to pass civil rights legislation and to grant federal courts jurisdiction to adjudicate cases arising under it.<sup>271</sup> Congress's new power was necessary to achieve the "intentions of the framers of the constitution, and to accomplish the objects for which governments are instituted."<sup>272</sup> Until the passage of the Thirteenth Amendment, rights varied "in different localities and according to the circumstances."<sup>273</sup> After its ratification, the Amendment "trenche[d] directly upon the power of the state and of the people of the state."<sup>274</sup>

Other decisions, such as *In re Turner*, which struck Maryland's apprenticeship statute, also rejected the ante-bellum states' right to arbitrarily discriminate against black citizens of the United States. In its place, Chief Justice Chase, writing as a designated circuit court justice, accepted Congress's power to set a national civil rights policy. Chase found that after the ratification of the Thirteenth Amendment "colored persons equally with white persons are citizens of the United States."<sup>275</sup> The Amendment made legislators primarily responsible for carrying out its principles: "Congress is itself the judge of its power to pass such a law, and is alone the judge of the existing necessity for it."<sup>276</sup>

Four years later, in *United States v. Given*, with Justice Strong also sitting as a circuit justice, a Delaware district court held that the Reconstruction Amendments "enlarged the powers of congress" by securing "to persons certain rights which they had not previously possessed."<sup>277</sup> He noted that "prior to the recent amendments" congressional legislation could not be used to protect all personal rights in the Constitution; "[b]ut the recent amendments have introduced great changes."<sup>278</sup> Reconstruction had not only extended the notion of rights to a universal principle often discussed during the revolutionary period,<sup>279</sup> it also increased federal legislative power to protect them. "Not only were the rights given--the right of liberty, the right of citizenship, and the right to participate with others in voting, on equal terms, without any

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<sup>270</sup> *United States v. Rhodes*, 27 F. Cas. 785 (C.C.D. Ky. 1866).

<sup>271</sup> *Id.* at 787.

<sup>272</sup> *Id.* at 792.

<sup>273</sup> *Id.* at 790.

<sup>274</sup> *Id.* at 788.

<sup>275</sup> *In re Turner*, 24 F.Cas. 337, 340 (C. C. Md. 1867).

<sup>276</sup> *Id.* at 339.

<sup>277</sup> *U.S. v. Given*, 25 F.Cas. 1324, 1325 (1873).

<sup>278</sup> *Id.* at 1326.

<sup>279</sup> *See supra* text accompanying notes -----.

discrimination on account of race, color, or previous condition of servitude--but power was expressly conferred upon congress to enforce the articles conferring the right.”<sup>280</sup>

Shortly thereafter the Supreme Court began diminishing the scope of congressional authority. Part VI will seek to demonstrate how this aggrandizement of judicial interpretive power at the expense of congressional enforcement power continues to impact civil rights jurisprudence.

This shift away from the expectations of the Reconstruction Congress began with the *Slaughter-House Cases* of 1872. Butchers challenged a Louisiana law giving a company an exclusive license to operate a slaughter yard in the New Orleans area.<sup>281</sup> Other than members of the corporation, all other butchers had to pay a fee to use the facility.

*Slaughter-House* is infamous for its narrow interpretation of the scope of American citizens’ privileges and immunities. In fact, the only national privileges the majority acknowledged had already either been enumerated by the original Constitution or identified by Supreme Court precedents. They included the right to travel to Washington, D.C., the right of protection on the high seas, and habeas corpus protections.<sup>282</sup> The Court implied that Congress had no authority to redress nor the Supreme Court to adjudicate violations against unenumerated rights. Such an interpretation ran against the expectations of the Reconstruction Congress as they had been described during debates on the Thirteenth and Fourteenth Amendments and the Civil Rights Act of 1866.<sup>283</sup> *Slaughter-House* interpreted Justice Washington’s dictum in *Corfield* about the Article IV Privileges and Immunities Clause to correspond to “rights belonging to the individual *as a citizen of a state*.”<sup>284</sup> The Amendment, Miller wrote, never meant “to transfer the security and protection of all the civil rights” from state to federal governments.<sup>285</sup>

Miller also rejected the butchers’ Thirteenth Amendment argument, finding its focus on the incidents of involuntary servitude inapplicable to a matter that was primarily about the exploitation of property rather than persons.<sup>286</sup> The Court, therefore, upheld the Louisiana monopoly; of more long-term consequence, it indicated the judiciary’s unwillingness to rigorously scrutinize state laws unless they were overtly racist.

Although, at first glance, *Slaughter-House* appeared to only prevent the judiciary from dismantling state monopolies, the case also underplayed the federal government’s ability to recognize privileges or immunities other than those explicitly named in the ante-bellum Constitution. The continuing use of state sponsored and vigilante racial violence, segregation, and employment and property discrimination made blacks the greatest losers in that case. In large part, Congress had lost its power to secure civil rights intrinsic to United States citizenship.

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<sup>280</sup> *Given*, 25 F.Cas. at 1326.

<sup>281</sup> *Slaughter-House Cases*, 83 U.S. 36 (1872).

<sup>282</sup> *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

<sup>283</sup> See *supra* text accompanying notes ----.

<sup>284</sup> *Id.* at 76. Miller actually misquoted *Corfield* rather than “citizens of the several states” the original case has “citizens in the several states.” The original is more open to a national perspective of privileges and immunities. See Kevin C. Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 654 (2000).

<sup>285</sup> *Id.* at 76.

<sup>286</sup> *Slaughter-House*, 83 U.S. at 66-74.

This came at a time when Southern states were increasingly being “redeemed” from federal control.

Four out of nine Justices dissented from Miller’s opinion. Two separate dissents are relevant here. Justice Swayne argued against rolling back jurisprudence to antebellum state federalism, viewing the Reconstruction Amendments as “a new departure” because they reduced state power in favor of a federal duty to protect the rights of the people.<sup>287</sup> Justice Bradley, in his dissent, focused on the Reconstruction Amendments’ effect on individuals’ relationship to their communities. The Fourteenth Amendment, Bradley argued, had made United States citizenship “primary,” enabling the federal government to step in if a state or local power “denied full equality before the law” to any classes of persons.<sup>288</sup>

The judicial retreat from Reconstruction became increasingly entrenched in 1876. *United States v. Cruikshank* relegated the prevention of racially motivated criminal violence to state authorities.<sup>289</sup> Just as in the civil realm, which the *Slaughter-House Cases* had involved, *Cruikshank* allowed state sensibilities to trump federal concerns for the welfare of American citizens.

It is worth taking a closer look at *Cruikshank* because the Supreme Court relied on it as recently as 2000 in a case that struck a civil remedy provision of the Violence Against Women Act.<sup>290</sup> *Cruikshank* was decided at a time when President Ulysses S. Grant’s Justice Department began scaling back civil rights enforcement.<sup>291</sup> The case concerned acts of terrorism perpetrated in Louisiana against blacks who were holding a political rally in 1873. The event came to be known as the Colfax Massacre.<sup>292</sup> A white mob converged on a courthouse that blacks had taken over. The mob then set the building ablaze and shot at anyone emerging from it. Over 100 black men and two white men lost their lives during the mayhem.<sup>293</sup>

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<sup>287</sup> *Id.* at 125, 128-29 (Swayne, J., dissenting).

<sup>288</sup> *Id.* at 112, 114-16 (Bradley, J., dissenting).

<sup>289</sup> *United States v. Cruikshank*, 92 U.S. 560 (1875). See Bezalel Stern, *Huck Finn and the Civil Rights Cases*, 30 COLUM. J.L. & ARTS 79, 87 (2006); Timothy Sandefur, *Can You Get There from Here?*, 22 LAW & INEQ. 1, 12-13 (2004).

<sup>290</sup> *United States v. Morrison*, 529 U.S. 598, 622 (2000); see *infra* Part VI.

<sup>291</sup> On Grant administration prosecutions of the Ku Klux Klan see Stephen Cresswell, *Enforcing the Enforcement Acts: The Department of Justice in Northern Mississippi, 1870-1890*, 53 J. S. HIST. 421, 425 (1987); Everette Swinney, *Enforcing the Fifteenth Amendment, 1870-1877*, 28 J. S. HIST. 202, 217-18 (1962); ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877, at 457 (1988); Louis F. Williams, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871-1872 (1996); Herbert Shapiro, *The Ku Klux Klan During Reconstruction: The South Carolina Episode*, 49 J. NEGRO HIST. 34 (1964); Michael E. Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 J. CRIM. L. & CRIMINOLOGY 1159, 1170 n.56 (1984)

<sup>292</sup> HAROLD M. HYMAN AND WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, at 488-89 (1982).

<sup>293</sup> ROBERT KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876, at 176 (1985); ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-1877, at 530-31 (Perennial

Federal prosecutors secured 100 indictments under the First Enforcement Act, but they only managed to convict three of the massacre participants. These convictions were appealed all the way up to the Supreme Court. Chief Justice Waite, who wrote for the *Cruikshank* majority, avoided any substantive decision on the case by dismissing all charges against the defendants because of facial deficiencies in the complaints.<sup>294</sup> While the Court recognized the existence of a national right to peaceful assembly,<sup>295</sup> it refused to extend the reach of the Fourteenth Amendment to privately perpetrated racist violence.<sup>296</sup> While seemingly a procedural decision, *Cruikshank* continued to rely on a states oriented approach to the punishment of crimes: “Sovereignty, for the protection of the rights of life and personal liberty within the respective States, rests alone with the States.”<sup>297</sup> This meant that private acts of discriminatory criminal violence could only be prosecuted in states irrespective of whether any of them lacked adequate remedies for hate crimes.

The Court’s willingness to overturn convictions obtained under a federal laws that was designed to protect political and civil rights was partly the cause of a sharp decline in federal prosecutions.<sup>298</sup> With little federal protection, claims of racial discrimination had to be brought in state courts, where the likelihood of success was minuscule because of the widespread use of witness intimidation and Southern efforts to undermine radical Reconstruction policies on fundamental rights.<sup>299</sup> Despite its negative impact on congressional Reconstruction, 125 years after the *Cruikshank* was decided, Chief Justice Rehnquist relied on *Cruikshank* in a 2000 case that overturned a provision of the Violence Against Women Act.<sup>300</sup>

The Rehnquist Court also found support for limiting Congress’s legislative powers in the *Civil Rights Cases*,<sup>301</sup> which arose from five joined law suits arising under the Civil Rights Act of 1875.<sup>302</sup> The Act was the final statute passed by the Reconstruction Congress.<sup>303</sup> Its full

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Library 1989) (1988); Everette Swinney, *Enforcing the Fifteenth Amendment, 1870-1877*, 28 J. S. HIST. 202, 207 (1962).

<sup>294</sup> Waite found that the indictments incomplete because they merely said that the defendants violated victims’ civil rights rather than enumerating those rights. *Cruikshank*, 92 U.S. at 552.

<sup>295</sup> *Id.* at 552-53.

<sup>296</sup> *Id.* at 542-43 (dicta) (“The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws; but it 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.”).

<sup>297</sup> *Id.* at 547.

<sup>298</sup> See Everette Swinney, *Enforcing the Fifteenth Amendment, 1870-1877*, 28 J. S. HIST. 202, 207 (1962).

<sup>299</sup> Everette Swinney, *Enforcing the Fifteenth Amendment, 1870-1877*, 28 J. S. HIST. 202, 209-11(1962).

<sup>300</sup> Morrison, 529 U.S. at 622.

<sup>301</sup> *Civil Rights Cases*, 109 U.S. 3 (1883).

<sup>302</sup> 18 Stat. 335.

<sup>303</sup> See Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 22 (discussing debate about Reconstruction that arose in passing Civil Rights Act of 1875). Concerning Charles Sumner’s heroic effort to secure passage of the Act see JAMES M. MCPHERSON, *THE ABOLITIONIST LEGACY: FROM RECONSTRUCTION TO THE NAACP* 16, 20-21 (2d ed. 1995). Even on his death bed, in March 1874, Sumner did not forget that abolition, *via*



name was “An act to protect all citizens in their civil and legal rights.”<sup>304</sup> The first section entitled “all persons within the jurisdiction of the United States” to “the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement.” Its second section provided criminal and civil penalties. Violators were subject both to private causes of action and to criminal prosecutions. The third section gave federal courts exclusive jurisdiction over cases arising under the Act, and the fourth section prohibited state and federal jury selection to be predicated on race.<sup>305</sup> The Act communicated Congress’s decision to finally effectuate America’s heritage of universal fundamental rights. Relying on the new departure of constitutional doctrine, the Act provided Congress with the power to end segregation.

By 1883, when claims under the Act made their way into the Supreme Court in the *Civil Rights Cases*, Reconstruction had come to a standstill, even though blacks were still deprived of the equal emoluments of national citizenship. Sharecropping, segregation, peonage, and the convict lease system disproportionately harmed blacks, relegating them to second class citizenship in many states.<sup>306</sup>

The Act of 1875 provided remedies against private and public discriminatory conduct. The Court rejected this far-reaching a use of congressional power. The *Civil Rights Cases* held that the Fourteenth Amendment protects citizens only against state infringements, but “individual invasion of individual rights is not the subject matter of the amendment.”<sup>307</sup> The Court would

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the Thirteenth Amendment, meant more than merely setting free millions of people who had been denied an education by Southern slave codes and were still excluded from numerous public places. As he lay on his death bed, Sumner was not remiss to remind a visitor, “You must take care of the civil-rights bill, . . . don’t let it fail.” ERIC FONER, *A SHORT HISTORY OF RECONSTRUCTION* 226 (1990). Sumner died on March 11, 1874 and did not live to see the enactment of the Civil Rights Act of 1875. *Id.* Benjamin Butler, who managed the Bill in the House, committed himself to defending “the rights of these men who have given their blood for me and my country.” *Id.* On the role of President Ulysses Grant in the controversy see WILLIAM B. HESSELTINE, *ULYSSES S. GRANT, POLITICIAN* 368-71 (1935).

<sup>304</sup> Civil Rights Act of 1875, ch. 114, §§ 1-4, 18 Stat. 335.

<sup>305</sup> *Id.*

<sup>306</sup> One author found that in Alabama, Mississippi, and Georgia, as many as one-third of all sharecropping farmers “were being held against their will in 1900.” JACQUELINE JONES, *THE DISPOSSESSED* 107 (1992). On the convict lease system see David Oshinsky *WORSE THAN SLAVERY* (1996). *See also* KARIN A. SHAPIRO, *A NEW SOUTH REBELLION: THE BATTLE AGAINST CONVICT LABOR IN THE TENNESSEE COAL FIELDS, 1871-1896* (1998); ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH* (1996).

<sup>307</sup> *Civil Rights Cases*, 109 U.S. at 11 (“[i]t is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope”); *id.* at 18 (“[t]his is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces State legislation on the same subject, or only allows it permissive force”).

not recognize the federal legislature's claim of authority to pass "general legislation upon the rights of the citizen," recognizing the constitutionality only of "corrective legislation; that is, such as may be necessary and proper for counteracting such laws as the states may adopt or enforce."<sup>308</sup> That significantly reduced Congress's power to act against private acts of discrimination. It left essential American interests of dignity and personhood at the sole discretion of the states. Here was an opportunity to end segregation in 1875, but the Court thwarted that effort.

The Court decided that the Fourteenth Amendment did not grant Congress authority to target and prevent social discriminations, such as the racial exclusion from public places of amusement and the segregation on public carriers. It found the Civil Rights Act of 1875 to have been unconstitutional because the law penalized behavior that was unconnected to adverse state action.<sup>309</sup> The Court refused to defer to Congress's finding that the enjoyment of equal public accommodations was essential to the full enjoyment of protected fundamental rights.<sup>310</sup> Similarly Justice Bradley, who wrote for the majority, rejected the claim that Congress could determine that racial segregation in public places was a badge or incident of involuntary servitude.<sup>311</sup>

The lone dissenter, Justice John Marshall Harlan argued that in denying Congress's ability to pass laws at "its own discretion, and independently of the action or non-action of the states" the Court undermined a primary purpose of the Reconstruction Amendments.<sup>312</sup> Only Justice John Marshall Harlan dissented in the *Civil Rights Cases*. He agreed with the majority that Section 5 of the Fourteenth Amendment enabled Congress to enact statutes to directly operate "upon states, their officers and agents," but he vigorously rejected the state action requirement. To the contrary, he argued, Congress could also prohibit the perpetration of racial discrimination by "individuals and corporations" who "exercise public functions and wield power and authority under the state."<sup>313</sup>

The Thirteenth and Fourteenth Amendments, Harlan continued, authorized "legislation of a primary and direct character, for the security of rights created by the national constitution."<sup>314</sup> Turning to issues of the *Slaughter-House Cases*, Harlan referred to "the obligation to protect the fundamental privileges and immunities granted by the Fourteenth Amendment to citizens residing in the several states."<sup>315</sup> To hold otherwise undermined "the foundations upon which the national supremacy has always securely rested."<sup>316</sup> He further asserted that railroads, inns, and businesses operating public amusements were proper party defendants under the Civil Rights Act of 1875 because they were state-regulated businesses not mere social actors.<sup>317</sup> Just as *Dred*

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<sup>308</sup> *Id.* at 13-14.

<sup>309</sup> *Id.* at 19.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.* at 24.

<sup>312</sup> *Id.* at 36 (Harlan, J. dissenting).

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

*Scott* had “overruled the action of two generations,” so too the majority’s undercutting of Congress “made a new departure in the workings of the federal government.”<sup>318</sup>

Both *Dred Scott* and the *Civil Rights Cases* struck federal laws—first the Missouri Compromise and later the Civil Rights Act of 1875—that had established national anti-discrimination standards. The Court elevated state discretionary sovereignty above congressional initiative to punish overt acts of discrimination. An antebellum notion of state prerogatives trumped five petitioners’ demands for the protection of elementary human dignity. The Court gave its institutional imprimatur to a racially binary America, which Congress had tried to bring to an end. The federal government then became intransigent in the face of a growing number of Jim Crow laws, until the Court finally began to undo segregation in *Brown v. Board of Education* and Congress followed suit with the Civil Rights Act of 1964.

Even though much criticism has been leveled at the *Civil Rights Cases* for undoing a civil rights statute, the Court has consistently held fast to the state action doctrine.<sup>319</sup> The precedent has so restricted the legislative branch’s power to pass substantive anti-discrimination laws that many twentieth-century civil rights cases, such as those upholding the constitutionality of the Civil Rights Act of 1964, have relied on the Commerce Clause’s authority to regulate the national economy.<sup>320</sup> In recent years, the Court has further eroded legislative prerogatives to enforce federally recognized civil rights.

## VI. Rehnquist Court Restraints on Congressional Authority

The *Civil Rights Cases* dealt a staggering blow to federal efforts to achieve true equality. The attempt to integrate the nation’s founding principles into enforceable laws, which the Supreme had prevented following Reconstruction, had to wait until passage of the Civil Rights Act of 1964. So harmful an effect might have been expected to fade with increasing sensitivity to minority rights. To the contrary, the state action requirement continues to obstruct federal civil

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<sup>318</sup> *Id.* at 54.

<sup>319</sup> See, e.g., Aviam Soifer, *Disabling the ADA: Essences, Better Angels, & Unprincipled Neutrality Claims*, 44 WM. & MARY L. REV. 1285, 1333-34 (2003) (stating that the current Court continues to follow the *Civil Rights Cases* holding on the restraints of Congress’s Fourteenth Amendment enforcement power); Marianne L. Engelman Lado, *A Question of Justice: African-American Legal Perspectives on the 1883 Civil Rights Cases*, 70 CHI.-KENT L. REV. 1123, Part III (1995) (citing extensively from African American newspapers decrying the opinion).

<sup>320</sup> See, e.g., Civil Rights Act of 1964, Pub. L. No.88-352, 78 Stat. 241-68; *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). My point is in the same vein as Justice Goldberg’s concurrence in *Heart of Atlanta*. He agreed with the majority that Congress had legitimately relied on Commerce Clause authority, but he wrote separately to emphasize that the “primary purpose of the Civil Rights Act of 1964 . . . is the vindication of human dignity and not mere economics.” 379 U.S. 241, 291 (1964). In his opinion, Congress’s authority to pass the Civil Rights Act of 1964 derives both from Section Five of the Fourteenth Amendment and the Commerce Clause. Justice Douglas, in a separate concurrence to *Heart of Atlanta*, was likewise reluctant to rest the opinion entirely on commerce authority since the “right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.” *Id.* at 279.

rights efforts. The Court persists in relying on post-Reconstruction precedents to defeat statutes seemingly dealing with core national rights.

*City of Boerne* lies in the continuum of cases, which evolved since the *Slaughter-House Cases*, that place barriers on Congress's ability to impose federal civil rights norms on state actors.<sup>321</sup> The holding in *Boerne* was that Congress had "exceeded" its Section 5 authority by passing the Religious Freedom Restoration Act ("RFRA").<sup>322</sup> The Act was meant to prevent state infringement against the free exercise of religion, which has an undeniable pedigree as an inalienable right harkening back to the Declaration of Independence.<sup>323</sup>

A bipartisan majority had passed the RFRA in response to an earlier Supreme Court holding, *Employment Division v. Smith*.<sup>324</sup> That case had found states could enforce laws of general applicability, such as drug enforcement statutes, even when those laws restrained persons from exercising their religion.<sup>325</sup> Thus, according to *Smith* a state did not violate the Free Exercise Clause by punishing an individual for ritually using peyote, which is a psychotropic cactus that some Native Americans ingest during worship.<sup>326</sup>

To protect the religious rights of individuals against abuse, the RFRA imposed a strict scrutiny standard of review on regulations that placed burdens on religious practices.<sup>327</sup> The holding in *Boerne*, that the statute was unconstitutional, came as a bit of a surprise because setting uniform standards against state infringement of religious rights appeared to be a core responsibility of national government. After all the First Amendment applies to the states through its incorporation under the Fourteenth Amendment,<sup>328</sup> and Section 5 of the latter seems to give Congress the authority to protect religious practices from government interference. In overturning the statute, the Court vastly increased its own power, finding itself to be the only branch of government that can define what rights the Fourteenth Amendment protects.

*Boerne* departed from, or at least narrowly construed, *Katzenbach v. Morgan*'s statement that "Section 5 of the Fourteenth Amendment . . . is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."<sup>329</sup> To the contrary, *Boerne* denied that Section 5 granted Congress the authority to decide what "constituted a substantive violation of Section 1 of the Fourteenth Amendment."<sup>330</sup> By augmenting its own power, the Court seemed to undermine the Fourteenth Amendment's congressional grant of authority to protect citizens' fundamental rights.

Instead of relying on the dictum about congressional authority found in *Morgan*, which was a Civil Rights Era case, *Boerne* reached back to Gilded Age precedents, giving its stamp of

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<sup>321</sup> See *supra* Part V.

<sup>322</sup> 521 U.S. 507, 536 (1997).

<sup>323</sup> 42 U.S.C. 2000bb to 2000bb-4 (2000).

<sup>324</sup> Robert C. Post and Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 Ind. L.J. 1, 44 (2003).

<sup>325</sup> *Employment Div. v. Smith*, 494 U.S. 872 (1990).

<sup>326</sup> *Id.* at 877-82.

<sup>327</sup> 42 U.S.C. § 2000bb-1(b).

<sup>328</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

<sup>329</sup> *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

<sup>330</sup> Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 694 (2000).

approval to the 1883 *Civil Rights Cases*, which had prevented Congress from criminalizing public racial segregation. *Boerne* also supported its rationale through *United States v. Harris*, which had found that Congress exceeded its Fourteenth Amendment Section 5 power when, in 1871, it criminalized all conspiracies meant to deprive “any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws.”<sup>331</sup> The 1871 statute had punished private violence “without reference to the laws of the State or their administration by her officers.”<sup>332</sup> *Boerne* relied on these cases for the premise that Section 5 of the Fourteenth Amendment only gave Congress the enforcement authority to remedy past patterns of state discrimination but not to identify fundamental constitutional rights in order to protect them.<sup>333</sup> Pursuant to this standard, only laws that are congruent and proportional for remedying unconstitutional state behavior can survive judicial scrutiny.<sup>334</sup> Applying this standard, the *Boerne* Court asserted its interpretational authority in a congressional policy matter affecting individuals’ fundamental right to worship.

In asserting the exclusivity of its power to define substantive Fourteenth Amendment rights, the Court denied that Section 5 granted Congress the authority to independently determine what laws are necessary and proper for preventing state infringements against a fundamental, First Amendment right. Congress, it found, lacked the mandate “to decree the substance of the Fourteenth Amendment’s restrictions on the States.”<sup>335</sup> That assertion was predicated on the Court’s primacy in the interpretation of the Constitution. Ever since 1803 in *Marbury v. Madison*, the established principle has been that “the federal judiciary is supreme in the exposition of the law of the Constitution.”<sup>336</sup> That definition of judicial function is an abiding fact in our tripartite system of governance. The problem with *Boerne* and its progeny is that they overextend the hand of the judiciary into the realm of legislative policy. The notion that Congress can play no role in determining and safeguarding rights that are essential to the American heritage is contrary to what the debates on the Fourteenth Amendment revealed. Participants of those debates, which I cited extensively in Part IV.C, indicated that the Amendment would reduce the judiciary’s ability to undermine use of legislative power by politicized cases like *Dred Scott*.

In fact debates on both the Thirteenth and Fourteenth Amendments indicated a national decision to expand congressional authority rather than constrain it to a mere remedial role. Erwin Chemerinsky has pointed out that *Boerne*’s remedial interpretation rests on the mere fact that the final draft of the Amendment was less comprehensive sounding than Representative Bingham’s first draft.<sup>337</sup> In *Boerne*, the Court quoted Bingham’s assertion that the final draft would grant Congress “the power . . . to protect by national law the privileges and immunities of all the

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<sup>331</sup> Act of Apr. 20, 1871, ch. 22, § 2, 17 Stat. 13. The popular name of the statute was the “Ku Klux Klan Act of 1871”. See Archibald Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 111 n. 108 (1966).

<sup>332</sup> *United States v. Harris*, 106 U.S. 629, 640 (1882).

<sup>333</sup> *Boerne*, 521 U.S. at 520 (“The Fourteenth Amendment’s history confirms the remedial, rather than substantive, nature of the Enforcement Clause.”).

<sup>334</sup> *Id.* at 520, 530, 532.

<sup>335</sup> *Boerne*, 521 U.S. at 519.

<sup>336</sup> *Cooper v. Aaron*, 358 U.S. 1 (1958), citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177.

<sup>337</sup> Erwin Chemerinsky, *Politics, Not History, Explains the Rehnquist Court*, 13 TEMP. POL. & CIV. RTS. L. REV. 647, 651 (2004).

citizens of the Republic . . . whenever the same shall be abridged or denied by the unconstitutional acts of any State.”<sup>338</sup> Contrary to the finding of the majority, enacting a law against state abridgement of citizens’ fundamental religious right to the free exercise of religion through the RFRA appears entirely congruous with Bingham’s statement. So too, Representative Stevens’s statement that the Amendment would “allow Congress to correct the unjust legislation of the State”<sup>339</sup> provides a reason to believe that a federal law against state interference in the right to worship was a proportionate and congruent use of legislative power to prevent the abridgement of an essential right.

The Court’s analytical error was to presume that it is the sole determiner of fundamental rights protected under the Fourteenth Amendment. Cases like *Boerne* seem to conceive of no higher authority on fundamental interests than the Court. The American heritage, on the other hand, posits these rights in the people. They retain inalienable rights and do not give government the authority to limit them except for the general welfare. It seems illogical, therefore, to only posit the right to periodically assess the nature of enumerated and unenumerated rights in unelected government officials. A more direct, urgent, and wide-ranging way for the people to act in their interest is through their elected representatives.

Legislative authority to identify fundamental rights and to pass laws protecting them was further diminished in *United States v. Morrison*.<sup>340</sup> There the Court again found that Congress overstepped its legislative Section 5 authority when it created a private cause of action under the Violence Against Women Act (“VAWA”).<sup>341</sup> As in *Boerne*, the Court predicated its decision on a reading of Section Five of the Fourteenth Amendment that only allowed Congress to respond to state wrongs when it had conducted exhaustive evidentiary hearings that had provided proof of systematic statewide abridgments of court defined rights. Congress had, in fact, developed a massive factual record before it enacted VAWA, finding that a national solution was critical because there existed a variety of inadequate state approaches for dealing with gender-based violence.<sup>342</sup> Congress had relied on a “mountain of data” that included information amassed through nine congressional hearings and four years worth of gender task force reports that were obtained from twenty-one states.<sup>343</sup> A five to four majority of the Court, nevertheless, found itself to be a better judge of the constitutional appropriateness for the legislation than a bipartisan majority of Congress.

The very notion that Congress must answer to the Court for the creation of an adequate record about state violations conceives Congress to be something analogous to a prosecutor and the states to defendants.<sup>344</sup> To the contrary, when it functions properly Congress is an institution of the people’s representatives acting according to their will. Laws protecting fundamental rights are legitimate so long as Congress’s factfinding provides it with a rational basis for believing that a group discrimination, violation of a political right, or infringement of a fundamental interest

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<sup>338</sup> *Boerne*, 521 U.S. at 522.

<sup>339</sup> *Boerne*, 521 U.S. at 522.

<sup>340</sup> 529 U.S. 598 (2000).

<sup>341</sup> *Id.* at 627.

<sup>342</sup> *Id.* at 653 (Souter, J., dissenting).

<sup>343</sup> *Id.* at 628-31 (Souter, J., dissenting).

<sup>344</sup> See Post and Siegel, *supra* note ----, at 13.

can adequately be addressed through uniform federal law.<sup>345</sup> If Congress were required to amass a record of abuse from all states before it can act to quell systematic abuses, then its ability to act quickly for the general welfare would be severely hampered.

The Court's requirement that Congress demonstrate instances of abuse in all the states before it may pass a bill pursuant to its Section 5 power further misconstrues the legislature's function.<sup>346</sup> Federal civil rights laws can apply to all states, even those that have no history of violating them. The Court's requirement that Congress demonstrate it is responding to a proven harm has much in common with the judicial doctrines of standing and ripeness but not the typical policymaking of a legislature, which is meant to identify, balance, and specify governmental programs. Public policy is not predicated on the ripeness doctrine but on the popular will. Nowhere does the Constitution provide states with the sovereign right to ignore uniform federal standards for the protection of fundamental rights. To the contrary, Section 5 of the Fourteenth Amendment provides Congress with the authority to pass laws to protect them.

Just as *Boerne* before it, the *Morrison* Court incorporated the state action requirement from *Harris* and the *Civil Rights Cases*, rendering the Fourteenth Amendment only applicable if a state violated a legally cognizable private interest.<sup>347</sup> The Court even found *Cruikshank*, which virtually forbade Congress from passing hate crime legislation, to be relevant in its decision to strike down VAWA.<sup>348</sup> Hundred and twenty year old cases that had denied a congressional role in ending racist discrimination played a pivotal role in the Rehnquist Court's federalism legacy. Jurisprudence that had derailed congressional Reconstruction now unhinged legislative efforts to end gender-based violence.

Relying on the same restraint on congressional civil rights authority, the Court went on to strike the state compliance provision of the Age Discrimination in Employment Act ("ADEA").<sup>349</sup> In *Kimel v. Florida Board of Education*, Justice O'Connor resorted to a loose interpretation of the Eleventh Amendment as a source of sovereign immunity that allowed states to abrogate national standards of workplace decency.<sup>350</sup> The Court's main concern was federal

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<sup>345</sup> The initial recognition of this judicial scrutiny derives from footnote four of *Caroline Products*. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). At the core of Justice Stone's footnote lay the American tradition, often breached by self-interest though it was, of protecting minorities against the whims of powerful majorities. "Prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.* That statement was the fulcrum for future elevated scrutiny cases that probed into whether individuals were unfairly treated for being members of an identifiable group. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1288 (2007).

<sup>346</sup> Calvin Massey, *Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power*, 76 GEO. WASH. L. REV 1 (2007).

<sup>347</sup> *Id.* at 621-23.

<sup>348</sup> See *supra* text accompanying notes ----.

<sup>349</sup> *Kimel v. Florida Board of Education*, 528 U.S. 62, 67 (2000).

<sup>350</sup> *Id.* at 72-73. For constitutional criticism of the Court's interpretation of the Eleventh Amendment see Jackson, *supra* note ----, at 701 ("Not only does the Court revert to an unjustifiably heroic mode of insisting on sovereign immunity as a first principle of government,

overreaching rather than the interests of ordinary, older Americans for whom the law provided redress against state agism. Absent from the Court's analysis was any indication of how the Fourteenth Amendment altered federalism and augmented congressional authority to punish state infringements of individual rights.<sup>351</sup> The Amendment's ratification substantially increased Congress's role in protecting the people against state violations of their basic interests.<sup>352</sup> The *Kimel* Court rejected Congress's finding that Section 5 enabled it to pass legislation, which was intended to protect elderly persons' interest to secure fulfilling job opportunities against state and private discrimination.<sup>353</sup> The Court's regressive federalism boded back to a pre-Reconstruction deference to the states, which allowed them to formulate inequitable policies without repercussions. Section 5 of the Fourteenth Amendment makes clear that Congress can "enforce, by appropriate legislation" laws that protect civil liberties throughout the United States. When it comes to federal statutes that punish the abridgement of basic rights, federal statutes are supreme and states must be deferential.

In his dissent to *Kimel*, Justice Stevens argued that the federal government can prohibit private and public acts of discrimination committed in the labor market.<sup>354</sup> He further reviewed the history of state sovereignty, finding that the framers established a structure of federalism that did not render the judiciary "the constitutional guardian of . . . state interests."<sup>355</sup> In Stevens's view, then, the Court usurped the legislative branch's lawmaking discretion.

On the heels of *Kimel*, *Board of Trustees of the University of Alabama v. Garrett* invalidated a provision of the Americans with Disabilities Act.<sup>356</sup> President George H. W. Bush likened the new law to the Declaration of Independence, hoping that "the Americans with Disabilities Act will likewise come to be a model for the choices and opportunities of future generations around the world."<sup>357</sup> *Garrett* denied Congress the ability to rely on its Section 5 power to create a private cause of action for disabled state employees to file claims against employing entities who allegedly failed to provide them with reasonable work related accommodations.<sup>358</sup> Congress was thereby judicially restricted from ending discrimination despite extensive evidence, which was cited to by the dissent, of state discriminatory conduct

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the Court also has mythologized and tried to unify the doctrines of sovereign immunity in a way that is false to their more complex history."); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1213 (2001) ("Sovereign immunity allows the government to violate the Constitution or laws of the United States without accountability."); William J. Rich, *Privileges or Immunities: The Missing Link in Establishing Congressional Power to Abrogate State Eleventh Amendment Immunity*, 28 HASTINGS CONST. L.Q. 235, 238 (2001) (arguing that "the Privileges or Immunities Clause authorizes Congress to abrogate states' sovereign immunity under the Eleventh Amendment when acting to enforce individual rights that Congress has been otherwise authorized to protect").

<sup>351</sup> See Chemerinsky, *supra* note ----, at 1213.

<sup>352</sup> See *supra* text accompanying notes ----.

<sup>353</sup> *Kimel*, 528 U.S. at 62, 91.

<sup>354</sup> *Id.* at 92-93.

<sup>355</sup> *Id.* at 93.

<sup>356</sup> ADA, 42 U.S.C. § 12112 (2000); *Garrett*, 531 U.S. 356 (2001).

<sup>357</sup> *Statement of President Bush upon Signing S.933*, 101st Cong., 26 WEEKLY COMP. PRES. Doc. 1165 (July 26, 1990).

<sup>358</sup> *Garrett*, 531 U.S. at 360.



against disabled employees.<sup>359</sup> Drawing on its reasoning in *Boerne*, the Court decided that “the legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.”<sup>360</sup> The Court relied on its own interpretation of Section 5, rather than any constitutional provision, to find that civil rights legislation must be responsive to past state patterns of discrimination.<sup>361</sup>

The Court’s precedents, in effect, gave license to states, even those that lacked adequate protections for disabled employees, to engage in federally cognizable harms. Congress’s assessment of how best to protect the general welfare did not dissuade the Court from intervening on behalf of the states. This set states’ interests in their sovereignty above the people’s interests in their inalienable rights.

Unexpectedly to many who thought that civil rights precedents were generally threatened by this old-time version of federalism, the Court qualified its earlier holdings. Accordingly, in *Nevada Department of Human Resources v. Hibbs*, the Court upheld the Family Medical Leave Act’s private cause of action against the states.<sup>362</sup> The Court deferred to Congress specifically because the statute aimed to redress violations of the Equal Protection Clause’s guarantee against sex discrimination.<sup>363</sup> The decision relied on the intermediate standard of scrutiny that is applicable to gender stereotype cases.<sup>364</sup> On the other hand, *Garrett*, and *Kimel* concerned characteristics, disability and age, to which the Court has only granted rational basis review.

Then came *Tennessee v. Lane*, which upheld Title II of the ADA’s provision for private damages arising from discrimination in the access to court facilities.<sup>365</sup> The Court invoked a standard of review approaching strict scrutiny because the fundamental right of access to the courts was involved.<sup>366</sup>

Court-created heightened and strict levels of scrutiny, which are based on plaintiffs’ class status, provided the Court with the precedent it needed to restrain its increasing inertia to strike federal civil rights legislation. The difficulty with even this line of reasoning is that *Hibbs* and *Lane* continue to adhere to the doctrine that Congress may not stamp out discrimination without the Court’s imprimatur that the rights it seeks to defend through a statute are within the ambit of the Fourteenth Amendment.<sup>367</sup> And that approach hampers Congress, as the people’s representative, from independently identifying fundamental American rights and passing necessary and proper laws to protect them. Even though *Hibbs* and *Lane* upheld two important pieces of Section 5 legislation, they retained the notion that, at least in circumstances where a court applies a rational basis standard of review, state sovereignty can trump the fundamental rights of American citizens. *Hibbs* and *Lane* provided some guidance for Congress, indicating that in order to pass constitutional muster its civil rights statutes can safeguard those rights that

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<sup>359</sup> *Id.* at 391-424 (Breyer, J. dissenting).

<sup>360</sup> *Id.* at 368.

<sup>361</sup> This interpretation bodes back to the *Civil Rights Cases*. See *infra* text accompanying notes ----.

<sup>362</sup> 538 U.S. 721 (2003); FMLA, 29 U.S.C. § 2612(a)(1)(C) (2000).

<sup>363</sup> *Id.* at 736.

<sup>364</sup> *Id.* at 735.

<sup>365</sup> 541 U.S. 509, 525-30 (2004).

<sup>366</sup> *Id.* at 529; *id.* at 522-23 (stating that the federal statute “a variety of . . . basic constitutional guarantees, infringements of which are subject to more searching judicial review”).

<sup>367</sup> *Hibbs*, 538 U.S. at 740; *Lane*, 541 U.S. at 533.

the Court previously recognized to be important or fundamental. Those cases, however, give little support to the premise that the Fourteenth Amendment granted Congress the independent authority to identify core concerns about the rights of American citizens and to pass appropriate laws to protect them.

By ratifying the Fourteenth Amendment, the people granted Congress the authority to establish national standards against state inequalities, due process violations, and infringements on the privileges or immunities of citizenship. The judiciary's role is to prohibit abridgment of rights in specific cases, but it seems to be contrary to the framing notion of personal interests to think judges can prevent legislative representatives from asserting rights retained by the people, especially in circumstances where the Court has never ruled on the subject of a proposed civil rights statute.<sup>368</sup>

Through a narrow interpretation that dates back to the post-Reconstruction period, the Court has continued to impair congressional civil rights initiatives. Had the Court not tampered with Reconstruction legislation, the nation could have been desegregated through the Civil Rights Act of 1875, instead decades passed before the Civil Rights Act of 1964 achieved much the same thing. Not only did the Rehnquist Court rely on the *Civil Rights Cases*, it added an extra level of complications to the use of congressional civil rights authority.

Since the Declaration of Independence and the Preamble to the Constitution indicate that a foremost purpose of government is safeguarding the people's rights, it makes sense for the Court to be able to strike discriminatory legislation. However, judicial protection of state sovereigns from federal anti-discrimination statutes intrudes on congressional Section 5 authority.

The Court's role as the final arbiter of constitutional meaning<sup>369</sup> enables it to overturn inequitable legislation. However, where Congress is acting to protect fundamental rights, the judiciary's role is to determine whether Congress had a rational reason for passing the law. Where such a rationale exists, the statute cannot be overturned even where the corrective legislation prohibits discrimination against a group, like the disabled or elderly, to whom the Court applies rational basis standard of review. After all, congressional enforcement authority is explicitly constitutional, while standards of review are not.<sup>370</sup>

## VII. Conclusion

The protection of fundamental rights is intrinsic to the American heritage. It bodes back to the Revolutionary Era. From then, through post-Civil War Reconstruction, and unto our time the protection of the people's essential rights has remained one of the government's foremost aims. The Declaration of Independence's assertion that everyone is created equal with the same inalienable rights and the Preamble to the Constitution's mandate to "promote the general welfare, and secure the blessings of liberty" applies to the federal government as a whole. With the passage of the Thirteenth and Fourteenth Amendment congressional enforcement authority grew, but the Court suppressed that revolution in constitutional doctrine. Today the Supreme

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<sup>368</sup> See Calvin Massey, *Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power*, 76 GEO. WASH. L. REV 1, 38 (2007).

<sup>369</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>370</sup> Fallon, Jr., *supra* note ----.

Court continues to rely on cases, such as the *Civil Rights Cases*, that restrict the role of Congress in civil rights legislation

The Supreme Court's recent restriction of Congress's enforcement authority, in cases like *Boerne* and *Morrison*, elevate the judiciary's power to protect individuals' from state discrimination above the legislature's authority to enforce fundamental rights through reasonable regulation. All three branches of government are equally responsible for achieving the goals of the Declaration and the Preamble. The system of checks and balances does not grant the Supreme Court a monopoly on the definition of constitutionally protectable interests.