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Principled Governance: The American Creed and Congressional Authority.

Alexander Tsesis
Loyola University Chicago, atsesis@luc.edu

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ALEXANDER TSESIS

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. Since the late nineteenth century, however, the Court has diminished the potential uses of these 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.*

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ALEXANDER TSESIS*

I. INTRODUCTION

A series of high profile Supreme Court cases recently found several provisions of civil rights laws unconstitutional. The most prominent of these statutes were the Violence Against Women Act (VAWA)[1] and the Americans with Disabilities Act (ADA).[2] The Court decided that Congress had overstepped its Fourteenth Amendment authority by passing prophylactic legislation. It restricted legislative authority to the passage of statutes responsive to past state infractions against judicially established fundamental interests.[3] In *City of Boerne v. Flores*, the majority explained that Congress's power to enforce the Fourteenth Amendment is limited to "remedial" statutes.[4] Unlike the judiciary, the legislative branch lacks "the power to decree the substance of the Fourteenth Amendment's restrictions on the States."[5]

This jurisprudential approach emphasizes the Supreme Court's lone authority to identify and explicate the nature of fundamental rights.[6] That judicial exclusivity diminishes the value public input can play in identifying fundamental rights.[7]

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* Assistant Professor, Loyola University of Chicago, School of Law. I am deeply indebted to Aviam Soifer, Mark Tushnet, Sanford Levinson, Herbert Hovenkamp, Margaret L. Moses, Andrew Taslitz, Jerry E. Norton, Gregory Shaffer, Robert Kaczorowski, Robert C. Post, Charmaine Stanislaw, Andrew Siegel, Margalit Cohen Keene Tocher, Andrew Epstein, Spencer Waller, and John Bronsteen for their advice and comments during various stages of writing.

[1] United States v. Morrison, 529 U.S. 598, 601–02, 605 (2000).

[2] Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001).

[3] *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 66, 86 (2000) (denying Congress the power to apply the Age Discrimination in Employment Act to state actors); City of Boerne v. Flores, 521 U.S. 507, 511, 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").

[4] *Boerne*, 521 U.S. at 519.

[5] *Id.*

[6] *See* Rebecca E. Zietlow, *Juriscentrism and the Original Meaning of Section Five*, 13 TEMP. POL. & CIV. RTS. L. REV. 485, 486 (2004) ("The Rehnquist Court's approach to Section Five leaves no room for Congress to independently interpret the Fourteenth Amendment . . . .").

[7] *See* 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, 252 (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."); Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1536 (2000) (arguing that there lacks

The Constitution does not explicitly name many of the core American rights, such as the right to privacy[8] and the right to travel,[9] which the judiciary has identified. The Ninth Amendment states that the Bill of Rights is a non-exhaustive list of interests that the people retain against governmental interference.[10] While the Reconstruction Amendments expanded federal power to secure essential liberties,[11] the constitutional change did not diminish states' control over most internal legal issues, such as those arising in torts and contracts. Like the Ninth Amendment, the Fourteenth Amendment does not include a full list of interests protected by its Equal Protection and Due Process Clauses.[12] Each generation of Americans has helped to define these ambiguous provisions. As Justice Felix Frankfurter pointed out, "[g]reat concepts like . . . 'due process of law,' 'liberty,' [and] 'property' were purposely left to gather meaning from experience."[13] The topic of this Article is the extent to which Congress can rely on legislative devices, such as task forces and committee hearings, independent of previous judicial findings to identify fundamental rights and then pass legislation safeguarding them.

Multiple perspectives on the nature of rights have been available at all stages of American history.[14] The protections of civil and political rights contained in the Declaration of Independence, Preamble to the Constitution, Bill of Rights, Reconstruction Amendments, and a number of other constitutional provisions are practical manifestations of a rights-based tradition that is traceable to the nation's founding. Unlike a number

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a "very strong case for exclusive or even primary reliance on judicial enforcement of the Bill of Rights").

[8] Lawrence v. Texas, 539 U.S. 558, 578 (2003) (applying sexual privacy right to gays and lesbians); Roe v. Wade, 410 U.S. 113, 164 (1973) (recognizing a right to reproductive privacy); Eisenstadt v. Baird, 405 U.S. 438, 443 (1972) (extending *Griswold* to the unmarried); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (establishing that it is an unconstitutional invasion of privacy to intrude into marital contraceptive decisions).

[9] Saenz v. Roe, 526 U.S. 489, 501 (1999) (holding that the right to travel derives from the Privileges and Immunities Clause); Papachristou v. City of Jacksonville, 405 U.S. 156, 162–64 (1972) (holding that freedom to wander and stroll is protected under the Constitution); United States v. Guest, 383 U.S. 745, 758–59 (1966) (finding that the Commerce Clause protects free movement); Zemel v. Rusk, 381 U.S. 1, 14–15 (1965) (finding the right to travel in the Fifth Amendment); Twining v. New Jersey, 211 U.S. 78, 97 (1908) ("Thus among the rights and privileges of National citizenship recognized by this court [is] the right to pass freely from State to State. . . ."); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869) (holding that the right to travel derives from the Privileges and Immunities Clause).

[10] 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.").

[11] U.S. CONST. amends. XIII, XIV, XV.

[12] U.S. CONST. amends. IX, XIV, § 1.

[13] Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).

[14] *See* MICHAEL FOLEY, AMERICAN CREDO: THE PLACE OF IDEAS IN POLITICS 6–9 (2007) (discussing various perspectives and traditions over the course of United States history).

of prominent legal thinkers,[15] I believe that there is a fairly stable American Creed that all three branches of government must follow.[16] This is not to deny the multiplicity of human, fiscal, and political values in a pluralistic society. My claim, rather, is that the nation has retained a civil rights ethos traceable to its founding documents against which governmental conduct can be analyzed.

Even though the American Creed has often been violated by discrimination involving gender, religion, race, and national origin, it provides an ideological cornerstone for civil rights reforms. For example, Abraham Lincoln believed that "the equality of men" had been a "central idea" permeating American "public opinion" since the Revolutionary Period.[17] While manifold inequalities have plagued the United States, they have not halted the "steady progress toward the practical equality of all men."[18] Human equality "is the great fundamental principle upon which our free institutions rest."[19] An American sociologist and historian, 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.[20] E. B. Reuter, writing in DuBois's *Phylon* journal, proclaimed that the "American Creed" is a

> body of ideals, held alike by the 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.[21]

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[15] See *infra* text accompanying notes 301–05, 309–13, 314–18, and 339–43 for a discussion of Supreme Court decisions restricting congressional power in order to protect civil rights.

[16] My understanding of the American Creed is similar to Gunnar Myrdal's:

> [T]here 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.

GUNNAR MYRDAL, 1 AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 3 (2d ed. 1944). The difference between our approaches is that Myrdal is focused on race, while I think the American Creed of civic equality extends to any group, including gender, nationality, and religious groups. Further, while he speaks in terms of social ethos, I think the American Creed 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) (noting Myrdal's emphasis on race relations and assertion of a social ethos).

[17] Abraham Lincoln, Speech at a Republican Banquet, Chicago, Illinois (Dec. 10, 1856), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, at 385 (Roy P. Basler ed., 1953).

[18] *Id.*

[19] Letter from Abraham Lincoln to James N. Brown (Oct. 18, 1858), *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, at 327 (Roy P. Basler ed., 1953).

[20] W. E. B. DUBOIS, THE SUPPRESSION OF THE AFRICAN SLAVE-TRADE TO THE UNITED STATES OF AMERICA 48 (1896).

[21] 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 review. *Id.* at 121–24. It should be

Martin Luther King, Jr. adopted such an understanding in his famous 1963 speech at the Lincoln Memorial. He affirmed that his hope for an equitable society was "deeply rooted in the American dream . . . . [T]hat 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.'"[22]

Yet Rogers M. Smith has recently popularized the contrary view that prejudicial, "ascriptive" systems of governance have been as much part of the American tradition as has the liberal democratic model.[23] Smith is undoubtedly correct that the unequal treatment of women, blacks, Native Americans, Jews, Catholics, Irish, Japanese, and others riddles the pages of United States' history. On my account, however, these were deviations from, not manifestations of, core American commitments. At all stages of American history, racism, chauvinism, and other forms of intolerance have been present. Reformers have nevertheless 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, has inspired resistance movements, and has forced constitutional change. The Fourteenth Amendment's Enforcement Clause grants legislators the power to play an active role in seeking to rectify past harms and to avoid committing new ones.[24]

Each generation reinterprets the principle of liberal equality through the "stream of history," to borrow Justice Frankfurter's term.[25] In the words of Justice Ruth Bader Ginsburg, progress occurs 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 or excluded."[26] President Franklin D. Roosevelt explained that the Declaration of Independence is a contract with the people who consented to being governed in exchange for protections of those rights: "The task of statesmanship has always been the re-definition of these rights in terms of

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added, of course, that much the same failure to achieve explicit governmental goals has harmed a number of other groups who face systemic discrimination.

[22] Martin Luther King, Jr., Address at Lincoln Memorial (Aug. 28, 1963), *available at* http://www.usconstitution.net/dream.html (last visited Nov. 17, 2008).

[23] 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).

[24] *See* Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966) (claiming that Congress's power under § 5 of the Fourteenth Amendment provides it with the ability to adopt measures to enforce the guarantees of that amendment).

[25] FELIX FRANKFURTER, THE COMMERCE CLAUSE 2 (1937); *see also* Reid v. Covert, 354 U.S. 1, 43 (1957) (Frankfurter, J., concurring) (noting that the Constitution is a "living framework of government designed for an undefined future").

[26] United States v. Virginia, 518 U.S. 515, 557 & n.21 (1996) (citing RICHARD B. MORRIS, THE FORGING OF THE UNION, 1781–1789, at 193 (1987)).

a changing and growing social order."[27]

I believe that the continuing development of nationally recognized fundamental rights is not predicated on John Hart Ely's "neutral and durable principle."[28] Nor are "substantive federal constitutional rights draw[n] . . . exclusively from the great body of relevant Supreme Court decisions," as Larry Yackle would have it.[29]

This Article seeks to demonstrate that contrary to the Court's recent holdings, Congress has the prerogative to identify interests that are intrinsic in the American Creed. I argue that any statute that expands rights must be rationally related to a legitimate government purpose but should not be subject to the strict scrutiny analysis applicable to laws that place limits on rights.

Thus civil rights statutes granting federal government jurisdiction over discriminatory conduct, such as the Civil Rights Act of 1964,[30] the Age Discrimination Employment Act,[31] and the Americans with Disabilities Act,[32] are legitimate means for furthering the overall purpose of American government. Supreme Court cases that have significantly constrained Congress's ability to identify substantive rights do not give adequate consideration to how much 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 this Article discusses the concepts of liberty and of equality during the Revolutionary Period. It emphasizes the early understanding of the national statements of purpose in the Declaration of Independence and the Preamble to the Constitution. It also discusses the constitutional compromises that failed to achieve the stated ends of national government. This historical background is critical to understanding the roots of American civil rights principles. Part III turns to several abolitionist views about the existence of a national obligation to protect rights. Those constitutional theories became particularly influential during debates about the ratification of the Reconstruction Amendments which granted Congress the power to pass laws securing rights intrinsic to national citizenship. Debates on the Thirteenth and Fourteenth Amendments, the subjects of Part IV, explicitly conceived Congress would have the enforcement power to pass principled legislation to protect human dignitary interests. As Part

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[27] FRANKLIN D. ROOSEVELT, 1 THE PUBLIC PAPERS & ADDRESSES OF FRANKLIN D. ROOSEVELT 753 (1938).

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

[29] LARRY YACKLE, REGULATORY RIGHTS: SUPREME COURT ACTIVISM, THE PUBLIC INTEREST, AND THE MAKING OF CONSTITUTIONAL LAW 1–2 (2007).

[30] 42 U.S.C. §§ 2000(a)(5)–(a)(6) (2000).

[31] 29 U.S.C. §§ 625–26 (2000).

[32] 42 U.S.C. § 12117(a).

V recounts, the Court has periodically restrained the reach of these new congressional powers. Recent Supreme Court decisions, such as *United States v. Morrison* and *Board of Trustees of the University of Alabama v. Garrett*, have further limited congressional power to protect civil rights.[33] The Article concludes with a discussion of congressional power to safeguard civil rights and the need for judicial deference when reviewing liberty enhancing statutes.

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.[34] Several clauses protected the institution of slavery against federal interference.[35] The Fugitive Slave Clause forbade passage of any federal emancipation law.[36] Another clause required the federal government to protect states from domestic insurrections, including slave uprisings.[37] The Three-Fifths Clause left states with the latitude to entirely exclude large segments of the population from government.[38]

These constitutional provisions undermined the often asserted central aims of national independence. Although prior to Reconstruction the equitable statements of governmental purpose found in the Declaration of Independence and the Preamble to the Constitution remained unenforceable against the states, they nevertheless established a national ethos. That principle of governance, which the country never fully put into practice, later became intrinsic to the increased authority the people granted Congress through the Thirteenth and Fourteenth Amendments.

A. *Declaration of Independence*

Thomas Jefferson drafted the Declaration of Independence to resonate

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[33] Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (holding that Congress was not authorized under § 5 of the Fourteenth Amendment to require that states abide by the terms of the Americans with Disabilities Act); United States v. Morrison, 529 U.S. 598, 627 (2000) (finding that Congress overstepped its Commerce Clause and Fourteenth Amendment authority by passing 42 U.S.C. § 13981).

[34] *See* Frederick Douglass, The Revolution of 1848, Speech at the West India Emancipation Celebration (Aug. 1, 1848), *in* THE NORTH STAR, Aug. 4, 1848, *reprinted in* 1 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: EARLY YEARS, 1817–1849, at 321, 328–29 (Philip S. Foner ed., 1950); Frederick Douglass, *in* THE NORTH STAR, Apr. 5, 1850, *reprinted in* VOICES FROM THE GATHERING STORM: THE COMING OF THE AMERICAN CIVIL WAR 40, 40–41 (Glenn M. Linden ed., 2001); Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 319–22 (2004).

[35] *See* Frederick Douglass, *The Constitution & Slavery*, *in* THE NORTH STAR, Mar. 16, 1849, *reprinted in* WRITINGS OF FREDERICK DOUGLASS, *supra* note 34, at 361, 361–67; WENDELL PHILLIPS, THE CONSTITUTION: A PRO-SLAVERY COMPACT 5–7 (1856); WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848, at 62–63 (1977).

[36] U.S. CONST. art. IV, § 2, cl. 3.

[37] *Id.* art. I, § 8, cl. 15.

[38] *Id.* art. I, § 2, cl. 3.

the political temperament in 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.[39] In drafting the Declaration, Jefferson relied on the contemporary understanding of universal rights.

Years after independence, two signers of the Declaration highlighted the document's reliance on established colonial thought. 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 invigorating spirit of the times rather than to express his personal views.[40] Lee, a delegate to the first Continental Congress and a signer of the Declaration, claimed that Jefferson "copied from Locke's treatise on government."[41] John Locke, whose political philosophy profoundly influenced American revolutionaries, insisted that persons "by nature, [are] all free, equal and independent."[42] The erudite Adams, almost surely the most powerful figure at 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" the Declaration "but what had been hackneyed in Congress for two years before."[43] Jefferson did not dispute Lee's or Adams's assertions. To the contrary, he explained that he had not aimed "to find out new principles . . . to say things which 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 in the elementary books of public right."[44] The preamble to the Declaration established an enduring legacy of principles for the United States.

Jefferson elegantly rendered the newborn nation's commitment to

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[39] THE DECLARATION OF INDEPENDENCE (U.S. 1776).

[40] Letter from Thomas Jefferson to Henry Lee (May 8, 1825), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 342, 343 (Paul Leicester Ford ed., 1899) (explaining that the Declaration of Independence "was intended to be an expression of the American mind").

[41] Letter from Thomas Jefferson to James Madison (Aug. 30, 1823), *in id.* at 266, 267–68.

[42] JOHN LOCKE, *An Essay Concerning the True Original Extent and End of Civil Government*, *in* TWO TREATISES OF GOVERNMENT 193, 279 (6th ed. 1764). Despite this statement, Locke was not as equalitarian as he seems to be from his *Essay*. In 1669, he drafted a constitution for the colony of South Carolina that prohibited interference with black slavery. *See* 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); Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 593 n.498 (2002).

[43] Letter from John Adams to Timothy Pickering (Aug. 6, 1822), *in* 2 THE WORKS OF JOHN ADAMS 512, 514 (Charles Francis Adams ed., 1850).

[44] Letter from Thomas Jefferson to Henry Lee (May 8, 1825), *in* THE WRITINGS OF THOMAS JEFFERSON, *supra* note 40, at 342, 343.

safeguard fundamental rights.[45] Daniel Webster, one of the best known politicians of the nineteenth century, believed Americans had plenty of reason to praise Jefferson for providing "the title-deed of their liberties."[46] Similarly, in modern times Martin Luther King, Jr. stated that the Constitution and Declaration constituted "promissory note[s]" to secure life, liberty, and the pursuit of happiness.[47]

The Declaration made clear that independence from British colonial rule entailed protecting the people against arbitrary infringements of rights intrinsic to humanity.[48] The ideology which inspired future generations to action was itself the product of "an ideological-constitutional struggle."[49] Historian Bernard Bailyn's rigorous analysis of revolutionary pamphlets revealed that colonists acted out of "fear of a comprehensive conspiracy against liberty."[50] 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."[51] The resulting ideas evolved in unpredictable ways throughout the federal and state constitution-making processes.[52]

From the many statements about the value of liberty and the government's obligation to protect rights emerged a genuinely humanistic reason for gaining independence. This historical background indicates John Hart Ely was too dismissive in thinking the Declaration to be "a brief" that harnessed "arguments of every hue," even those without any support in "positive law."[53] Jefferson expressed the contrary view in an 1825 letter to James Madison, placing the Declaration among three of the "best guides" for ascertaining the "distinctive principles of the Government of our own State [Virginia], and of . . . the [United] States."[54] In 1794, Samuel Adams, serving as the Acting Governor of Massachusetts after

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[45] For detail about how Thomas Jefferson became increasingly tolerant of slavery, see ALEXANDER TSESIS, WE SHALL OVERCOME: A HISTORY OF CIVIL RIGHTS AND THE LAW 29–30 (2008).

[46] Daniel Webster, Adams and Jefferson: Discourse in Commemoration of the Lives and Services of John and Thomas Jefferson, Delivered in Faneuil Hall (Aug. 2, 1826), *available at* http://etext.virginia.edu/jefferson/grizzard/ellis/eellis09.html (last visited Nov. 17, 2008).

[47] Martin Luther King, Jr., I Have a Dream (Aug. 28, 1963), *available at* http://www.juntosociety.com/hist_speeches/mlkihad.html (last visited Nov. 17, 2008).

[48] *But see* RAOUL BERGER, GOVERNMENT BY JUDICIARY 87 (1977); M. E. BRADFORD, A BETTER GUIDE THAN REASON 41 (1979) (rejecting the constitutional significance of the Declaration).

[49] Bernard Bailyn, *Introduction* to PAMPHLETS OF THE AMERICAN REVOLUTION, 1750–1776, at viii (1965).

[50] *Id.* at x.

[51] BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION x, 184–85 (1967) (internal quotation marks omitted).

[52] Gordon S. Wood, *Rhetoric and Reality in the American Revolution*, 23 WM. & MARY Q. 3, 21 (1966).

[53] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 49 (1980).

[54] Letter from James Madison to Thomas Jefferson (Feb. 8, 1825), *in* 9 THE WRITINGS OF JAMES MADISON 218, 221 (Gaillard Hunt ed., 1910).

John Hancock's death, told both branches of the state's congress that when "the Representatives of the United States of *America*" agreed "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."[55]

As a heuristic device, the Declaration was a product of its time, and its significance to ascertaining the congressional role in establishing fundamental rights can only be understood by placing it into the perspective of revolutionary philosophy about the function of government. The writings of Enlightenment philosophers, like Locke, Hugo Grotius, Samuel Puffendorf and Jean J. Burlamaqui, were at the core of American revolutionary philosophy.[56] Their ideas about inalienable rights were trumpeted by the Declaration. Grotius, for instance, explained that the well-being of rulers "depends on the Happiness of his Subjects."[57] A common desire to avoid harm interlinks governors and subjects. "[T]he nature of man," Burlamaqui explained, is to pursue happiness.[58] Through this intellectual lens, the revolutionaries considered it only natural for every individual to seek what is good and agreeable for "preservation, perfection, entertainment, and pleasure."[59] Locke also linked the "[f]oundation of [l]iberty"[60] to the "earnest and constant . . . pursuit of happiness."[61] Because the "preferable good" might not be immediately achieved, our immediate desires must sometimes be suspended.[62] Individuals willingly relinquish some license to act impetuously in exchange for the long-term benefits of being members of a civil society beholden to the people's "preservation, perfection, entertainment, and pleasure."[63] A representative government's primary purpose is to increase the happiness and prosperity of individuals.[64]

There was a near consensus among natural law philosophers about the purposes of polity. William Wollaston, who wrote a popular treatise on natural religion, found that "[t]he end of society is the common welfare

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[55] Speech of Samuel Adams, *in Domestic Occurrences*, MASS. MAG., Jan. 1794, at 59, 62–64.

[56] BAILYN, *supra* note 51, at 27. Alexander Hamilton recommended that an opponent "attend diligently" to the writings of "Grotius, Puffendorf, Locke, Montesquieu, and Burlamaqui." ALEXANDER HAMILTON, THE FARMER REFUTED: FOR A MORE IMPARTIAL AND COMPREHENSIVE VIEW OF THE DISPUTE BETWEEN GREAT-BRITAINAND THE COLONIES 5 (1775).

[57] 1 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 106 (W. Innys et al. eds., 1738) (1625).

[58] JEAN J. BURLAMAQUI, THE PRINCIPLES OF NATURAL LAW 39 (5th ed. 1791) (1748).

[59] *Id.* at 41.

[60] JOHN LOCKE, 1 AN ESSAY CONCERNING HUMAN UNDERSTANDING 348 (Alexander Campell Fraser ed., Oxford: Clarendon Press 1894) (1689).

[61] *Id.* at 342.

[62] *Id.* at 348.

[63] BURLAMAQUI, *supra* note 58, at 41.

[64] BENJAMIN TRUMBULL, DISCOURSE, DELIVERED AT THE ANNIVERSARY MEETING OF THE FREEMEN OF THE TOWN OF NEW-HAVEN 27 (1773).

and good of the people associated."[65] In almost identical terms, chemist Joseph Priestley claimed that "[t]he great object of civil society is the happiness of the members of it."[66] The value of "safety and happiness of society," to which Madison gave homage in the *Federalist Papers*, was grounded in "the transcendent law of nature and of nature's God."[67] 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."[68] Government's role, according to an English polemicist, was to serve the public good since our happiness is dependent on society.[69]

The government as a whole, without distinction of judiciary and legislative branches, was to further "the happiness of the society."[70] The purpose of creating a union of states, as the Declaration of Independence put it, 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 affect their Safety and Happiness."[71] In very similar terms, Ebenezer Bridge, from the pulpit, told the governor of Massachusetts Bay that a compact among natural equals voluntarily bound them to "just regulation[s]" tended to better "promote[] and secure[]" the "happiness of men."[72]

The legitimacy of governmental regulation could be tested against its ability to protect the people's intrinsic interests. John Hancock, who had become governor of Massachusetts in 1780, regarded American federalism as a system "founded in the ideas of natural equality" that enabled its members "to seek their own happiness as a community."[73] His fellow Massachusettsian, 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.[74]

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[65] WILLIAM WOLLASTON, THE RELIGION OF NATURE DELINEATED 273 (8th ed. 1759) (1722) (emphasis omitted).

[66] JOSEPH PRIESTLEY, AN ESSAY ON THE FIRST PRINCIPLES OF GOVERNMENT 94 (2d ed. 1771) (1768).

[67] THE FEDERALIST NO. 43, at 297 (James Madison) (Jacob E. Cooke ed., 1961).

[68] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 53 (Max Farrand ed., 1911).

[69] HENRY ST. JOHN VISCOUNT BOLINGBROKE, LETTERS ON THE SPIRIT OF PATRIOTISM 5, 7, 11–12, 21 (Philadelphia, Franklin & Hall 1749).

[70] JAMES WILSON, CONSIDERATIONS ON THE NATURE AND THE EXTENT OF THE LEGISLATIVE AUTHORITY OF THE BRITISH PARLIAMENT 3 (Philadelphia, Bradfords 1774). The peoples' will could limit the government's authority. JOHN TUCKER, A SERMON PREACHED AT CAMBRIDGE, BEFORE HIS EXCELLENCY THOMAS HUTCHINSON 13–14 (Boston, Draper 1771).

[71] THE DECLARATION OF INDEPENDENCE (U.S. 1776).

[72] EBENEZER BRIDGE, A SERMON PREACHED BEFORE HIS EXCELLENCY FRANCIS BERNARD 14 (Boston, Green & Russell 1767).

[73] JOHN HANCOCK, RESOLVES OF THE GENERAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS 39 (Boston, Adams 1792).

[74] Samuel Adams, Domestic Occurrences: Speech to Fellow Citizens of the Two Branches of the Legislature (Jan. 17, 1794), *reprinted in* MASS. MAG., Jan. 1794, at 59, 62–63. Adams was elected Governor of Massachusetts later that month.

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.[75] An anti-Federalist similarly held that persons join to form governments for strength of security, which is needed for "the *greatest acquir[ing]*" of "*benefits*" with the "*least sacrifice*."[76] 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, "clashing interests and violence" would endanger "[i]mportant . . . rights of mankind."[77] They included the rights to a "safe and unmolested enjoyment of life, liberty and property, and to the best improvement of all their powers, with every reasonable and equitable advantage they have to promote their present and everlasting welfare."[78] Governments that function against the people's will become the "public fountains of oppression and injustice."[79] To achieve overall public happiness, aristocratic privilege had to be eradicated.

In 1778, British political philosopher Richard Price claimed the maxim "that all men are naturally equal" required government to treat all people "grown up to maturity" as "independent agents, capable of acquiring property, and of directing their own conduct."[80] The children of both peasants and noblemen deserved a government committed to the "equal rights [of] the subjects."[81] 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."[82] Moral rights arising from the liberty and humanity of "all brethren" are identical for all no matter what their intellectual and physical differences.[83]

The unequal treatment of blacks, women, religious minorities, foreigners, and Native Americans plagued an American nation that claimed to be a bastion against tyranny and despotism.[84] 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

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[75] *Id.* at 62–63.

[76] *Essays by The Impartial Examiner* No. 1 (Feb. 20, 1788), *in* 5 THE COMPLETE ANTI-FEDERALIST 172, 176 (Herbert J. Storing ed., 1981); *see also Letters of Cato* No. 3, *in id.* at 101, 109–10 ("The freedom, equality, and independence which you enjoyed by nature, induced you to consent to a political power.").

[77] STEPHEN JOHNSON, INTEGRITY AND PIETY THE BEST PRINCIPLES OF A GOOD ADMINISTRATION OF GOVERNMENT 5–6 (New London, Green 1770).

[78] *Id.* at 5.

[79] TRUMBULL, *supra* note 64, at 32.

[80] RICHARD PRICE, ADDITIONAL OBSERVATIONS ON THE NATURE AND VALUE OF CIVIL LIBERTY, AND THE WAR WITH AMERICA 12 (1778).

[81] ROBERT CORAM, POLITICAL INQUIRIES 87 (Wilmington, Andrews & Brynberg 1791).

[82] DEWITT CLINTON, AN ADDRESS DELIVERED BEFORE HOLLAND LODGE 8 (New York, Childs & Swaine 1794) (emphasis omitted).

[83] *Id.*

[84] *See, e.g.*, JOHN SHIPPEN, AN ORATION DELIVERED ON THE ANNIVERSARY OF THE SCIENTIFIC SOCIETY 11 (Philadelphia, Bailey 1794) (lauding America for having shed the yoke of British oppression and thereby becoming the "happiest nation in the world").

their founding ideals would have required putting an end to arbitrary discrimination, the worst of which was slavery, and to privileges based solely on immutable 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.[85] Long before the opening salvos at Lexington and Concord, Samuel Pufendorf had rejected the "absurdity . . . of some men's being slaves by nature."[86] Such a view, he said, was "directly repugnant to . . . *natural Equality*."[87] It would have been a monumental thing had Congress risen to the challenge of identifying liberty as a fundamental right violated by slavery.

Many revolutionaries recognized the incompatibility of slavery to their philosophical statements about natural equality. The "American in Algiers," who referred to the Declaration of Independence as "the fabric of the rights of man," faulted those who had bound Africans to slavery even as they enjoyed "the Rights of Man."[88] 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.[89]

Critics of the Revolution drew attention to the disconnect between humanistic statements of national purpose and institutionalized racial inequality.[90]

Many American patriots similarly based their indictment of slavery on what they considered American principles. In this vein, New Jersey

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[85] 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 (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.

[86] SAMUEL PUFFENDORF, THE LAW OF NATURE & NATIONS 230 (5th ed., tr. Basil Kennet, 1749) (1672).

[87] *Id.*

[88] THE AMERICAN IN ALGIERS, OR THE PATRIOT OF SEVENTY-SIX IN CAPTIVITY 23–24 (New York, Buel 1797).

[89] *Id.* at 24–25.

[90] *See, e.g.*, *Criticism*, THE PORT FOLIO, Mar. 28, 1801, at 98–99.

Quaker leader David Cooper underscored the contradiction between principles of equality and slavery by publishing revolutionary dogma in a left-hand column and condemning American practices on the right.[91] The Declaration made much of self-evident truths which must apply to all of humanity, he noted, but "the very people who make these pompous declarations are slave-holders."[92] Cooper also realized that foreigners would condemn Americans 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."[93] 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."[94] Cooper further juxtaposed a 1774 Continental Congress resolution, proclaiming the colonies' commitment to the "*immutable laws of nature*," with the treatment of blacks.[95] Just like whites, blacks had never ceded, and indeed could not cede, their claim to the immutable rights of life, liberty, and property. The manifold injustices perpetrated against them undermined the core political foundation of the Revolution.[96]

Early abolitionist societies, which demanded America meet its obligation to identify and protect universal natural rights, did not conceive this to be the sole province of the judiciary. It was their view that the entire government had to put effort into recognizing and ending oppression. The New Jersey Society for Promoting Abolition extolled "the principles which animated our forefathers to fly from tyranny and persecution" and to protect "life, liberty, and the pursuit of happiness," but criticized them for withholding "those rights from an unfortunate and degraded class of our fellow creatures."[97] Meanwhile the Pennsylvania Society for Promoting the Abolition of Slavery relied on the second paragraph of the Declaration in its effort to remove "this evil . . . from the land."[98] To a college student, who later became acting president of Harvard, it was a "matter of painful astonishment" that during such an

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[91] A SERIOUS ADDRESS TO THE RULERS OF AMERICA, ON THE INCONSISTENCY OF THEIR CONDUCT RESPECTING SLAVERY: FORMING A CONTRAST BETWEEN THE ENCROACHMENTS OF ENGLAND ON AMERICAN LIBERTY, AND, AMERICAN INJUSTICE IN TOLERATING SLAVERY 6–13 (Trenton, Collins 1783).

[92] *Id.* at 12.

[93] *Id.* at 5.

[94] *Id.* at 9.

[95] *Id.*

[96] *Id.*

[97] THE CONSTITUTION OF THE NEW-JERSEY SOCIETY, FOR PROMOTING THE ABOLITION OF SLAVERY 3–4 (Isaac Neale, Burlington 1793) (emphasis omitted).

[98] CONSTITUTION AND ACT OF INCORPORATION OF THE PENNSYLVANIA SOCIETY, FOR PROMOTING THE ABOLITION OF SLAVERY AND THE RELIEF OF FREE NEGROES, UNLAWFULLY HELD IN BONDAGE 34 (J. Ormrod, Philadelphia 1800).

"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.[99]

The term "rights" was typically subdivided into "natural and unalienable" rights and "constitutional or fundamental" ones. This distinction, however, often broke down. Inalienable or fundamental rights in the United States included property ownership, peaceable worship, individual security, representation regarding 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.[100] By being part of a representative government, everyone retained "a share in the legislative, taxative, judicial, and the vindictive powers."[101]

The Declaration of Independence's statement on inalienable rights embodied the widespread colonial belief that people form governments to protect inherently equal, human interests. There is no indication in the document that only the judiciary could determine the nature of those rights.

B. *Preamble to the Constitution*

Like the Declaration of Independence, the Preamble to the Constitution is a statement of national purpose. The significance of establishing "a more perfect Union" 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"[102] is as relevant today as it was in 1787. While the Preamble has never been recognized as an independent source of rights, it is a key interpretative tool that all three branches of government must use to meet their responsibilities to the people.[103]

If the judiciary were to limit Congress's power to provide for the general welfare, it would overstep its Article III power by restricting the legislature from carrying out an intrinsic, constitutional obligation. In determining whether the Court's recent decisions have unconstitutionally limited congressional civil rights authority, which this Article discusses in

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[99] THEODORE PARSONS & ELIPHALET PEARSON, A FORENSIC DISPUTE ON THE LEGALITY OF ENSLAVING THE AFRICANS 4 (John Boyle, Boston 1773). Parsons defended the pro-slavery position, while Pearson advocated against slavery.

[100] ADDITIONAL NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 51–53 (1788).

[101] AMERICA'S APPEAL TO THE IMPARTIAL WORLD 7 (Ebenezer Watson, Hartford 1775).

[102] U.S. CONST. pmbl.

[103] *See, e.g.*, LeFlore v. Robinson, 434 F.2d 933, 955 (5th Cir. 1970) (Gewin, J., 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.").

Part V, it is important to determine how best 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. An eighteenth century author regarded the "preamble" to be "the key of the Constitution."[104] He urged the people to reject the exercise of any federal authority "contrary to the spirit breathed by this introduction."[105] While the Preamble lacks an explicit enforcement clause, any legislation, executive action, or judicial decision that espouses a view contrary to the Preamble violates the Constitution's aspirations for tranquility through national unity. What the Preamble lacks in a specific positive grant of power, it makes up for by 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.[106] 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 as much may be implied from those so granted."[107] Despite this limiting assertion, Harlan recognized the Preamble's value as an interpretive tool, "the general purposes for which the people ordained and established the Constitution."[108] Similarly, in his classic treatise on the Constitution, Joseph Story asserted that while the Preamble does not confer explicit powers like other parts of the Constitution, lawmakers must look to it for "the nature, and extent, and application of the powers actually conferred by the constitution . . . ."[109] 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

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[104] A NATIVE OF VIRGINIA, OBSERVATIONS UPON THE PROPOSED PLAN OF FEDERAL GOVERNMENT 10 (1788).

[105] *Id.*

[106] *See* Robert J. Peaslee, *Our National Constitution: The Preamble*, 9 B.U. L. REV. 2, 13 (1929) (concerning the relatively few mentions of the Preamble during the state ratifying conventions).

[107] Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905).

[108] *Id.*

[109] 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 445 (1833).

Posterity.'"[110] The rationale was based both on welfare recipients' procedural entitlement to pre-termination hearings and on indigent persons right to enjoy "the same opportunities that are available to others to participate meaningfully in the life of the community."[111] 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 safeguarding the basic liberty of equals to pursue happiness in their lives.

The dearth of similar judicial expositions of the Preamble[112] 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 because little was said there about the Preamble. On the other hand, contemporary publications and the text itself provide a window into what duties the Preamble establishes for national governance by statutory, regulatory, and common law.

To begin, the phrase "We, the People" indicates that the collective colonial community, rather than state governments, was the source of national power. To regard the Preamble as pure rhetoric is to dismiss the idea that the people established the government for a common purpose.[113] 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."[114]

These collective, abstract "people" share a common interest in

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[110] Goldberg v. Kelly, 397 U.S. 254, 265 (1970) (quoting U.S. CONST. pmbl.).

[111] *Id.*

[112] *See* Milton Handler et al., *A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation*, 12 CARDOZO L. REV. 117, 120 n.14 (1990) (discussing the relatively few cases in which the preamble is mentioned, let alone relied upon, by the Supreme Court).

[113] 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." HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 12 (1981) (quoting Patrick Henry, Speeches of Patrick Henry in the Virginia State Ratifying Convention (June 4, 1788), *in* THE ANTI-FEDERALIST 293, 297 (Herbert J. Storing ed. 1985) (emphasis omitted)). For a more recent criticism of the notion that the Revolution was the product of popular will rather that powerful interests, see CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 14–18 (1913).

[114] *See* Cook v. Gralike, 531 U.S. 510, 528 (2001) (Kennedy, J., concurring) ("The Constitution was ratified by Conventions in the several States, not by the States themselves, 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." (citation omitted)); *see also* Alden v. Maine, 527 U.S. 706, 786 (1999) (Souter, J., dissenting) (asserting that the "'Constitution [was] established by the people of the United States.'" (quoting Chisholm v. Georgia, 2 U.S. 419, 466 (1793) (emphasis omitted))); 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 (D. Va. 1823) (No. 15,747) (opinion by Chief Justice Marshall sitting as designated circuit justice))); Barron v. Mayor of Balt., 32 U.S. 243, 247 (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.").

submitting themselves to a national bond in order to "establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our Posterity."[115] The Preamble makes clear that a primary purpose of forming a national government was the vindication of liberty rights, something the founding generation considered intrinsic to the general welfare.[116] In 1791, the Attorney General of Massachusetts articulated the reasoning behind "the preamble to the frame of government" as 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."[117]

"[P]olitical honesty," as a Massachusetts convention on the ratification of the Constitution interpreted it, was more likely to come from "the body of the people" rather than "a single person, or a very small number."[118] The states retained independent sovereignty over local matters but the will of the people, through representatives of the federal government, was superior in matters of fundamental justice affecting the welfare of the whole nation.[119]

The people retained power to identify and to redress infringements against their fundamental interests. They did not alienate the ability to define those interests to any single branch of government, such as the judiciary. Rather, working through a representative democracy, the people could exercise their evolving understanding of inalienable rights.

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

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[115] U.S. CONST. pmbl.

[116] "[General] welfare" is 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." JOHN CARTWRIGHT, AMERICAN INDEPENDENCE, THE INTEREST AND GLORY OF GREAT BRITAIN 35 (1776).

[117] JAMES SULLIVAN, OBSERVATIONS UPON THE GOVERNMENT OF THE UNITED STATES OF AMERICA 26 (1791).

[118] RESULT OF THE CONVENTION OF DELEGATES HOLDEN AT IPSWICH IN THE COUNTY OF ESSEX, WHO WERE DEPUTED TO TAKE INTO CONSIDERATION THE CONSTITUTION AND FORM OF GOVERNMENT, PROPOSED BY THE CONVENTION OF THE STATE OF MASSACHUSETTS-BAY 17 (Newburyport, John Mycall 1778).

[119] *See* DAVID RAMSAY, AN ENQUIRY INTO THE CONSTITUTIONAL AUTHORITY OF THE SUPREME FEDERAL COURT, OVER THE SEVERAL STATES, IN THEIR POLITICAL CAPACITY 11–12 (Charelston, W.P. Young 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).

> within each State, independently of the State Governments . . .[120]

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, resided in the people alone who could later choose any other form of government that would "be more conducive to their welfare."[121] Because 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 of retaining the original Constitution without amendment, apologists argued that the inclusion of a 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*, for example, that past bills of rights had been grants from kings to their subjects.[122] 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.[123] James Wilson proudly distinguished the need of British citizens for a declaration of rights and the implicit retention of rights by American citizens against governmental interference. The Magna Carta regarded the declared liberties to be "the gift or grant of the king"; Wilson argued on the other hand the Constitution was a grant of power to government from the people who would not part with their natural liberties.[124] 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."[125] Thomas Hartley further explained that because the people delegated power to government through the Constitution, "whatever portion of those natural rights we did not transfer to the government was

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[120] James M. Beck, *The Preamble of the Constitution*, 14 GEO. L.J. 217, 223 (1926) (quoting a letter written by a historian, Motley, to *The London Times* during the Civil War) (quotation omitted).

[121] James Iredell, Convention of North Carolina (July 22, 1788), *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 228, 230 (Jonathan Elliot ed., 1891) [hereinafter DEBATES IN THE SEVERAL STATE CONVENTIONS].

[122] THE FEDERALIST NO. 84, at 259, 262 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1981).

[123] *Id.*

[124] James Wilson, The Pennsylvania Convention (Nov. 28, 1787), *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES: PENNSYLVANIA 382, 383–84 (Merrill Jensen ed., 1976) [hereinafter THE DOCUMENTARY HISTORY].

[125] RESULT OF THE CONVENTION OF DELEGATES, *supra* note 118, at 14.

still reserved and retained by the people."[126]

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.[127]

Where there was no enumeration of rights, Wilson argued, the people retained all rights, but "an imperfect enumeration" of rights threatened to make the government seem like the grantor of innate interests.[128] During the North Carolina ratification convention, one 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."[129] The real risk was that any branch of government would usurp the people's power by refusing to recognize any inalienable right they had not listed in the 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.[130] This meant that "in the progress of things," future generations might "discover some great and Important [right], which we don't now think of."[131]

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. The judiciary has no constitutional authority to suppress that process. 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 essential rights. The Preamble places obligations on all three branches of government; hence, it appears before the enumeration of

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[126] Thomas Hartley, The Pennsylvania Convention (Nov. 30, 1787), *in* 2 THE DOCUMENTARY HISTORY, *supra* note 124, at 429, 430.

[127] James Iredell, Convention of North Carolina (July 29, 1788), *in* 4 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 121, at 164, 167.

[128] James Wilson, Convention of Pennsylvania (Nov. 26, 1787), *in* 2 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 121, at 418, 436.

[129] Archibald Maclaine, Convention of North Carolina (July 29, 1788), *in* 4 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 121, at 160, 161.

[130] 1 THE WORKS OF JAMES WILSON 127 (James Dewitt Andrews ed., 1896).

[131] Letter from Edmund Pendleton to Richard Henry Lee (June 14, 1788), *in* 2 THE LETTERS AND PAPERS OF EDMUND PENDLETON, 1734–1803, at 530, 532–33 (David John Mays ed., 1967).

Congress's powers in Article 1, the President's authority in Article 2, and the judiciary's 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 universal-sounding principles of the Declaration and the Preamble. Many of the framers understood that, by retaining slavery, the newly formed states violated the moral norms at the core of the colonists' assertion of independence from Great Britain. Patrick Henry even acknowledged his own hypocrisy after he read an abolitionist tract:

> [I]s 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 [and] 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 opp[o]rtunity will be offered to abolish this lamentable Evil.[132]

Nevertheless, at the nation's founding, the Constitution protected the institution of slavery. For the sake of compromise, even Gouverneur Morris, the most outspoken opponent of slavery at the Philadelphia Convention,[133] eventually agreed to the inclusion of the Three-Fifths, Importation and Fugitive Slave Clauses.[134] Those clauses made egalitarian statements appear to be no more than empty rhetoric, and 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

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[132] Letter from Patrick Henry to Robert Pleasants (Jan. 18, 1773), *reprinted in* GEORGE S. BROOKES, FRIEND ANTHONY BENEZET 443–44 (1937).

[133] *See* 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).

[134] Morris's failure to maintain his stance against slavery is explored 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).

reciprocal rights and duties.[135] A "state of society" had to rely on the "common wisdom" of its subjects to achieve the "interest and welfare of [the] community."[136] The Declaration's philosophical commitment to equal rights remained unrealized because blacks, women, and property-less white males were unable to participate in any meaningful type of policymaking. By countenancing arbitrary state restrictions on political rights, the nation's collective wisdom remained untapped, reducing its ability to provide for 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 it would whither of its own accord.

During the struggle with England, slavery was the subject of an ever increasing number of polemical publications, denouncing its infringement against the Rights of Man. Benjamin Rush, a physician who 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."[137] England would not accept the force of revolutionary reasoning, another author wrote in 1774, until Americans ended the cruelty of slavery.[138] 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."[139] Allen further pointed out that a duty on tea was of far smaller consequence to white colonists than the bondage of a captive.[140] These abolitionist-minded statements did not win the day in the immediate aftermath of the Revolution.

III. ABOLITIONIST IDEALISM

Contrary to the expectations of revolutionaries like Dr. Benjamin

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[135] *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 58 (1969) (noting that the general political attitude in the late eighteenth century was one that emphasized the need to work together for the common good).

[136] SAMUEL WILLIAMS, A DISCOURSE ON THE LOVE OF OUR COUNTRY 9–10 (1774).

[137] DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770–1823, at 274 (1975) (quoting Benjamin Rush's argument that Americans could not complain about their previous servitude to England so long as slavery still existed in America).

[138] *See* RICHARD WELLS, A FEW POLITICAL REFLECTIONS SUBMITTED TO THE CONSIDERATION OF THE BRITISH COLONIES 80 (1774) (arguing that the people of England would not accept the Colonies' revolutionary ideology until slavery was abolished).

[139] JOHN ALLEN, THE WATCHMAN'S ALARM TO LORD N---H 27 (1774).

[140] *Id.* at 28.

Rush, slavery remained a persistent problem in the United States. Nevertheless, groups inspired by the nation's founding principles advocated for the federal government to help end slavery. Such abolitionist rhetoric deeply influenced the nation's "second founding" at the end of the Civil War, when new constitutional amendments augmented congressional authority. The Declaration's and Preamble's statements of governmental purposes were at the core of many abolitionist views about universal rights.

William Lloyd Garrison, an arduous abolitionist newspaper editor,[141] believed that immediate abolition was implicit in the self-evident truths of the Declaration of Independence.[142] He and other abolitionists relied on the Declaration to develop a national reform agenda. They not only opposed slavery; many abolitionists were also among the most progressive feminists, believing that the phrase "all men are created equal" referred collectively to the "human species," implicitly including both men and women.[143]

There was a widespread belief among abolitionists that the Revolution was waged to secure inalienable rights for all. This founding purpose, they believed, obligated the national government to protect its citizens' natural rights. An eloquent abolitionist, Wendell Phillips explained, "I acknowledge the great principles of the Declaration of Independence, that a state exists for the liberty and happiness of [all] the people . . . [because] these are the ends of government."[144]

The Preamble to the Constitution also figured prominently in abolitionist writings. The General Welfare Clause, as they saw it, required

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[141] *See* WALTER M. MERRILL, AGAINST WIND AND TIDE: A BIOGRAPHY OF WM. LLOYD GARRISON 43 (1963) (noting that Garrison began his career as both an abolitionist and a newspaper editor). Radical constitutionalists, such as Alvan Stewart, Salmon P. Chase, Frederick Douglass, and Charles Sumner, argued that, read correctly, the Fifth Amendment "required immediate abolition." 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, believed that "the Constitution established and protected the institution of slavery" and should therefore be repudiated. MERRILL, *supra*, at 206; *see* CONG. GLOBE, 37th Cong., 2d Sess. 1448–49 (1862) (Sumner presenting anti-slavery view of the Fifth Amendment); FREDERICK DOUGLASS, UNCONSTITUTIONALITY OF SLAVERY 15–16 (1860) (Douglass relying on several constitutional provisions, including the Fifth Amendment, to argue that slavery was unconstitutional); JOHN NIVEN, SALMON P. CHASE: A BIOGRAPHY 188 (1995) (same subject about Chase); Louisa M. A. Heiny, *Radical Abolitionist Influence on Federalism and the Fourteenth Amenemdent*, 17 Temp. Pol. & Civ. Rts. L. Rev. 155, 162 (2007) (discussing Stewart's anti-slavery view of the Fifth Amendment).

[142] *See* William Lloyd Garrison, An Address Delivered Before the Old Colony Anti-Slavery Society at South Scituate, Mass. 17 (July 4, 1839) ("[I]f we advocate gradual abolition, we shall perpetuate what we aim to destroy, and proclaim that the Self-Evident Truths which are set forth in the Declaration of Independence are Self-Evident Lies!").

[143] WENDELL PHILLIPS ET AL., WOMAN'S RIGHTS TRACTS 2–3 (1854).

[144] WENDELL PHILLIPS, THE WAR FOR THE UNION (1861), *reprinted in* AMERICAN PATRIOTISM: SPEECHES, LETTERS AND OTHER PAPERS WHICH ILLUSTRATE THE FOUNDATION, THE DEVELOPMENT, THE PRESERVATION OF THE UNITED STATES OF AMERICA 562, 577 (Selim H. Peabody ed., 1881).

Congress to act for the betterment of all Americans.[145] Inaction in the face of entrenched slavery hurt the common good of society. In a racist society, neither slaves nor free blacks fully shared in the blessings of liberty.[146] The national government's protection of slavery—for instance, its tolerance of slave trading in Washington, D.C.—violated its obligation to promulgate impartial laws for the general welfare.[147] Abolitionists realized a disconnect existed 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 continued despotism against persons of African descent.[148]

To some abolitionists, like Senator Charles Sumner, the original Constitution and Bill of Rights contained several clauses obligating Congress to end slavery in the states and the territories under U.S. control.[149] Other anti-slavery advocates, on the other hand, believed that while Congress lacked the power to end slavery in existing states, it could act in federal territories.[150]

Many abolitionists relied on revolutionary ideology about fundamental rights to help them formulate theories about congressional power. They adopted a creed which considered fundamental rights intrinsic to national citizenship.[151] Lucretia Mott, an early abolitionist and feminist, noted that what struck her about the first American Anti-Slavery Society meeting of

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[145] *See, e.g.*, G. W. F. MELLEN, AN ARGUMENT ON THE UNCONSTITUTIONALITY OF SLAVERY: EMBRACING AN ABSTRACT OF THE PROCEEDINGS OF THE NATIONAL AND STATE CONVENTIONS ON THIS SUBJECT 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 [C]ongress of the United States shall consult in all things the general welfare of the people").

[146] 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.*

[147] *See* John Hope Franklin & Henry Louis Gates, Jr., *Race in America: Looking Back, Looking Forward*, 55 BULL. AM. ACAD. ARTS & SCI. 42, 46–47 (2001) (listing discriminatory laws in effect even before Washington, D.C., became a city, and discussing pro-slavery theorists' rationale for justifying slavery). 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) (noting that the Moral Reformers hoped to abolish slavery in Washington, D.C., by appointing lecturers, establishing a press, petitioning congress, and encouraging free labor).

[148] MELLEN, *supra* note 145, at 55, 63.

[149] *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) (discussing Sumner's belief that the due process provision of the Fifth Amendment as well as the common defense and war clauses authorized Congress to pass a statute that would abolish slavery); *see also* Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305, 305 (1988) (noting that commentators frequently discuss the original Constitution's due process, equal protection, and privileges and immunities clauses in anti-slavery rhetoric).

[150] *See* tenBroek, *supra* note 149, at 182–83 (1951) (noting that some abolitionists believed the Constitution authorized Congress to abolish slavery in the District of Columbia and the Territories but not in the states).

[151] *See* Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L.R. 1773, 1798 (2006) (noting that the abolitionists believed that natural rights were intrinsic to citizenship).

1833 was the declaration of sentiments, based on "the truths of Divine Revelation, and on the Declaration of Independence, as an Everlasting Rock."[152] A female physician, writing in the 1850s, 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.[153]

In the opinion of such activists, citizenship was the birthright of everyone born in the United States, and safeguarding it was the obligation of the entire federal government.[154] Their political rhetoric extolled the American project to protect human rights. Natural rights, their publications often stated, are intrinsic to everyone and predate society.[155] In language more than likely familiar to the founders, Unitarian abolitionist William E. Channing asserted that civil societies are organized to protect those rights.[156] Without legislative power and willingness to pass national statutes against slavery, the protection of civil rights was left to the discretion of the very states that sanctioned the institution.

Slavery prevented hundreds of thousands of people from enjoying their inalienable rights.[157] Theodore Parker, like other abolitionist authors,

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[152] JAMES AND LUCRETIA MOTT: LIFE AND LETTERS 115 (Anna Davis Hallowell ed., 1884) (quoting Lucretia Mott's description of her reaction to the first American Anti-Slavery Society meeting of 1833).

[153] HARRIOT K. HUNT, GLANCES AND GLIMPSES; OR FIFTY YEARS SOCIAL, INCLUDING TWENTY YEARS PROFESSIONAL LIFE 318–19 (1856).

[154] *See* JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY: TOGETHER WITH THE POWERS AND DUTIES OF THE FEDERAL GOVERNMENT, IN RELATION TO THAT SUBJECT 91, 93 (1849) (noting that slaves born in the United States are citizens, and that it is the responsibility of the federal government to protect the rights of *anyone* who is a rightful citizen of the United States).

[155] *See, e.g.*, *id.* at 86–87 (noting that people necessarily existed before government was created, that the government was therefore designed to protect people's individual rights, and that these protected rights include the right to personal security, personal liberty, and private property).

[156] *See* WILLIAM E. CHANNING, SLAVERY, *reprinted in* THE WORKS OF WILLIAM E. CHANNING, D.D. 688, 699 (American Unitary Association ed., 1900) ("[T]he great end of civil society is to secure [individual rights].").

[157] *See Principles of the Anti-Slavery Society*, *in* THE AMERICAN ANTI-SLAVERY ALMANAC, FOR 1837, at 30 (1837) ("*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.").

located the right to live a free and happy life in the Declaration of Independence and the Preamble.[158] Liberty, as other inalienable rights, was guaranteed equally for all, irrespective of their race.[159] Incumbent on the national government was the obligation to abolish slavery through laws that would provide for the equal enjoyment of "civil and political rights and privileges."[160]

The abolitionist understanding of national government and congressional power rested largely 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 Antebellum 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."[161] According to constitutional attorney Joel Tiffany, when the Revolutionary generation denied 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.[162] Radical abolitionists regarded the "principles embodied" in the Declaration of Independence as "in direct antagonism" with the Constitution, which represented "no more than the political compromises of a day."[163] Only constitutional amendments could shift the nation's legal priorities.

Prior to the Civil War, abolitionists were in the minority.[164] However, the abolitionist branch of Congress became increasingly influential as the Civil War took a larger toll on the nation's financial and human resources. Those who sought the abolition of slavery through constitutional amendment were determined to also augment congressional authority over civil rights.

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[158] *See* Theodore Parker, *The Dangers from Slavery* (July 2, 1854), *in* 4 OLD SOUTH LEAFLETS 1–3 (1897) (noting that natural rights are protected by the Declaration of Independence and the Preamble, and that no state or federal law supported the notion of slavery).

[159] *See* WILLIAM GOODELL, ADDRESS OF THE MACEDON CONVENTION BY WILLIAM GOODELL; AND LETTERS OF GERRIT SMITH 3 (1847) (arguing that the "rights of all shall be equally and impartially protected," regardless of race).

[160] New-England Anti-Slavery Soc'y, *Constitution of the New-England Anti-Slavery Society*, *in* 1 THE ABOLITIONIST: OR RECORD OF THE NEW ENGLAND ANTI-SLAVERY SOCIETY 2 (1833).

[161] Am. Anti-Slavery Soc'y, *Declaration of the Anti-Slavery Convention*, Dec. 4, 1833, *in* PROCEEDINGS OF THE ANTI-SLAVERY CONVENTION, ASSEMBLED AT PHILADELPHIA 12 (1833).

[162] *See* TIFFANY, *supra* note 154, at 29 ("By denying to the government of Great Britain, the rightful power to violate these privileges in their own persons, they denied to *themselves* the rightful power to violate them in the persons of others; and by this solemn act of theirs, they are forever estopped from setting up such claim.").

[163] 2 WILLIAM HEPWORTH DIXON, NEW AMERICA 354 (5th ed. 1867).

[164] 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 149, at 182.

IV. CONSTITUTIONAL RECONSTRUCTION

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. To make this a reality, the Constitution needed amendments to augment federal statutory authority enough to identify and to protect the people's fundamental rights. Several members of Congress during the Civil War had long been involved in abolitionist causes.[165] They and others repeatedly spoke of how changes to the Constitution would allow the legislative branch to pass laws for protecting individual rights.[166] The decision to expand legislative authority into matters that previously had been the states' sole province is unmistakable from speeches delivered by supporters of the proposed Thirteenth and Fourteenth Amendments and the Civil Rights Bill of 1866.[167]

A. *The Thirteenth Amendment*

Debates on the Thirteenth Amendment repeatedly referred to the American Revolution's ideals. The spirit of '76 filled radical Republicans who ardently supported the Amendment. John P. Hale, a Senator from New Hampshire, for example, 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" and proclaimed that the nation's "fathers uttered

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[165] 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 became 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* 2 COMMITTEES IN THE U.S. CONGRESS, 1789–1946, *passim* (David T. Canon et al. eds., 2002). For a listing of congressional radicals and conservatives, see MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863–1869, at 339–77 (1974).

[166] *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) ("Congressional Republicans legislated to secure the civil rights of Americans . . . with the understanding that . . . the Thirteenth and then the Fourteenth Amendment . . . gave . . . all Americans the fundamental rights of citizenship and delegated to Congress the authority to protect citizens in their enjoyment of these rights.").

[167] On the merging of principles from the Civil Rights Act of 1866 into § 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 Decrees and* Ex Parte Young, 62 WASH. & LEE L. REV. 1001, 1060 (2005).

years ago and which have slumbered dead letters upon the pages of our Constitution, of our Declaration of Independence, and of our history."[168] 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."[169] "Our ancestors'" hypocrisy in fighting to safeguard their own "inalienable right of liberty," asserted Senator John B. Henderson of Missouri, while denying "it to others" under the guise of "false counsels of expediency," led to Civil War.[170] Preserving individual rights for the common good of the nation required restructuring its organic law. Constitutional amendments were essential for changing national aspirations into enforceable rights.

Establishing a doctrinal foundation for the rebirth of freedom, proponents of the Thirteenth Amendment interpreted the Declaration of Independence to refer to everyone, irrespective of their race. The effect of such amendment made the self-evident truth of the Declaration a practical application, rendering it beyond doubt that everyone is endowed with legally cognizable inalienable rights of life, liberty, and the pursuit of happiness.[171] As Representative James S. Rollins of Missouri interpreted it, American Revolutionaries, from the North and the South, anchored "the great principle . . . in the rights of man, founded in reason," and made applicable to everyone "without distinction of race or of color" to be "created equal."[172] A Democrat from Maryland, Reverdy Johnson, whose support for the Thirteenth Amendment was crucial to its passage, considered the Declaration to be "the Magna Charta of human rights."[173] Based on the well-spring of American rights, Johnson believed slavery to be "inconsistent with the principles upon which the Government is founded."[174] Following the abolitionists' lead, Congress of the mid-1860s conceived slavery as violative of the Preamble's guaranty of tranquility and general welfare.[175]

The emphasis on egalitarian principles was a further indication of the fundamental change in structure of government. The head of the House Judiciary Committee, James F. Wilson of Iowa, drew his inspiration from

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[168] CONG. GLOBE, 38th Cong., 1st Sess. 1443 (1864).

[169] *Id.* at 1461.

[170] *Id.*

[171] *See id.* at 1424 ("We mean that the Government in future shall be . . . one, an example of human freedom for the light and example of the world, and illustrating in the blessings and the happiness it confers the truth of the principles incorporated into the Declaration of Independence, that life and liberty are man's inalienable right.").

[172] CONG. GLOBE, 38th Cong., 2d Sess. 260 (1865).

[173] CONG. GLOBE, 38th Cong., 1st Sess. 1420 (1864).

[174] *Id.* at 1422.

[175] *See, e.g., id.* at 1423 ("How pregnant with a conclusive answer is the preamble to the proposition that slavery cannot be abolished! . . . Is there no justice in putting an end to human slavery?").

the revolutionary proclamation of "human equality" as the "sublime creed," demanding all be treated as "equals before the law."[176] The nation would be rebuilt, with the union forever changed where "*equality before the law* is to be the great corner-stone" that the states and the judiciary would be unable to undermine.[177] Following ratification of the Thirteenth Amendment, its opponents argued that it was never meant to make blacks equals before the law but only to set them free from the fetters of slavery.[178] This was no less than an attempt to annul the breadth of the Amendment's principles.

Part of the uncertainty about the Amendment's wide-ranging grant of congressional authority arose from its cryptic language, allowing for a stilted literal interpretation. In hindsight, the Senate erred 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."[179] Others thought Sumner's addendum to be extraneous because equality was already implicit in constitutional abolition. But the failure to include some mention of equality enabled congressmen, like Senator Thomas A. Hendricks of Indiana, to argue—even after ratification of the Thirteenth Amendment—that blacks were inferior. "It may be preached; it may be legislated for . . . but there is that difference between the two races that renders it impossible," Hendricks proclaimed.[180]

The Amendment's supporters, who made up the supermajority of both chambers of Congress, repeatedly expressed a very different view. Their speeches often stressed the equality of every person to enjoy inalienable rights.[181] With the passage of the Thirteenth Amendment, argued one 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."[182] By passing the Thirteenth Amendment, Senator Lot M. Morrill argued a year after its ratification that the nation had "wrought" a "change" that "was in harmony with the

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[176] *Id.* at 1319.

[177] *Id.* at 2989.

[178] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866) (statement of Mr. Willard Saulsbury) (arguing that before the adoption of the amendment, Congress did not have the authority to make free African-Americans equal to white-Americans before the law). 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).

[179] CONG. GLOBE, 38th Cong., 1st Sess. 521 (1864); *id.* at 1483.

[180] *Id.* at 1457.

[181] *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 1423 (1864) ("I am not to be told, Mr. President, that our fathers looked to this race merely because they differed in color from ourselves as not entitled to the rights which for themselves they declared to be inalienable.").

[182] *Id.* at 2989.

fundamental principles of the Government."[183]

A century later in 1968, the Warren Court made the same point about the extent of congressional power available under the Thirteenth Amendment:

> [T]his Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its "burdens and disabilities"—included restraints 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."[184]

Accordingly, Section 2 of the Thirteenth Amendment grants Congress the authority to pass laws rationally related to achieving the legitimate governmental purpose of rectifying continued incidents of involuntary servitude.[185]

B. *Civil Rights Act of 1866*

The Thirteenth Amendment not only abolished slavery, its second section provided Congress with the power to develop a statutory agenda to protect fundamental rights—especially those connected to life, liberty, and the pursuit of happiness.[186] 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."[187] Enacted less than four months after states ratified the amendment, the Civil Rights Act of 1866 offers one of the most telling indicators of the extent to which reconstruction of the Constitution expanded congressional prerogatives regarding how best to secure essential freedoms.[188]

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[183] CONG. GLOBE, 39th Cong., 1st Sess. 570 (1866) (statement of Sen. Morrill).

[184] Jones v. Alfred H. Mayer, 392 U.S. 409, 441 (1968) (quoting Civil Rights Cases, 109 U.S. 3, 22 (1883)).

[185] *See id.* at 440–41 ("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.").

[186] ALEXANDER TSESIS, PROMISES OF LIBERTY: THIRTEENTH AMENDMENT ABOLITIONISM AND ITS CONTEMPORARY VITALITY (Alexander Tsesis ed., Columbia Univ. Press, forthcoming 2009) [hereinafter PROMISES OF LIBERTY].

[187] CONG. GLOBE, 39th Cong., 1st Sess. 129 (1866).

[188] Civil Rights Act, ch. 31, 14 Stat. 27 (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

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."[189] 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" through concrete federal statutes.[190]

The Civil Rights Act of 1866 applied to "the whole people" throughout the United States, regardless of whether they were "high and low, rich and poor, white and black."[191] From its inception, the nation had "professed" to be governed by "the absolute equality of rights," but the United States then "denied to a large portion of the people equality of rights . . . ."[192] The newly ratified amendment provided Congress with authority to make freedom universally applicable to all states.

Even opponents of the bill realized 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 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."[193]

A supermajority was needed to pass the bill into law over President Andrew Johnson's veto.[194] Many of the speeches supporting its passage argued that prohibiting discrimination was essential for guaranteeing real freedom.[195] Normative arguments during congressional debates relied on the country's founding principles to support congressional civil rights authority; discrimination was asymmetrical with the stable norms of post-bellum republican governance. Section 2 of the Thirteenth Amendment had granted Congress the dynamic authority to discern and legislate against

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prosecuted. All violators could be imprisoned for up to a year and fined no more than $1000. States retained concurrent authority to pass civil rights laws. *Id.*

[189] CONG. GLOBE, 39th Cong., 1st Sess. 1159 (1866) (statement of Rep. Windom).

[190] *Id.* at 474.

[191] *Id.* at 1159 (statement of Rep. Windom).

[192] *Id.*

[193] *Id.* at 476 (statement of Rep. Saulsbury).

[194] For Johnson's veto message with its objection to the expansion of federalism at the expense of state rights, see *id.* at 1857–60.

[195] *See, e.g., id.* at 1152 (statement of Rep. Thayer) ("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 . . . .").

any abiding or new infringements on fundamental legal freedoms.[196] Reconstruction broke from "the dogma that this is the country of the white man, and that no other man has rights here which the white man is bound to respect."[197]

Enforcement of the Constitution's new guarantee of universal freedom was to be "a return to the principles of the founders of the Government."[198] While the purpose of governance continued to be grounded in early American thought, the Thirteenth Amendment wrought a revolutionary change in the relationship between state and federal governments. Its passage was an unambiguous decision that federal authority over civil rights was necessary given states' unwillingness to abide by the principles of governance found in the Declaration of Independence and the Preamble to the Constitution. Unsurprisingly, the Reconstruction Congress did not leave the task of protecting fundamental rights to the judiciary alone, given that less than ten years before the Thirteenth Amendment the Court had found the Constitution inapplicable to black persons.[199] Anti-discrimination policy became a national rather than solely a state or local matter.

Congress, not the judiciary, was to take the leadership role for protecting individual rights. From the very beginning of the debate, Senator Trumbull elaborated on the nature of liberty and equality. He acknowledged that in a civil society absolute freedom was inconceivable, but he proclaimed that Congress could secure to all freepersons the rights to travel, bring law suits, enter into contracts, and to own, inherit, and dispose of property.[200] The new federalism vested Congress with the power to identify and to protect individual rights for the common good. Trumbull relied on William Blackstone's *Commentaries* to stress 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.'"[201]

The bill's opponents argued vehemently that the law would hinder states from governing internal matters; they believed that its provisions would usurp state sovereignty over ordinary contract and real estate

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[196] U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation.").

[197] CONG. GLOBE, 39th Cong., 1st Sess. 1262 (statement of Rep. Broomall). For similarly racist comments, see *id.* at 530 (statement of Sen. Davis) and *id.* at 1263 (statement of Rep. Wright). Other congressmen rejected the bill because they considered it an over-extension of congressional power. *See, e.g.*, *id.* at 1267–68 (statement of Rep. Kerr).

[198] *Id.* at 1262 (statement of Rep. Broomall).

[199] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 403–04, 407–08 (1856).

[200] CONG. GLOBE, 39th Cong., 1st Sess. 474–75 (1866).

[201] *Id.* at 474 (statement of Sen. Trumbull).

transactions, over which states had formerly exercised sole discretion.[202]

Responding to these concerns, Senator Trumbull asserted that the new law was not meant to destroy federalism, but rather to secure equal rights for each American.[203] Among these essential interests, he asserted, are "the right to life, to liberty, and to avail one's self of all the laws passed for the benefit of the citizen to enable him to enforce his rights . . . ."[204] 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 law.[205]

States no longer had sovereign discretion to implement racially discriminatory laws. The Thirteenth Amendment, explained Senator Lot M. Morrill, a former governor of Maine, was predicated on "the high principles of American law . . . ."[206] The civil rights bill was meant to place blacks on "the plane of manhood," bringing them "within the pale of the Constitution."[207] Its aim was not merely to be legislative, but also to be declarative "of a grand, fundamental principle of law and politics . . . ."[208] The law thereby remained true to the Thirteenth Amendment's interconnection between enforceable constitutional law, the Declaration of Independence and the Preamble to the Constitution.

The Thirteenth Amendment granted the federal government far more power to protect fundamental rights than it enjoyed prior to the Civil War. The states' variegated policies on interpersonal behavior could not impede congressional civil rights efforts.[209] The Civil Rights Act was born of a determination to establish law that would "carry to its legitimate and just result the great humane revolution . . . ."[210]

To the great surprise of the Reconstruction Congress, Andrew Johnson vetoed it.[211] During the debates following that unexpected outcome, Trumbull, whose Senate Judiciary Committee had fashioned the language of the Thirteenth Amendment, became even clearer about why Congress

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[202] *Id.* at 476–78 (statements of Rep. Saulsbury) (discussing the invasion of states' rights in general and to govern real estate transactions); *id.* at 595–96 (statements of Rep. Davis) (discussing states' rights to regulate property).

[203] *Id.* at 599.

[204] *Id.* at 600.

[205] *Id.* at 599–600.

[206] *Id.* at 570.

[207] *Id.* at 569–70.

[208] *Id.*

[209] 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. 528–29 (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.

[210] *Id.* at 1151 (Statement of Rep. Thayer from Pa.).

[211] ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM 56 (2004).

had the authority to pass a national law prohibiting discrimination in property, contract, and court related matters.[212] The civil rights bill was meant to safeguard "inherent, fundamental rights which belong to free citizens or free men . . . and they belong to them in all the States of the Union."[213] 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."[214] To further signal the great change in federalism initiated by the Thirteenth Amendment, Trumbull relied not on judicial precedents but on classic legal treatises. The Amendment would overturn any precedent violative of fundamental rights and it afforded Congress's power to safeguard it.

Trumbull again relied on Blackstone for the proposition that citizens are entitled to "natural liberty" and, therefore, the law can only restrain them insofar as it "'is necessary and expedient to the general advantage of the public.'"[215] Civil liberties "'should be *equal to all*, or as much so as the nature of things will admit.'"[216] These quotes from Blackstone in the context of debates about the civil rights bill reflected a national perspective on individual rights and general welfare. Trumbull also quoted James Kent, who, like Blackstone, wrote a leading legal treatise. Kent premised that among the interests included in "'equal[] . . . rights . . . of a commonwealth'" are "'the right of personal security, the right of personal liberty, and the right to acquire and enjoy property.'"[217] In Kent, Trumbull found further support for the proposition that inalienable rights are not limited to citizens but extend to all the inhabitants of the United States.[218]

A review of the congressional debates indicates that the civil rights bill was meant to achieve the normative purposes of American government. Congress used its Thirteenth 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*,[219] to deduce the extent of congressional authority under the Thirteenth Amendment.[220] 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

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[212] CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866); BERNARD SCHWARTZ, FROM CONFEDERATION TO NATION: THE AMERICAN CONSTITUTION, 1835–1877, at 191 (1973).

[213] CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866).

[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823).

[220] CONG. GLOBE, 39th Cong., 1st Sess. 474–75 (1866).

> 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 . . . .[221]

The Reconstruction Congress interpreted the Thirteenth Amendment as a grant of authority to identify and secure these and other essential liberties, whether or not the Bill of Rights enumerated them.[222]

Key supporters of the Civil Rights Act of 1866 expected Congress to begin with *Corfield* in its Thirteenth Amendment obligation to identify inalienable civil rights.[223] But just like the Bill of Rights, the dictum in *Corfield* 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, Section 3 of the Civil Rights Bill gave district courts exclusive jurisdiction over criminal and civil offenses arising under the Act.[224] But it was Congress, not the judiciary, who was to be primarily responsible for identifying which rights were fundamental enough to warrant federal protections.[225]

Summing up the significance of the new law, Trumbull concluded: "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."[226] Just a few months earlier, 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

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[221] *Id* at 551–52.

[222] *See* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND BILL OF RIGHTS 80–83 (1986) (discussing the constitutional authority Congress relied on to pass the Civil Rights Act of 1866); Michael K. Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the* Slaughter-House Cases *without Exhuming* Lochner: *Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 32 n.122 (1996) (citing primary sources on congressional authority to pass the Civil Rights Act of 1866).

[223] *See* BERNARD H. SIEGAN, PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT 249 (2001); CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 64 (1987); Lawrence Rosenthal, *Policing and Equal Protection*, 21 YALE L. & POL'Y REV. 53, 70 n.84 (2003).

[224] Ch. 31, 14 Stat. 27 § 3 (1866) (current version at 42 U.S.C. § 1988 (1999)); CONG. GLOBE, 39th Cong., 1st Sess. 1759 (1866).

[225] In a 1968 decision, the Supreme Court asserted: "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 v. Alfred H. Mayer, 392 U.S. 409, 440 (1968).

[226] CONG. GLOBE, 39th Cong., 1st Sess. 1761 (1866).

slavery, then it was "a bitter mockery" and "a cruel delusion."[227] 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 Section 2 of the Amendment as 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.[228]

Opponents of the bill repeatedly attacked the extent to which the amendment would augment congressional power. Their most cogent 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 States."[229] Johnson denied that the Thirteenth Amendment enabled Congress to act against perceived violations of fundamental rights.[230]

Reverdy Johnson's view was shared by a relatively small minority, and a super-majority soon overrode President Andrew Johnson's veto—the first veto override regarding a major law in United State history.[231] 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 Congress, immediately after ratification of the Thirteenth Amendment, conceived itself 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 both for identifying the meaning of the Constitution and for passing laws to protect fundamental rights.

C. *Fourteenth Amendment*

Many of the congressmen who voted against the Civil Rights Act of 1866 were Democrats claiming it posed a threat to state sovereignty. The most prominent Republican to vote against it was Representative John A. Bingham.[232] Before the final vote, he explained that he was unwilling to

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[227] 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).

[228] *Jones*, 392 U.S. 440–41 ("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.").

[229] CONG. GLOBE, 39th Cong., 1st Sess. 1777 (1866).

[230] CONG. GLOBE, 39th Cong., 1st Sess. 1778 (1866).

[231] *See* Aviam Soifer, *Protecting Full and Equal Rights: The Floor and More*, *in* PROMISES OF LIBERTY", *supra* note 186.

[232] 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. *Id.* at

support a statute granting Congress the authority to affect rights the Supreme Court had left at the sole discretion of the states in *Barron v. Baltimore*.[233] In his mind, only an additional constitutional amendment could extend congressional power over civil rights and citizenship.[234] To this end, even before the passage of the Civil Rights Act, Bingham had begun advocating for the passage of the Fourteenth Amendment.[235]

In May 1866, Congress formally started its debate on the language of the Fourteenth Amendment, which was partly meant to constitutionalize the federal authority over liberty rights codified in the Civil Rights Act of 1866.[236] The general presumption was that the pre- and post-veto debates about the statute had adequately articulated Congress's role in protecting civil rights, requiring little further elaboration. Accordingly, when Senator Jacob M. Howard proposed the Citizenship Clause in the future Fourteenth Amendment, he decided to avoid saying anything "on that subject except that the question of citizenship has been so fully discussed in this body [during the civil rights bill debates] as not to need any further elucidation . . . ."[237]

Members of the Joint Committee of Fifteen on Reconstruction, such as Howard, John A. Bingham, and William P. Fessenden, wanted to extend national power over civil rights beyond the protections enumerated by the 1866 statute.[238] In Howard's words, the Committee "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

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1679 (Johnson's veto message); *id.* at 1861 (House vote to override veto); *id.* at 1809 (Senate vote to override veto).

[233] CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866); Barron v. Mayor Baltimore, 32 U.S. (7 Pet.) 243, 250–51 (1833) (holding that the Fifth Amendment solely applies to federal, rather than state private property takings). 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 v. Mayer Co., 392 U.S. 409, 440–41 (1968), and private school segregation to be punishable. Runyon v. McCrary, 427 U.S. 160, 173 (1976).

[234] CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866).

[235] Interestingly, Bingham made his first mention of the Fourteenth Amendment on January 9, 1866, *id.* at 158, three days before Trumbull introduced the civil rights bill, *id.* at 211.

[236] *See* Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1584–85 (1995) (stating that the questionable authority to pass the Civil Rights Act prompted the Joint Committee to solidify it in an amendment). For a couple of examples of statements connecting the Fourteenth Amendment with the Civil Rights Act of 1866, see CONG. GLOBE, 39th Cong., 1st Sess. 2511 (1866) (statement by Rep. Eliot) and *id.* at 2462 (statement of Rep. Garfield).

[237] CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866). To the extent that the debates on the proposed Fourteenth Amendment concentrated on defining citizenship, many of the statements reflected period prejudices against anyone of Chinese, Gypsy, African, and Indian ancestry. *See, e.g.*, *id.* at 2890–91, 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. *See* Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 Ohio St. L.J. 1085, 1088 (1989); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 82 n.151 (1993).

[238] CONG. GLOBE, 39th Cong., 1st Sess. 2896 (1866).

Senator from Wisconsin [James R. Doolittle], who would pull the whole system up by the roots and destroy it . . . ."[239] The Committee's aim was to clarify the grant of congressional enforcement authority in the Thirteenth Amendment by adding what would become the Equal Protection, Due Process, and Privileges or Immunities Clauses to the Constitution.

The Committee incorporated phrases with unmistakable abolitionist overtones into its drafts. 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.[240] The terms of Section 1 of the Fourteenth Amendment were broad enough to provide for contemporary and future federal protections for fundamental rights. Through Supreme Court interpretation and statutory enactment, for example, twentieth and twenty-first century judges interpreted the Due Process and Equal Protection Clauses to cover the rights of women,[241] racial minorities,[242] and disabled persons.[243]

In 1866, when 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 matters. During debates on the Fourteenth Amendment, a New Jersey congressman, Representative Andrew J. Rogers, attacked Section 1 as an "attempt to consolidate the power of the States and to take away from them the elementary principles which lie at their foundation."[244] Rogers denounced Section 1 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

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[239] *Id.*

[240] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (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, *Undermining Inalienable Rights: From* Dred Scott *to the Rehnquist Court*, 39 ARIZ. ST. L.J. 1179, 1199–1200 (2007) (discussing the proslavery sentiments endorsed by the *Dred Scott* decision).

[241] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2000) (prohibiting, with some exceptions, that no one "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"); United States v. Virginia, 518 U.S. 515, 519 (1996).

[242] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e–2) (2000) (prohibiting employers, labor organizations, and employment agencies from engaging in race, sex, color, religion, or national origin discrimination); Brown v. Board of Ed., 347 U.S. 483, 493 (1954).

[243] Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2000); Tennessee v. Lane, 541 U.S. 509, 523 (2004).

[244] CONG. GLOBE, 39th Cong., 1st Sess. 2538 (1866).

President of the United States.[245] Rogers cautioned that the Amendment threatened to diminish state powers.[246]

The aims of the proposed amendment were in fact 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[] . . . fundamental equality."[247]

The aspirations of radical congressmen were at least as far-reaching as Lawrence's. 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."[248] Those "self-evident" truths had proven inadequate to prevent the spread of slavery during the antebellum years. The Fourteenth Amendment now was meant to provide federal legislators with the constitutional grant of authority to protect citizens' life, liberty, and ability to pursue happiness and to create uniform civil rights standards.

The possibility that the Supreme Court might overturn legislation passed pursuant to Section 5 of the Fourteenth Amendment never even arose during the floor debate. This may be in part because prior to 1866 the Justices had only twice found federal laws unconstitutional; one of those cases being the infamous *Dred Scott* decision which the Reconstruction Amendments overturned.[249] And it seemed almost inconceivable that the Court would meddle with 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."[250] Senator Luke P. Poland of Vermont believed that the Declaration of Independence and the Constitution had inspired the first clause of the Fourteenth Amendment.[251] 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

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[245] *Id.*

[246] *Id.*

[247] *Id.* at 1836 (statement of Rep. Lawrence).

[248] *Id.* at 2539 (statement of Rep. Farnsworth).

[249] United States v. Rhodes, 27 F. Cas. 785, 793 (C.C.D. Ky. 1866) (No. 16,151). The two cases were *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) and *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 452 (1856). In 1866, *Ex parte Garland* held unconstitutional an *ex post facto* law meant to disbar many southern attorneys. *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 381 (1866).

[250] CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866) (statement of Sen. Poland).

[251] *Id.*

happiness' without 'equal protection of law?'"[252]

Even after the adoption of the Fourteenth Amendment, legal disabilities for blacks persisted.[253] Women's rights, moreover, were not even on Congress's agenda.[254] 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."[255] Furthermore, to many people the Fourteenth Amendment was an imperfect achievement to combat centuries of despotism in the name of a free republic.[256] 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

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[252] *Id.* at 2539 (statement of Rep. Farnsworth).

[253] *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 487–89, 495 (1954) (recognizing the legal inequalities blacks still suffered, specifically with regards to public education, almost ninety years after the Fourteenth Amendment was ratified).

[254] Susan B. Anthony and Elizabeth Cady Stanton unsuccessfully petitioned Congress to add a provision to the Fourteenth Amendment guaranteeing women's suffrage rights. CARRIE CHAPMAN CATT & NETTIE ROGERS SHULER, WOMAN SUFFRAGE AND POLITICS: THE INNER STORY OF THE SUFFRAGE MOVEMENT 92–106 (1926). Feminist aspirations were also offended because Section 2 of the Fourteenth, for the first time, introduced the word "male" into the Constitution. It provided that a state's 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., 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 CAROL DUBOIS, FEMINISM AND 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. ELIZABETH CADY STANTON, EIGHTY YEARS AND MORE 243 (1898). Stanton demanded that the clause be excised because enfranchising only black men meant that women were "left outside with lunatics, idiots and criminals." WILLIAM L. O'NEILL, EVERYONE WAS BRAVE: THE RISE AND FALL OF FEMINISIM IN AMERICA 17 (1969).

[255] LEWIS FORD, *A Woman Suffrage Catechism in Part*, THE VARIETY BOOK 155, 155 (1892).

[256] Stevens would have been satisfied with the Joint Committee of Fifteen's initial proposal which 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). That proposed section would have explicitly provided Congress with the power to enact laws for ending unequal treatment.

> 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.[257]

To make up for the Congressmen's inability to achieve complete liberal democracy immediately, Section 5 of the Fourteenth Amendment granted Congress enforcement authority for future legal progress.[258] All that was needed to match national ideals was the legislative initiative to press for statutory reform. However, in short order the Supreme Court would so restrain congressional power as to render the Amendment virtually unrecognizable to participants of the 1866 debate.

V. SUPREME COURT IMPACT ON CONGRESSIONAL AUTHORITY

Immediately after ratification of the Reconstruction Amendments, Supreme Court Justices deferred to newly enacted civil rights statutes. Shortly thereafter, however, the nation turned away from revolutionary reconstruction and toward national reconciliation. In keeping with this trend, the Court soon checked federal legislative power by nullifying laws meant to protect fundamental liberties and by closing off federal court jurisdiction to adjudicate cases arising from racial discrimination. Even today, the Court continues to rely on precedents whose conceptualization of federalism is incompatible with the Thirteenth and Fourteenth Amendments' constitutional incorporation of national civil rights norms.

A. *Decisions in the Aftermath of the Civil War*

The first federal 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*.[259] 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.[260] 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."[261]

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[257] CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866).
[258] U.S. CONST. amend. XIV, § 5.
[259] United States v. Rhodes, 27 F. Cas. 785, 794 (C.C.D. Ky. 1866) (No. 16,151).
[260] *Id.* at 787.
[261] *Id.* at 792.

Until the passage of the Thirteenth Amendment, rights varied "in different localities and according to the circumstances."[262] After its ratification, wrote Justice Swayne, the Amendment "trenche[d] directly upon the power of the states and of the people of the states."[263]

Other decisions, such as *In re Turner*, which struck down Maryland's apprenticeship statute, also rejected the antebellum state right to discriminate against blacks.[264] In its place, Chief Justice Chase, also writing as a designated circuit court justice, accepted Congress's power to set a national civil rights policy.[265] Chase found that after the ratification of the Thirteenth Amendment, "[c]olored persons equally with white persons are citizens of the United States."[266] 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."[267]

Four years later, in *United States v. Given*, with Justice Strong also sitting as a circuit justice, the Delaware District Court held that the Reconstruction Amendments "enlarged the powers of [C]ongress" by securing "to persons certain rights which they had not previously possessed."[268] 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."[269] Reconstruction had not only extended the notion of rights to a universal principle often discussed during the Revolutionary Period,[270] 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 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."[271]

As radical Reconstruction came to an end by the 1870s, the Supreme Court began diminishing the scope of congressional civil rights authority. The Court itself took an increasingly activist role. In this capacity, it decreased Congress's ability to protect fundamental national interests.

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[262] *Id.* at 790.
[263] *Id.* at 788.
[264] *In re* Turner, 24 F. Cas. 337, 339 (C.C. Md. 1867) (No. 14,247).
[265] *Id.*
[266] *Id.* at 340.
[267] *Id.* at 339.
[268] United States v. Given, 25 F. Cas. 1324, 1325 (C.C.D. Del. 1873) (No. 15,210).
[269] *Id.* at 1326.
[270] *See supra* text accompanying notes 35–48.
[271] *Given*, 25 F. Cas. at 1326.

B. *Period of Retrenchment*

The dramatic judicial 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.[272] Other than members of the corporation, all other butchers had to pay a fee to use the facility.[273]

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 been enumerated by the original Constitution or identified by Supreme Court precedent. They included the right to travel to Washington, D.C., the right to protection on the high seas, and *habeas corpus* protections.[274] The Court implied that Congress had no authority to redress unenumerated rights. Such an interpretation, which severely limited legislative power to safeguard the principles of American governance, ran against the federalist expectations of the Reconstruction Congress as indicated throughout the debates on the Thirteenth and Fourteenth Amendments and the Civil Rights Act of 1866.[275] *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*."[276]

The Fourteenth Amendment, Justice Samuel F. Miller portentously wrote for the majority in *Slaughter-House*, never meant "to transfer the security and protection of all the civil rights" from state to federal governments.[277] That conclusion undermined the very purposes of the Reconstruction Amendments: to substantiate the American Creed by making the federal government primarily responsible for safeguarding individual freedoms essential to the people's general welfare. And *Slaughter-House* set a precedent that the Supreme Court continues to follow in preventing Congress from enacting civil liberty laws, such as those prohibiting carrying guns close to schools, violence against women, or dumping of nuclear waste. I will analyze this contemporary aspect in

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[272] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 57, 59 (1872).

[273] *Id.* at 59–61.

[274] *Id.* at 79.

[275] *See supra* Part IV (discussing the debates and speeches made in favor of the proposed Thirteenth and Fourteenth Amendments and the Civil Rights Bill of 1866).

[276] *Slaughter-House*, 83 U.S. (16 Wall.) at 76 (emphasis added). Miller actually misquoted *Corfield*. Corfield v. Coryell, 6 Fed. Cas. 546 (1823). Rather than "citizens of the several states," which was Miller's formulation, the original case has "citizens in the several states." *Id.* at 550. The original is more open to a national perspective of privileges and immunities. Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 YALE L.J. 643, 654 (2000).

[277] *Slaughter-House*, 83 U.S. (16 Wall.) at 77.

the final section of this Article.[278]

Although at first glance, *Slaughter-House* appeared to prevent only the judiciary from dismantling state monopolies, the case also radically underplayed the federal government's ability to identify privileges or immunities other than those explicitly named in the antebellum Constitution. The growing prevalence in the 1870s and 1880s of state-sponsored and vigilante racial violence, segregation, and employment and property discriminations made blacks the decision's greatest losers. In large part, Congress had lost its power to secure civil rights intrinsic to United States citizenship. This came at a time when Southern states were increasingly being "redeemed" from federal control.[279]

Four out of nine Justices dissented from Miller's opinion.[280] Two separate dissents are directly 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.[281] Justice Bradley focused on the Reconstruction Amendments' effect on the relationship of individuals 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.[282] Bradley implied that the Fourteenth Amendment's nationalization of citizenship augmented federal jurisdiction to redress unfair legal treatment.

In an 1876 case, the Court continued to diminish the people's ability to gain legal redress from the federal system. *United States v. Cruikshank* nullified a federal law prohibiting racially motivated violence, making its prevention the sole provenance of the state.[283] The opinion left people's physical safety dependent on differing states' norms rather than on a congressionally created, unified standard against hate crimes. Just as *Slaughter-House* had done in the civil realm, *Cruikshank* placed states' traditional sovereignty rights ahead of the newly ratified constitutional directive for maintaining the American's welfare.

The extent to which the Court in *Cruikshank* meddled with a legitimate congressional effort deserves some further elaboration because the

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[278] *See infra* Part V.C.

[279] *See, e.g.*, DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY (2002); C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 187 AND THE END OF RECONSTRUCTION (1951).

[280] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 111 (1872) (Field, J., dissenting).

[281] *Id.* at 125, 128–29 (Swayne, J., dissenting).

[282] *Id.* at 112–16 (Bradley, J., dissenting).

[283] United States v. Cruikshank, 92 U.S. 542, 553–54 (1875); Timothy Sandefur, *Can You Get There from Here?: How the Law Still Threatens King's Dream*, 22 LAW & INEQ. 1, 12–13 (2004); Bezalel Stern, *Huck Finn and the* Civil Rights Cases*: A Case Study in Supreme Court Influence*, 30 COLUM. J.L. & ARTS 79, 87 (2006).

Supreme Court relied on the precedent as recently as 2000, in a case that struck down a civil remedy provision of the VAWA.[284]

Cruikshank was decided at a time when President Ulysses S. Grant's Justice Department began scaling back its successful civil rights enforcement.[285] That effort had helped to bring the Ku Klux Klan's reign of terror to an end, but stopped prematurely partly because of fiscal concerns and partly because the Court closed meaningful avenues for federal redress.[286] *Cruikshank* concerned 1873 acts of terrorism, known as the Colfax Massacre, perpetrated against blacks in Louisiana holding a political rally at a courthouse.[287] By the time the mob violence ended at least seventy black men and two white men had died.[288]

Federal prosecutors relied on the First Enforcement Act in obtaining almost one hundred indictments. They were far less successful at trial, however, securing only three convictions.[289] Defendants eventually appealed these convictions to the Supreme Court, where the majority refused to reach the merits of the case. Chief Justice Waite relied on a procedural device to dismiss all charges against the defendants, finding the complaints to be deficient.[290] While the Court recognized the existence of a national right to peaceful assembly,[291] it refused to extend the reach of the Fourteenth Amendment to privately perpetrated racial violence.[292]

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[284] United States v. Morrison, 529 U.S. 598, 622 (2000); *see infra* Part VI.

[285] On Grant administration prosecutions of the Ku Klux Klan, see ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 457 (1988); LOU FAULKNER WILLIAMS, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871–1872, at 123 (1996) (explaining the reason for the decline in Enforcement Act prosecutions by the Justice Department in the 1870s); Stephen Cresswell, *Enforcing the Enforcement Acts: The Department of Justice in Northern Mississippi, 1870-1890*, 53 J. S. HIST. 421, 425 (1987) (describing the reduction in the number of U.S. Army soldiers aiding Justice Department officials in the 1870s); 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) (noting federal enforcement actions against the Ku Klux Klan under the Federal Election Act); Herbert Shapiro, *The Ku Klux Klan During Reconstruction: The South Carolina Episode*, 49 J. NEGRO HIST. 34, 45–46 (1964) (describing the Grant Administration's role in assisting weak state governments in suppressing the Ku Klux Klan); Everette Swinney, *Enforcing the Fifteenth Amendment, 1870–1877*, 28 J. S. HIST. 202, 217–18 (1962) (listing the number of Enforcement Act cases by state from 1870 to 1877).

[286] *See* ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876, at xiii (1985).

[287] HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835–1875, at 488–89 (1982).

[288] FONER, *supra* note 285, at 530–31; KACZOROWSKI, *supra* note 286, at 176; LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR AND THE DEATH OF RECONSTRUCTION 109 (2008); Swinney, *supra* note 285, at 207.

[289] KACZOROWSKI, *supra* note 286, at 176–77.

[290] Waite found the indictments incomplete because they merely said that the defendants violated the victims' civil rights rather than enumerating rights enforceable by the federal government. United States v. Cruikshank, 92 U.S. 542, 552–53 (1875).

[291] *Id.* at 552–53.

[292] *Id.* at 554 ("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

Though seemingly a procedural decision, *Cruikshank* thwarted enforcement of a federal hate crimes law that had been drafted to exert the nation's post–Civil War determination to make the federal government responsible for protecting the rights to life, liberty, and the pursuit of happiness. These values had been dormant in the nation's founding documents, and the Reconstruction Amendments made them enforceable. Yet the Court found a legal technicality to prevent federal enforcement of a popularly enacted anti-terror law. "Sovereignty," Chief Justice Waite stated in the opinion, for the protection of the rights of life and personal liberty within the respective States, "rests alone with the States."[293] This meant that private discriminatory crimes could only be prosecuted in states, irrespective of whether any of them lacked adequate remedies against racist violence. State sovereignty doctrine served as an end around federal authority to prevent racially motivated violence.

The likelihood that state courts—especially those in the former Confederate states—would aggressively prosecute lynch mobs was minuscule at best because of the widespread use of witness intimidation, accepted racism, and wide-scale efforts to undermine radical Reconstruction policies.[294] Despite the Waite Court's egregious undermining of congressional Reconstruction, 125 years later, Chief Justice Rehnquist relied on *Cruikshank* to overturn a civil remedy of a popular civil rights statute, the VAWA.[295]

The Rehnquist Court also relied on the 1883 *Civil Rights Cases* for precedent in overturning federal civil liberties laws.[296] That nineteenth century decision ruled on five consolidated causes of action arising under the Civil Rights Act of 1875,[297] the Reconstruction Congress's final statute.[298] The law provided criminal and civil remedies against racial segregation in public places of accommodation, such as inns, land and water carriers, and theaters.[299]

The Civil Rights Act of 1875 showed Congress's willingness to effectuate America's heritage of universal fundamental rights. Relying on the post–Civil War shift in constitutional doctrine, the Act provided Congress with the power to end public segregation, the societal norm

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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.").

[293] *Id.* at 553.

[294] *See* Swinney, *supra* note 285, at 209–11 (arguing that racism and witness intimidation made it "extremely difficult to gather evidence").

[295] United States v. Morrison, 529 U.S. 598, 621–22 (2000); *see infra* text accompanying notes 339–45.

[296] *Morrison*, 529 U.S. at 621–27.

[297] Civil Rights Cases, 109 U.S. 3, 4 (1883).

[298] Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875); *see also* Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 22 (1995) (discussing debate about Reconstruction that arose in passing Civil Rights Act of 1875).

[299] Civil Rights Act of 1875, ch. 114, §§ 1–4, 18 Stat. 335, 335–37 (1875).

which threatened to undermine the moral achievements of Union victory. Had the Court ruled in favor of a national right to enjoy public spaces, it could have provided relief for litigants and signaled a willingness to defer to the popular will—as it expressed itself through congressional enactment—to end centuries of racial separation. In the 1880s, however, it was apparent that many in the South sought to maintain slavery by other names. Sharecropping, segregation, peonage, and the convict lease system disproportionately harmed blacks, relegating them to second-class citizenship.[300]

The *Civil Rights Cases* rejected broad use of congressional power, holding that the Fourteenth Amendment protects citizens only against state infringements and stating that "[i]ndividual invasion of individual rights is not the subject matter of the amendment."[301] Victims of exclusionism could no longer invoke the private remedy provision of the Civil Rights Act of 1875, even if states had no comparable remedy or had condoned private discrimination. The Court would 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."[302] This rationale significantly reduced Congress's power to act against private acts of discrimination. It left the essential, citizen interests of dignity and personhood at the sole discretion of the states. Here was a legislative effort to end segregation in 1875, but the Court refused to allow Congress to rely on constitutionally delegated powers to achieve that end.

The Court decided that the Fourteenth Amendment did not grant Congress authority to target and prevent social discriminations, including racial exclusion from public places of amusement and racial segregation on public carriers. It found the Civil Rights Act of 1875 to be unconstitutional

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[300] 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: AMERICA'S UNDERCLASSES FROM THE CIVIL WAR TO THE PRESENT 107 (1992). On the convict lease system, see DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II (2008), and DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996). *See also* ALEX LICHTENSTEIN, TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH (1996); KARIN A. SHAPIRO, A NEW SOUTH REBELLION: THE BATTLE AGAINST CONVICT LABOR IN THE TENNESSEE COALFIELDS, 1871–1896 (1998).

[301] Civil Rights Cases, 109 U.S. 3, 11 (1883) ("It 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."); *see also id.* at 19 ("This 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.").

[302] *Id.* at 13–14.

because the law penalized behavior unconnected to adverse state action.[303] The Court refused to defer to Congress's finding that the enjoyment of equal public accommodations was essential to the full enjoyment of human dignity.[304] Justice Bradley, who wrote for the majority, also rejected the claim that Congress could determine that racial segregation in public places was a badge or incident of involuntary servitude.[305]

Justice John Marshall Harlan stood alone in dissent. He argued that by prohibiting Congress from passing 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.[306] He agreed with the majority that Section 5 of the Fourteenth Amendment enabled Congress to enact statutes to operate directly "upon States, their officers and agents," but vigorously rejected the state action requirement.[307] Such a notion, to Harlan, was a Court created criterion rather than a substantive part of the Constitution. 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."[308]

The Thirteenth and Fourteenth Amendments, Harlan continued, authorize "legislation of a direct character, for the security of rights created by the national Constitution."[309] Turning to the issues of the *Slaughter-House Cases*, Harlan invoked "the obligation to protect the fundamental privileges and immunities granted by the Fourteenth Amendment to citizens residing in the several States."[310] In holding otherwise, Harlan stated, the majority had undermined "the foundations upon which the national supremacy has always securely rested."[311] 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 and not mere social actors.[312] Just as *Dred Scott*

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[303] *Id.* at 18–19 ("If the principles of interpretation which we have laid down are correct, as we deem them to be, . . . it is clear that the law in question cannot be sustained by any grant of legislative power made to Congress by the Fourteenth Amendment.").

[304] *See id.* (explaining the Court's disagreement with congressional legislation that "declares that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances, and places of public amusement").

[305] *See id.* at 24 (concluding that "an act of refusal has nothing to do with slavery or involuntary servitude").

[306] *Id.* at 57 (Harlan, J. dissenting).

[307] *Id.* at 36, 46.

[308] *Id.* at 36.

[309] *Id.* at 57.

[310] *Id.* at 54–57.

[311] *Id.*

[312] *See id.* at 58–59 ("In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable, in respect of their duties and functions, to governmental regulation.").

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."[313]

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 augmented its own authority at the expense of congressional initiatives meant to prevent the spread of discrimination. In the *Civil Rights Cases*, an antebellum notion of federalism, restraining Congress from protecting individual rights, trumped petitioners' demands for the protection of elementary human dignity. The Court thus gave its institutional imprimatur to a racially binary America, which for a brief time Congress had tried to bring to an end. The federal government soon became intransigent in the face of a growing number of Jim Crow laws. In recent years, the Court has further eroded legislative prerogatives intended to enforce federally recognized civil rights.

C. *Contemporary Judicial Restraints on Congressional Authority*

Late nineteenth century cases, like *Cruikshank* and the *Civil Rights Cases*, significantly eroded congressional Thirteenth and Fourteenth Amendment enforcement authority. Even if congressmen had the will to pass additional laws commensurate with the country's founding principles, they were likely to be overturned. The effort to integrate the American Creed into enforceable federal laws, which the Supreme Court had obstructed following Reconstruction, had to await passage of the Civil Rights Act of 1964.

The civil rights era of the 1960s increased Americans' awareness of minority rights. Given this cultural change, the Court might have become increasingly deferential to civil liberties laws passed pursuant to the Reconstruction Amendments. To the contrary, in the 1990s, the Supreme Court increasingly interfered with congressional policies. During the same period, the Court augmented state sovereign immunity above federal employment guidelines for the fair treatment of elderly and disabled workers. The Court persisted in relying on post-Reconstruction precedents to defeat statutes dealing with core national rights.

City of Boerne v. Flores, for example, falls within the continuum of cases that erect barriers against Congress's ability to impose federal civil rights norms on state actors.[314] Not only had the Court limited the scope of the Fourteenth Amendment to state actions since the *Civil Rights Cases*, as of late it also immunized states' officials from liability; thereby, it entirely

[313] *Id.* at 57.
[314] *See supra* Part V.

closed certain avenues for federal relief. *Boerne* held that Congress had exceeded its Section 5 power in passing the Religious Freedom Restoration Act (RFRA).[315] The majority found the law to be neither congruent nor proportional to any judicially recognized violation of the Fourteenth Amendment.[316] The Act had been 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.[317]

A bipartisan majority passed RFRA in response to the Supreme Court's holding in *Employment Division v. Smith*.[318] That case found states could enforce laws of general applicability, such as drug enforcement statutes, even when those laws restrained persons from exercising their religion.[319] Thus, according to *Smith*, Oregon had not violated the Free Exercise Clause by punishing a devotee of the Native American Church for the ritual use of peyote, which was a "controlled substance" under state law.[320]

RFRA meant to overrule *Smith* by reinstating a strict scrutiny standard of review on state conduct that placed substantial burdens on individuals' religious exercise.[321] The holding in *Boerne*—that the statute was unconstitutional—came as a surprise because the incorporation doctrine indicates that uniform standards against state infringement of religious rights is a core responsibility of national government. The First Amendment applies to the states through its incorporation under the Fourteenth Amendment, and Section 5 of the latter grants Congress the authority to protect religious practices from government interference.[322] In overturning the statute, the Court vastly increased its own power, finding itself to be the only branch of government that can define what inalienable rights the Fourteenth Amendment protects. It appears the Court augmented its power as the final determinative authority of constitutional interpretation at the expense of a democratic measure designed to protect civil liberties.

Boerne implicitly rejected *Katzenbach v. Morgan*'s assertion 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."[323] To the contrary, *Boerne*

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[315] City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

[316] *Id.* at 520, 536.

[317] 42 U.S.C. §§ 2000bb–2000bb-4 (2000).

[318] Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 21 n.97, 44 (2003).

[319] Employment Div. v. Smith, 494 U.S. 872, 882 (1990).

[320] *Id.* at 877–82.

[321] 42 U.S.C. § 2000bb-1(b).

[322] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[323] Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

denied that Section 5 granted Congress the authority to decide what "constituted a substantive violation of Section 1 of the Fourteenth Amendment."[324]

Morgan made clear that Section 5 does not limit the legislative branch "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional."[325] In his majority opinion, Justice Brennan explained that "[b]y including [Section] 5," the Reconstruction Congress "sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause."[326] This characterization meant Congress could rely on its broad grant of enforcement authority to identify appropriate policies needed for enacting regulations to achieve legitimate constitutional aims.[327] Acting in accordance with the Declaration of Independence and Preamble principles, legislators could remain disciplined in protecting fundamental rights while preventing governmental infringements.

Instead of relying on *Morgan*'s substantive interpretation of enforcement authority, *Boerne* reached back to a Gilded Age precedent that had undercut liberalizing efforts, reaffirming the *Civil Rights Cases*. *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 any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws."[328] The 1871 statute punished private violence "without reference to the laws of the State or their administration by her officers."[329] *Boerne* relied on these cases for the premise that Section 5 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.[330] Pursuant to this rule, only laws congruent and proportional for remedying unconstitutional state behavior can survive judicial scrutiny.[331] Applying this standard, the *Boerne* Court diminished individuals' ability to seek

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[324] Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 694 (2000).

[325] *Morgan*, 384 U.S. at 648–49.

[326] *Id.* at 650.

[327] *Id.* (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819), which established the current scope of Necessary and Proper Clause authority).

[328] Act of Apr. 20, 1871, ch. 22, § 2, 17 Stat. 13; United States v. Harris, 106 U.S. 629, 638–39 (1882). 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).

[329] *Harris*, 106 U.S. at 640.

[330] City of Boerne v. Flores, 521 U.S. 507, 520 (1997) ("The Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause.").

[331] *Id.* at 520, 530, 532.

legal redress for violations of an essential aspect of fundamental American liberty, the nationally recognized right to worship freely without substantial state interference.

In asserting the exclusivity of its power to define substantive Fourteenth Amendment rights, the *Boerne* Court denied that Section 5 granted Congress the authority to determine independently what laws are necessary and proper to prevent state infringements against a First Amendment right. Congress, the Court claimed, lacked the mandate "to decree the substance of the Fourteenth Amendment's restrictions on the States."[332] The latter was predicated on the Court's presumed supremacy in the interpretation of the Constitution. Beginning in 1803 with *Marbury v. Madison*, the established principle has been that "the federal judiciary is supreme in the exposition of the law of the Constitution."[333] That definition of judicial function is an abiding fact in our tripartite system of governance.

A key 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 only a severely hampered role in determining and safeguarding rights essential to the American heritage as free exercise is contrary to what the debates on the Fourteenth Amendment and the Civil Rights Act of 1866 revealed. Participants in those debates, which this Article extensively discussed earlier, indicated that the Thirteenth and Fourteenth Amendments were meant to reduce the judiciary's ability to undermine the use of legislative power for the expansion of civil rights. The legislature was to be primarily guided by the principles of the Declaration of Independence and the Preamble in establishing liberty principles according to the people's will.[334] Instead, *Boerne* conceived the judiciary to be the supreme and only source for rights definitions, effacing the people's ability to make its collective will known through their representatives' enactments.

In fact, debates on both the Thirteenth and Fourteenth Amendments indicated a national decision to expand congressional authority rather than to confine it to a mere remedial role. Erwin Chemerinsky has pointed out that *Boerne*'s remedial interpretation of congressional authority rests on the mere fact that Congressman Bingham's final draft of the amendment was less comprehensive sounding than the first draft.[335] 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

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[332] *Id.* at 519.

[333] Cooper v. Aaron, 358 U.S. 1, 18 (1958) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[334] *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 51 (1999).

[335] Erwin Chemerinsky, *Politics, Not History, Explains the Rehnquist Court*, 13 TEMP. POL. & CIV. RTS. L. REV. 647, 651 (2004).

all the citizens of the Republic . . . whenever the same shall be abridged or denied by the unconstitutional acts of any State."[336] The majority erred, however, in finding a law against state abridgement of religious freedom was incongruous with Bingham's statement. Even the *Slaughter-House Cases*' shallow interpretation of privileges and immunities, which listed among these the First Amendment "right to peaceably assemble and petition for redress of grievances,"[337] would allow for congressional intervention in state violation of religious rights. At the time of passing the amendment, Representative Stevens forcefully argued that the amendment would "allow[] Congress to correct the unjust legislation of the States,"[338] likewise indicating that a federal remedy against any state interference with the right to worship is a congruent and proportional use of Section 5 authority.

The Court's analytical error was to presume that it is the sole determiner of what fundamental rights are protected under the Fourteenth Amendment. Cases like *Boerne* seem to conceive of no higher authority than the Court. American heritage, on the other hand, posits primary responsibility for identifying inalienable rights in the people who have a say in government through their congressional representatives. The people retain inalienable rights and do not give government the authority to limit these rights except for the general welfare. It seems illogical, therefore, to claim that the power to assess the nature of enumerated and unenumerated rights resides exclusively in unelected government officials. A more direct, immediate, and wide-ranging way for the people to act in their interest is by electing officials who are politically accountable for their policy choices. The judiciary's role in preventing majorities from trampling the constitutional interests of minorities is inapplicable where the legislation is designed to add safeguards of essential interests, like the free exercise of religion.

United States v. Morrison further illustrates this diminished legislative authority to identify fundamental rights and to pass laws protecting them.[339] The Court again found that Congress overstepped its legislative Section 5 authority when it created a private cause of action under the VAWA.[340] As in *Boerne*, the Court predicated its decision on a reading of Section 5 that only allowed Congress to respond to state wrongs after it had conducted exhaustive evidentiary hearings producing proof that states had abridged court-defined rights. Congress had, in fact, developed a massive factual record before it enacted VAWA, finding a national

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[336] City of Boerne v. Flores, 521 U.S. 507, 522 (1997) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866)).

[337] *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

[338] *Boerne*, 521 U.S. at 522 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866)).

[339] United States v. Morrison, 529 U.S. 598, 617, 627 (2000).

[340] *Id.* at 605, 627.

solution was critical because many states' responses to gender-based violence were inadequate.[341] Congress relied on a "mountain of data" amassed through nine congressional hearings and four years worth of gender task force reports from twenty-one states.[342] A 5–4 majority of the Court,[343] nevertheless, found itself to be a better judge of the constitutional appropriateness for the legislation than a bipartisan majority of Congress.

Just as in *Boerne*, 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.[344] The Court also found *Cruikshank*, which derailed Congress's nineteenth century attempt to end racial violence, to be an important precedent that supported the decision to strike down VAWA.[345] Jurisprudence which had dismantled Reconstruction now provided a lynchpin for disemboweling the private remedy against gender-based violence.

Morrison's premise—that Congress must answer to the Court for the creation of an adequate record detailing state violations—conceived Congress to function somewhat like an administrative agency or a prosecutor acting against recalcitrant states.[346] Congress is instead an institution of the people's representatives who are institutionally responsible for protecting basic liberties for the common good. If Congress were required to amass a record of abuse from all states before it could act to quell systemic abuses, then its ability to act quickly for the general welfare would be severely hampered.

The most robust stance on supreme federal civil rights authority would make Congress's determination of its Section 5 authority final in the same way that the Supreme Court's interpretation of its Article III powers is final. To be clear, this refers to legislation meant to protect constitutional rights associated with human dignity, not statutes dealing with regulatory matters like money laundering.

Under this robust model, to overturn a liberty enhancing law passed pursuant to Congress's Fourteenth Amendment authority, a constitutional amendment would be needed.[347] This is similar to the use of the

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[341] *Id.* at 653–54 (Souter, J., dissenting).

[342] *Id.* at 628–31.

[343] *Id.* at 600 (majority opinion).

[344] *Id.* at 621–23.

[345] *See supra* text accompanying notes 283–84.

[346] *See* Post & Siegel, *supra* note 318, at 13 (referencing Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001), where the Court "reasons about Section 5 legislation as if it were an accusation, and as if states subject to its regulation were defendants in a lawsuit"). I am indebted to Aviam Soifer for the agency analogy.

[347] *See* U.S. CONST. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either

amendment process as the only means of overturning the Supreme Court's interpretation of the Constitution. It would be the people, then, not the judiciary, who could determine whether laws purporting to protect substantive due process or equal protection comport with the founding and evolving principles of governance.

The advantage of this method is that it would favor democratic self-governance. Its potential disadvantage is that it is likely to lead to disagreements between legislative and judicial interpretations of the Constitution. In order to avoid such a conflict between the branches, Congress would need to respect judicial interpretation of the Constitution. This can be achieved by allowing Congress to expand rights beyond the Court's guidelines, but not to intrude on those the Court has identified, like the right to privacy. Likewise, the Court would be able to identify rights, but not to undermine Congress through judicial creations, like sovereign immunity.

The congressional debates discussed earlier in this Article indicate that many advocates of the Thirteenth and Fourteenth Amendments supported plenary congressional powers over civil rights. The amendments' supporters simply could not have anticipated the extent of judicial interference following ratification, given that until 1866 only two Supreme Court cases held federal statutes to be unconstitutional.[348] They expected that one of Congress's roles would be to identify practical ways of achieving the central tenet of the Declaration of Independence and the Constitution: The protection of individual rights for the general welfare.[349]

Article 5 of the Fourteenth Amendment and Article 2 of the Thirteenth Amendment grant Congress the power to expand safeguards for critical American rights. Legislative independence in identifying constitutional rights, therefore, has a textual basis. The notion that the Court can contract rights Congress has recognized by statute is a regressive form of jurisprudence that runs counter to the country's avowed commitment to "establish Justice" and "secure the Blessings of Liberty."[350] By diminishing the American people's entitlement to file federal claims to vindicate statutorily identified liberties, the Court strengthened state sovereignty while stifling progressive measures. If the electorate disagrees with its representatives' concept of protectable interests, it can vote them out of office or pass a constitutional amendment.

Of course, if they were enabled to interpret the Constitution independently, it is probable that some congressmen would abuse their

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Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths . . . .").

[348] *See supra* note 249 and accompanying text.

[349] *See* Jed Rubenfeld, *The Paradigm-Case Method*, 115 YALE L.J. 1977, 1987–88 (2006) (discussing the paradigm case method of constitutional interpretation).

[350] U.S. CONST. prmbl.

new status. But the current situation, in which a five Justice majority of the Supreme Court can strike a law like VAWA, which Congress found constitutional after years of fact-gathering, is itself rife for cultivating erroneous precedents. The idea that rights-expanding statutes can be overturned by a simple majority of judges (or justices for that matter), without the input of the electorate, is no consolation for women who find state redress for domestic violence inadequate.[351]

The strong form of this Article's proposal carries the risk of legislative abuse rectified only through a drawn out amendment process or periodic elections. It also differs drastically from the current model of judicial review.[352] Indeed, the judiciary's judgments are often more objective because they are less susceptible to political pressures than are the legislative's judgments. The Court's constitutional analysis can therefore be important for preventing the administration of inflexibly draconian laws, like mandatory sentencing guidelines.[353] It is therefore important to develop a more moderate alternative, allowing Congress to enact legislation to further the principles of the American Creed while preserving judicial review. To that end, a more likely use of Section 5 power would allow Congress to identify and pass civil rights laws that the Court could later review through low level scrutiny. Congress could identify rights even before the Court has flagged them. If the Court finds that a law is not rationally related to the purported just aim, it can still overturn the statute.

A rational basis of review would enhance the federal government's involvement in core purposes of national decision-making. This approach to federalism would require the Court to be deferential toward congressional policy when balancing the enhanced liberty protections against state sovereignty concerns. As Erwin Chemerinsky has pointed out, the Court's recent preference for state rights has been part of a historical pattern, which was evident in the *Civil Rights Cases*, to rely on federalism "to resist progressive federal efforts, especially in the areas of civil rights and social welfare."[354] He recommends replacing the

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[351] *See* ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 151 (1999) ("States are obligated to ensure equal protection for rape victims at . . . trials, whether we root that obligation in the federal or state constitutions or the dictates of sound policy."); Sally F. Goldfarb, *The Supreme Court, The Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 86 (2002) ("[E]ven in states that had dramatically reformed their rape and domestic violence statutes, enforcement remained profoundly inadequate.").

[352] *See, e.g.*, Robert Justin Lipkin, *Which Constitution? Who Decides?: The Problem of Judicial Supremacy and the Interbranch Solution*, 28 CARDOZO L. REV. 1055, 1077–78 (2006); Richard Stith, *Securing the Rule of Law Through Interpretive Pluralism: An Argument for Comparative Law*, 35 HASTINGS CONST. L.Q. 401, 433 (2008); Adam Winkler, *The Federal Government as a Constitutional Niche in Affirmative Action Cases*, 54 UCLA L. REV. 1931, 1949 (2007).

[353] Gall v. United States, 128 S. Ct. 586, 594 (2007) (finding federal sentencing guidelines to be advisory and reasonable deviation from them only subject to abuse of discretion appellate review).

[354] ERWIN CHEMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY 6 (2008).

formalistic approach to federalism, which prevented battered women from filing suits in federal courts, with "a functional analysis of how to equip each level of government with the authority to deal with social problems and enhance liberty."[355]

Under the approach advanced in this Article, the Court would have to uphold any laws protecting fundamental rights so long as congressional debates and hearings provide it with a rational basis to find that group discrimination, violation of a political right, or infringement of a fundamental interest should be addressed by a uniform federal law.[356] Where Congress's purpose is to expand rights, the Court should go no further than determining whether the statute is reasonably related to the equal protection of liberties. The strict scrutiny standard should be left to cases where Congress has undermined a Court-recognized right.

As for current jurisprudence, *Morrison*'s fact-finding requirement misconstrues the legislature's function by placing it under tutelage of the judiciary rather than construing it to be a coequal branch bound by the Preamble to the Constitution's statement of governmental purposes.[357] Federal civil rights laws can apply to all states, even those with no history of violating them. What is required is national policymaking that accords with the historical expansion of American civil rights.

The Court's requirement that Congress demonstrate that it is responding to a proven harm has much in common with the judicial doctrines of standing and ripeness. But that methodology has little place in the context of the legislature's typical policymaking 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 such rights.[358] The Reconstruction

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[355] *Id.* at 8.

[356] The initial recognition of this judicial scrutiny derives from footnote four of *Carolene 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: "[P]rejudice 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).

[357] *See* Calvin Massey, *Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power*, 76 GEO. WASH. L. REV. 1, 15–16, 25–26 (2007) (discussing the Court's rationale for striking down the Violence Against Women Act because evidence of gender-motivated crimes in twenty-one states did not establish "evidence of a national problem").

[358] U.S. CONST. amend. XIV § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

Congress included that legislative power to provide the constitutional authority necessary to pass laws for the common good, making judicial deference constitutionally imperative.

This allocation of power renders governance more efficient: Congress has greater resources than the judiciary to evaluate social problems and pass laws furthering liberty according to the nation's core principles.

Relying on the same restraint of congressional civil rights authority as it did in *Morrison*, the Supreme Court went on to strike the state compliance provision of the Age Discrimination in Employment Act (ADEA).[359] The Court again raised its definitive voice in constitutional definition-making above Congress's power to prevent arbitrary employer conduct.[360] In *Kimel v. Florida Board of Regents*, Justice O'Connor relied on a textually dubious interpretation of the Eleventh Amendment as a source of sovereign immunity that allows states to abrogate national standards of workplace decency.[361]

The Court's principal concern was preventing federal overreaching rather than safeguarding the interests of older Americans for whom the law had provided redress against state ageism.[362] Rather than balancing competing interests, the Court refused to analyze the relative value of individual rights and state sovereign immunity.[363] The majority did not so much as hint at how the Fourteenth Amendment altered federalism and

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[359] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 67 (2000).

[360] *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (stating that *Marbury* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution"). While judicial review is an essential feature of the American legal system, it is not a license for intruding on congressional prerogatives to pass civil rights laws that are based on Fourteenth Amendment enforcement authority and are rationally related to the goal of achieving the Preamble's mandate for the government to protect fundamental rights for the general welfare. *See supra* Part IV.C.

[361] *Kimel*, 528 U.S. at 72–73. For constitutional criticism of the Court's interpretation of the Eleventh Amendment, see 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."); Jackson, *supra* note 324, at 701 ("Not only does the Court revert to an unjustifiably heroic mode of insisting on sovereign immunity as a first principle of government, 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."); Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 820 (1999) (arguing for the existence of constitutional state sovereign immunity while stating that "the texts of the Tenth and Eleventh Amendments simply do not provide for such immunities and constitutional structure, while a useful aid to interpretation, is not itself text"); 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").

[362] *See Kimel*, 528 U.S. at 86 (noting that ADEA, "*through its broad restriction on the use of age as a discriminating factor*, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard") (emphasis added).

[363] *See id.* at 78 (concluding that "Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity").

augmented congressional authority to punish state infringements of individual rights.[364] The Amendment's ratification substantially increased Congress's role in protecting people against state violations of their basic interests.[365] *Kimel* diminished the federal government's ability to punish arbitrary treatment of a protected group.

A rational standard of review would have provided verifiable analysis instead of whimsical reliance on the Eleventh Amendment. Under a more deferential review, there seems to be nothing illegitimate about Congress's decision to promote the "employment of older persons based on their ability rather than age."[366] That policy, in fact, seems to accord with the Declaration of Independence's emphasis on equality. The Court's analysis in *Kimel*, to the contrary, applied the rational basis standard to state rather than federal action. It focused on a state's right to "discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest."[367] Placing state prerogatives ahead of federal civil rights norms turned the rational basis argument on its head, providing the Court with a justification to decrease the supremacy of Section 5, the Fourteenth Amendment's enforcement authority.

In his dissent to *Kimel*, Justice Stevens argued that the federal government can legitimately rely on its authority to prohibit private and public acts of discrimination committed in the labor market.[368] 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."[369] In Stevens's view, the Court usurped the legislative branch's lawmaking discretion.[370]

On the heels of *Kimel*, the Court invalidated a provision of the Americans with Disabilities Act in *Board of Trustees of the University of Alabama v. Garrett*.[371] This was a law that President George H. W. Bush likened to the Declaration of Independence, hoping that "the Americans with Disabilities Act [would] . . . be a model for the choices and opportunities of future generations around the world."[372] Given this

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[364] *See* Chemerinsky, *supra* note 335, at 1213 (noting that "the state employees in *Kimel* . . . have federal rights, but due to sovereign immunity, no remedies").

[365] *See supra* Part IV.C.

[366] 29 U.S.C. § 621(b) (2000) ("It is . . . the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.").

[367] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000).

[368] *Id.* at 92–93 (Stevens, J., dissenting in part and concurring in part).

[369] *Id.* at 93.

[370] *Id.* at 96.

[371] Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001).

[372] Statement on Signing the Americans with Disabilities Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1165, 1166 (July 26, 1990).

principled statement of purpose, the law was a deliberate effort to expand opportunities for the handicapped. Under my deferential model, the constitutionality of this law should have been reviewed under a rational basis test because the statute expanded liberty rights.

Garrett found that Congress lacked the Section 5 power to create a private cause of action for disabled workers to sue their state employers for failing to make reasonable work-related accommodations.[373] Congress was thereby precluded from protecting workers despite extensive evidence of states' discriminatory conduct against disabled employees.[374] Drawing on its reasoning in *Boerne*, the Court decided that "[t]he legislative record of the ADA . . . simply fail[ed] to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."[375] The Court allowed all states, even those Congress had found violated national standards of employment decency, to police their own conduct without having to comply with national employment standards. The ADA was enacted, in large part, to enforce Fourteenth Amendment authority to establish a nationally comprehensive mandate against workplace discrimination.[376] Rather than deferring to this congressional civil rights policy, the Court gave states a pass by instituting a low threshold of review for their treatment of the handicapped.

An earlier case, *City of Cleburne v. Cleburne Living Center*, had, in fact, established a rational relation scrutiny for a city ordinance affecting the handicapped, but that case resulted in a victory for the disabled.[377] Discrimination against the handicapped based on stereotypes rightly did not survive rational basis scrutiny in *Cleburne*, and expansion of their rights through the ADA should have been found to be within Congress's Section 5 power to prevent "irrational prejudice."[378] *Garrett*, on the other hand, disregarded the Reconstruction Amendment's emphasis on federal supremacy in matters of civil rights law, relying on a low threshold of scrutiny to tolerate state employers' discriminatory conduct against the disabled.[379]

The *Garrett* Court, 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

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[373] *Garrett*, 531 U.S. at 374.

[374] *See id.* at 391–424 (Breyer, J. dissenting) (listing examples of discriminatory conduct by state).

[375] *Id.* at 368 (majority opinion).

[376] Americans with Disabilities Act, 42 U.S.C. § 12101(b) (2000).

[377] City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). On *Garrett*'s selective misapplication of the *Cleburne* standard, see Aviam Soifer, *Disabling the ADA: Essences, Better Angels, and Unprincipled Neutrality Claims*, 44 WM. & MARY L. REV. 1285, 1292–93 (2003).

[378] *Cleburne*, 473 U.S. at 450.

[379] Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 372–73 (2001).

the states. The Court effectively placed states' sovereignty interests above the equal protection of liberty interests.

Nevada Department of Human Resources v. Hibbs produced a different outcome. While the Court had rejected Congress's authority to prevent state perpetrated age and disability discrimination, in *Hibbs* it upheld a private cause of action against states violating the Family Medical Leave Act (FMLA).[380] The Court deferred to Congress explicitly because the statute prohibited gender discrimination.[381] The decision relied on the intermediate standard of scrutiny applicable to gender stereotype cases.[382] This was distinguishable from *Garrett* and *Kimel* because those cases concerned disability and age respectively, to which the Court has applied only a rational basis of review. However, that distinction did not explain why in *Morrison* the Court did not uphold the VAWA on the basis of intermediate scrutiny. The VAWA was intended to combat widespread gender discrimination in state courtrooms, a goal that seems as important as providing medical leave to take care of sick relatives.[383]

The Court might have avoided the contradiction in *Hibbs* and *Morrison* by focusing on whether the statutes involved were rational uses of congressional Section 5 power to further American freedom. Both FMLA and VAWA were liberty enhancing laws. And judicial deference to congressional decision-making would have enabled Congress to enforce the equality principles asserted idealistically in the Declaration of Independence and pragmatically in the Thirteenth and Fourteenth Amendments. Instead, in *Morrison* the Court acted as a super-legislature, overturning bipartisan political effort, while in *Hibbs* it chose to give Congress a pass.

In another recent case abrogating state immunity, the Court's rationale likewise focused on state actions rather than congressional plenary power to safeguard civil liberties. *Tennessee v. Lane* upheld Title II of the ADA's provision for private damages arising from discrimination in the access to court facilities.[384] The Court invoked a standard of review approaching strict scrutiny because a fundamental right of access to the courts was involved.[385] The positive outcome in this case cannot be reconciled with *Boerne*, where the Court struck a law that protected religious freedom.[386] Both access to courts and free exercise of religion are subject to heightened

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[380] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

[381] *Id.* at 736.

[382] *Id.*

[383] J. Randy Beck, *The Heart of Federalism: Pretext Review of Means-End Relationships*, 36 U.C. DAVIS L. REV. 407, 435 (2003) (stating congressional purpose behind VAWA).

[384] Tennessee v. Lane, 541 U.S. 509, 525–29 (2004).

[385] *Id.* at 529; *see also id.* at 522–23 (stating that the federal statute "seeks to enforce a variety of . . . basic constitutional guarantees, infringements of which are subject to more searching judicial review").

[386] *See supra* text accompanying notes 314–17.

scrutiny review, so the analysis should have been similar. These are both cases dealing with liberty enhancements that, since the Reconstruction, have been constitutionally subject to congressional authority.

Even though *Hibbs* and *Lane* upheld federal civil rights laws, they remained committed to a limited view of legislative authority. The Court found that Congress cannot stamp out discrimination without the Court's prior imprimatur of constitutionally recognized rights.[387] And that approach hampers Congress from independently identifying fundamental American rights and passing necessary and proper laws to protect them. *Hibbs* and *Lane* do provide some guidance for Congress, indicating that in order to pass constitutional muster, civil rights statutes must safeguard those rights the Court previously recognized to be sufficiently 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 reasonable laws to protect such rights.[388]

By ratifying the Fourteenth Amendment, the people granted Congress authority to establish national standards for state imposed or condoned inequalities. The judiciary's role is to strike any law lacking a rational relation to the legitimate purpose of protecting individual rights. However, it undermines the underlying notion of representational democracy for judges to prohibit lawmakers from protecting identified rights retained by the people.[389]

VI. CONCLUSION

From the Revolutionary Era through post–Civil War Reconstruction and into the present, protecting essential rights has remained one of the government's foremost imperatives. 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 Amendments, congressional enforcement authority expanded, but the Court resisted that constitutional revolution. Recent cases have continued to resort to the narrow view of congressional civil rights authority.

Rehnquist Court decisions, such as *Boerne* and *Morrison*, do not reflect the Reconstruction Amendment's grant of legislative enforcement authority to promulgate policies reasonably calculated to protect fundamental rights. The system of checks and balances does not grant the

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[387] *Lane*, 541 U.S. at 533; Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 740 (2003).

[388] *See supra* text accompanying notes 243–49.

[389] *See* Massey, *supra* note 357, at 38.

Supreme Court a monopoly on the definition of constitutionally protectable interests.

The Court and Congress have equally important roles to play in enhancing liberty interests. The Court's principal role, as the final arbiter of constitutional meaning, enables it to overturn inequitable legislation. Legislative constriction of Court established rights, such as the right to racial intermarriage, warrants strict judicial scrutiny.

However, where Congress is acting to protect fundamental rights, the judiciary's role is to determine whether Congress had a legitimate reason for passing the law. Where such a rationale exists, the statute should not be overturned even when the corrective legislation prohibits discrimination against groups, such as the disabled and elderly, to whom the Court applies a rational basis standard of review. After all, congressional authority to protect liberty rights is explicitly constitutional, while judicial standards of review are not.[390]

[390] Fallon, Jr., *supra* note 356, at 1268.