DEFYING CONGRESSIONAL INTENT: JUSTICES MILLER AND BRADLEY ALTER THE COURSE OF RECONSTRUCTION

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Following the end of the Civil War, the 39th Congress met to consider legislative proposals that would grant to Blacks the same civil rights and statutory guarantees then afforded to whites. To that end, the 39th Congress passed two Constitutional amendments, several civil rights bills, and a series of enforcement acts. In the process, Congress made clear in its debates that the federal government would have an expanded role in the domain of civil rights protection and enforcement of Constitutional mandates. The United States Supreme Court, in considering the federal government's authority, failed to acknowledge the intent of Congress in this respect. This article argues that the failure of the Court to recognize and apply this intent significantly impeded the development of civil rights for Blacks and encouraged a disregard for equal enforcement of Constitutional guarantees that continues, in part, to the present.

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I. INTRODUCTION

The Civil War was over and, as of December 1865, the Thirteenth Amendment was enshrined in the Constitution.[1] Little changed, however, in the aftermath of the conflict. Shortly after the war, the United States Congress received reports of widespread violence against recently freed slaves.[2] Restrictive laws called "Black Codes" required Black men to sign labor contracts or face prosecution and limited the ability of former slaves to own firearms, to travel from one county to another without a pass, to serve as a minister, to testify in court, and to serve on juries.[3] Congress responded to these reports and conditions by enacting the Civil Rights Act of 1866, the Fourteenth and Fifteenth Amendments to the Constitution, and a series of Enforcement Acts—all of which were designed to bring a measure of protection and equal rights to the freedmen[4].

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[1] U.S. CONST. amend. XIII; *infra* Appendix.

[2] CONG. GLOBE, 39th Cong., 1st Sess. 39, 41 (1866) (statement of Senator Henry Wilson) [hereinafter 39th Cong. 1st Sess.].

[3] *Id*. at 474; ERIC FONER, THE SECOND FOUNDING 47–48 (2019).

[4] U.S. CONST. amend. XIV; U.S. CONST. amend. XV; The Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866), *infra* Appendix, (contains the relevant text of the Civil Rights Act of 1866, the Fourteenth and Fifteenth Amendments as well as the identity and relevant text of the enforcement acts passed by Congress during the period in question.)

With the passage of these Amendments and Acts, Congress provided the United States Supreme Court with a singular opportunity to shape post-Civil War constitutional law. The language Congress adopted in these measures reflects Congressional intent to ensure fundamental rights for all against state action, including state inaction, and to provide universal due process and equal application of law where states were delinquent.[5] It was left to the Courts to effectuate this intent and thereby secure the nascent liberties of the freedmen in the South. The Supreme Court profoundly failed to do either.

The Supreme Court's failures in this respect are incomprehensible given the debate language of the Framers. In particular, the words of John Bingham, Thaddaeus Stevens, James Wilson, and Jeremiah Wilson in the House, and Jacob Howard of Michigan, Lyman Trumbull of Illinois, and John Pool of North Carolina in the Senate, the principal Framers, clearly expressed Congress's intent in passing the Amendments and Acts.[6] As described below, the Court, led by Justices Samuel Miller and Joseph Bradley, chose to largely ignore this language and the Framers' post-war objectives as expressed during the debates. These justices, with little or no discussion of these objectives, settled on interpretations grounded in the jurisprudence of pre-war federalism.[7]

It is perhaps debatable whether different outcomes at the Supreme Court during and shortly after Reconstruction could have prevented the violence, the denial of civil and legal rights, and the overall exclusion of the recently freed slaves from white society during this period and later.[8] What is not debatable is the deep disconnect between how Miller and Bradley understood the Fourteenth Amendment and the Enforcement Acts, and how the

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[5] *See* discussion *infra* Section II

[6] *See Id.*

[7] *See* discussion *infra* Section III.

[8] This article is focused on outcomes at the United States Supreme Court. Congressional intent fared better in the lower courts. *See* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction,* 61 N.Y.U. L. REV. 863, 867–868 (1986).

Framers of those Amendments and Acts understood them. The failure of these justices, especially in *Slaughter-house*[9] and *Cruikshank,*[10] to give meaning to Congressional intent helped institutionalize segregation for the next several decades, and facilitated the rise of Jim Crow. As noted by Reconstruction scholar Eric Foner, "[w]hen it comes to the status of Black Americans, however the 14th Amendment's promise has never been fulfilled."[11]

This article argues that the horror of the Jim Crow era, including the physical terror perpetrated by non-state actors, might have been prevented or curtailed had the Waite and Fuller Courts: (1) endorsed the scope of the privileges and immunities clause as intended by the Framers, including the incorporation of the first eight amendments, (2) acknowledged that under the Fourteenth Amendment and the Enforcement Act of 1870, state action was broader than the legislative branch, and that state *inaction*, in the form of denials or omissions of protection by the judicial and executive branches of state government, was violative of the Fourteenth Amendment, (3) acknowledged or understood that Section 6 of the Enforcement Act of 1870 was directed at the conduct of individuals, and required neither a racial nor state action predicate, and, (4) given the term "civil rights" a construction sufficiently tolerant of the broader goals of the Framers of the Fourteenth Amendment, as suggested by Justice Harlan.

Section II, What the Framers Intended, discusses the Congressional debates that preceded passage of the Civil Rights Act of 1866, the Fourteenth Amendment, and the Enforcement Act of 1870. This section is critical to understanding the intent of Congressional leaders at that time to provide freedmen rights equal

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[9] The Slaughter-house Cases, 83 U.S. 36 (1873); *see* discussion *infra* Section III.

[10] United States v. Cruikshank, 92 U.S. 542 (1875); *see* discussion *infra* Section III

[11] ERIC FONER, *The Lost Promise of Reconstruction*, N.Y. TIMES (Sept. 7, 2019) at SR 7.

to those of whites and to prevent the states from usurping these rights.

Section III, Justices Miller's and Bradley's Misunderstanding of Congressional Intent, discusses the lead opinion of Justice Miller in *Slaughter-house Cases*,[12] and the opinions of Justice Bradley in *Cruikshank*[13] and *The Civil Rights Cases.*[14]. The discussion of these cases illustrates the failure of the Court justices to acknowledge the Framer's intent as to the Fourteenth Amendment and the Enforcement Act of 1870, especially Sec. 6 of that Act.

Section IV, The Fuller Court's Further Erosion of Congressional Intent, discusses the impact of Justices Miller's and Bradley's opinions discussed in Section II, and the failure of the Fuller Court justices to acknowledge Congressional intent as to the Fourteenth Amendment and the Enforcement Act of 1870.

Section V, Conclusion, summarizes the lasting damage and impact of the cases discussed in Sections II and III to the causes of civil rights and racial justice.

II. WHAT THE FRAMERS INTENDED

In December 1865, about eight months after President Andrew Johnson had been inaugurated, the 39th Congress at last convened. By the time it convened, Republican Congressional leaders understood that they would have to confront the ugly outcomes of the Black Codes and the unabated racial attitudes in the South. The latter was exemplified by President Andrew Johnson's assertion in September 1865 that "this is a Country for white men and …as long as I am president it shall be a government for white men."[15]

The response by these Republicans over the next several years was to expand the authority of the federal government in its relationship to the states and to provide federal protection of

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[12] Slaughter-house, 83 U.S. 36 (1873); *see* discussion *infra* Section III

[13] United States v. Cruikshank, 25 F. Cas. at 708 (C.C.D. La. 1874). Chief Justice Waite's majority opinion at the Supreme Court is also discussed.

[14] The Civil Rights Cases, 109 U.S. 3 (1883).

[15] BRENDA WINEAPPLE, THE IMPEACHERS 83 (2019).

certain basic and fundamental rights. They did this with the passage of the CRA of 1866, the Fourteenth Amendment, and the Enforcement Acts of 1870 and 1871, and, in so doing, brought about a historic shift in the balance of power between the states and the federal government. As a first step in this respect, Congress decided to "inquire into the condition of the States which formed the so-called Confederate States of America, and report whether they, or any of them, were entitled to be represented in either house of Congress."[16] To this end, the Congressional Joint Committee on Reconstruction, a bipartisan group of Republican and Democratic Senators and House members, took testimony and evidence on the existing social and political conditions in those states. For the next several months, the Joint Committee heard eye-witness accounts of the desperate circumstances that remained for the Black community in much of the South.[17] To address these conditions, Committee member and Representative John Bingham, a Republican from Ohio, proposed for submission to Congress the framework of what ultimately became the first section of the Fourteenth Amendment.[18]

A. The Civil Rights Act of 1866

Prior to the beginning of debates on the Fourteenth Amendment, Congress passed the Civil Rights Act of 1866 (CRA of 1866), overriding President Johnson's veto. Section 1 of the CRA of 1866 set the tone for what was to come from the 39th Congress by redefining United States citizenship.[19] This Section made all persons, regardless of race or color and without regard to previous

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[16] Journal of the Joint Comm. on Reconstruction, p. 5. 39th Cong. 1st sess [hereinafter Joint Comm. on Reconstruction].

[17] 39th Cong. 1st Sess., *supra* note 2, at 2765.

[18] Joint Comm. on Reconstruction, *supra* note 16, at 39.

[19] U.S. CONST. amend. XIV; U.S. CONST. amend. XV; The Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866).

condition of servitude, citizens of the United States.[20] Further, it declared that such citizens, again without regard to race or color, had the same rights in every state: to make and enforce contracts, to purchase, own, and convey property, to sue and give evidence, to full and equal protection of all laws as enjoyed by whites, and to the same penalties and punishments, notwithstanding "any law, statute, ordinance, regulation, or custom, to the contrary."[21] [22]

With this language, Congressional Republicans articulated a sweeping vision of a new America. The CRA of 1866 proposed to eliminate all distinctions in civil rights entitlement between Black and white Americans.[23] Senator Trumbull of Illinois, who introduced the CRA of 1866 in the Senate, emphasized that the proposed bill would ensure that all people, both Black and white, would have equal rights, and that each would be entitled to the same civil rights, namely, the rights to the fruit of their own labor, to make contracts, to buy and sell property, and to enjoy liberty and happiness.[24] Senator Garrett Davis of Kentucky, who opposed the bill, understood the potential impact of Senator Trumbull's bill and the consequences of racial equality in the United States.[25]

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[20] *Id*.

[21] 39th Cong., 1st Sess., *supra* note 2, at 1857–1861.

[22] In Section 2 of the Civil Rights Act of 1866, Congress provided criminal penalties for "any person who, under color of any law, statute, ordinance, regulation, or custom …" deprived another of the rights protected by the Act. *See* Senator Trumbull's (Chairman of the Senate Judicial Committee) discussion of the meaning of "under color of any statute or custom" during debate on the Civil Rights Act of 1866, Cong. Globe, 39th Cong. 1st Sess. 1758 (1866).

[23] *Id.* at 504 ("[i]ts intention [the 14 amendment] was to make him the opposite of a slave, to make him a freeman... there is to be hereafter no distinction between the white race and the black race.").

[24] *Id.* at 599.

[25] Senator Davis predicted that the bill would ban discrimination in the rental of hotel rooms, and the use of salons and railroad cars. He asserted that the bill would "break down and sweep away" race discrimination in those settings, discrimination long established by ordinances, regulations, and customs, and would "bring the two races on the same plane of perfect

In the House, the record of debates on the bill discloses the same sentiment: to forbid all race discrimination and to eliminate any distinction in basic civil rights between white and Black people.[26] By "civil rights" the Framers had in mind every right that pertains to citizens under the laws and Constitution of the government.[27] Republican Representatives James Wilson and Burton Cook, Republicans from Iowa and Illinois respectively, spoke ardently in support of these principles.[28] (The majority opinion of Justice Potter Stewart in *Jones v. Alfred H. Mayer*, provides an excellent chronology and assessment of the intent of Congress regarding the CRA of 1866.[29])

B. The Fourteenth Amendment

Congress was now ready to take up what became the Fourteenth Amendment. Some in Congress criticized Bingham's proposed amendment on the ground that it was duplicative of the provisions of the recently passed CRA of 1866. [30] Representative

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equality." *Id.* at App. 183. Senator Davis, having passed away, was unable to appreciate the effects of *The Civil Rights Cases* and *Plessy v. Ferguson.*

[26] 39th Cong., 1st Sess., *supra* note 2, at 1291 (statement of Rep. Bingham).

[27] *Id*.

[28] *Id.* at 1115–119 (statement of Rep. Wilson) ("and we must do as best we can to protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental right which belong to all men."); 1123–1125 (statement of Rep. Cook) ("[s]ir, I know of no way by which these men [freedmen] can be protected except it be by the action of Congress, either by passing this bill or by passing a constitutional amendment.").

[29] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422–437 (1968) ("Stressing what they consider to be the revolutionary implications of so literal a reading of § 1982, the respondents argue that Congress cannot possibly have intended any such result. Our examination of the relevant history, however, persuades us that Congress meant exactly what it said.").

[30] 39th Cong., 1st Sess., *supra* note 2, at 2459 ("the first time that the South with their copperhead allies obtain the command of Congress [the CRA of 1866] will be repealed.").

Thaddeus Stevens of Pennsylvania argued, however, as did other House members, that those rights would be more permanent if made part of the Constitution and not subject to nullification by a simple majority in a later Congress.[31] Stevens then addressed the meaning of Bingham's proposed first clause that would prohibit the states from abridging the privileges and immunities of citizens of the United States and from depriving persons of life, liberty, or property or equal protection of the laws.[32] He said these provisions are asserted "in some form or other" in the Declaration of Independence.[33] He also said the first section of the amendment was curative in that it would impose the same Constitutional restrictions on the states as then imposed on the federal government.[34] Stevens then described the second section of the proposed amendment which fixed the basis of representation in Congress.[35] Section three, said Stevens, imposed voting limits on former Confederate soldiers. Section four prohibited any addition to the federal debt of those amounts owed by the former Confederate states.[36]

Andrew Rogers, a Democrat from New Jersey, responded to Stevens and spoke dramatically in opposition to the proposed Amendment. Federalism was clearly on Rogers' mind as he told the House that the proposed first section of the Amendment was

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[31] *Id.*

[32] *See* 39th Cong., 1st Sess., *supra* note 2, at 5; *see also* U.S. CONST. amend. XIV §1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at 2460. Stevens at this point did not discuss the enforcement section of the proposed amendment which became section five. *See infra* Appendix.

dangerous to liberty in that it "saps" the foundation of the government, "destroys the elementary principles of the States," and "annihilates all the rights … of the States."[37] Rogers argued that "all the rights we have under the laws of the [Country] are embraced under the definition of privileges and immunities."[38] Thus, if the Amendment ever became law it would "prevent any state from refusing to allow anything to anybody …".[39] To this Rogers added that in such an event the Country would witness a "revolution worse than that through which we just passed."[40]

Representative Bingham took to the floor shortly after Rogers spoke and argued that there was a "want" in the Country following the war "to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged and denied by the unconstitutional acts of any State."[41] Bingham then made clear that the first section of the Amendment took nothing from the states because, in his words, "No State ever had the right … to deny to any freedmen the equal protection of the laws or to abridge the privileges and immunities of any citizen of the Republic … ."[42]

In support of his argument of a "want," Bingham pointed to the Supreme Court's holding in *Barron v. Mayor and City Council of Baltimore*.[43] In that case, the Court held that the Bill of Rights did not apply to the states, but only to the federal government. Bingham believed his proposed Amendment corrected that omission by embedding in the Constitution the right of all

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[37] *Id.* at 2538.

[38] 39th Cong., 1st Sess., *supra* note 2, at 2538.

[39] *Id.*

[40] *Id*. The same Representative Rogers voted against adoption of the Thirteenth Amendment on the ground that the Amendment robbed people of the millions they had invested in "negroes" as property. *Id.* at 1123.

[41] 39th Cong., 1st Sess., *supra* note 2, at 2542.

[42] *Id.* at 2542.

[43] Barron v. Baltimore, 32 U.S. 243 (1833).

citizens to the same privileges and immunities, and to equal protection of all laws whenever the same was abridged by the states.[44] Bingham's proposed Amendment passed the House on May 10, 1866, by a vote of 128 to 37. Only five border state Republicans voted nay.[45]

The Senate took up the House bill on May 23, 1866. Senator Jacob Howard, a Republican from Michigan who had also served on the Joint Committee, opened the debate. He first addressed the meaning of the term "citizen of the United States."[46] He believed that a citizen of the United States was simply one who was born within the boundaries of the United States and subject to its laws.[47] On May 30, 1866, Howard, joined by a Democratic Senator from Maryland, proposed the language currently in the first section: "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the States wherein they reside."[48] This language was necessary because the Constitution otherwise did not define national citizenship except to imply that it was a byproduct of state citizenship.[49]

With the new language proposed by Senator Howard, national citizenship was no longer dependent upon state citizenship. National citizenship instead became primary, with state citizenship derivative of it. The Framers of the Fourteenth

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[44] 39th Cong., 1st Sess., *supra* note 2, at 2542 ("The want of the Republic to-day is... for the supremacy of the laws, for the restoration of all the States to their political rights and powers under such irrevocable guarantees as will forevermore secure the safety of the Republic, the equality of the States, and the equal rights of all the people under the sanctions of inviolable law... Allow me... to say that this amendment takes from no State any right that ever pertained to it. No state ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws.").

[45] *Id.*

[46] *Id.* at 2765.

[47] *Id.*

[48] *Id.* at 2890.

[49] *Id.* at 2893.

Amendment thus removed the states' authority to define eligibility for national citizenship, nullifying the holding in *Dred Scott*.[50]

Senator Howard then addressed the phrase "privileges and immunities."[51] Citizens, he declared, are entitled "to all the privileges and immunities of citizens in the several States."[52] "They are, by constitutional right, entitled to these privileges and immunities, and may assert this right and these privileges and immunities, and ask for their enforcement whenever they go within the limits of the several States of the Union."[53] Significantly, Howard's conception of the phrase made no distinction between privileges and immunities based on state and national citizenship. Rather, Howard's proposed Fourteenth Amendment provided for one set of privileges and immunities, national in scope, and unrelated to state residence.[54]

As to a specific definition of the phrase, he conceded that it was not easily defined, but quoted at length and with approval the language of Judge Washington in *Corfield v. Coryell*:

> We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may,

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[50] HORACE E. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 64 (1908).

[51] 39th Cong., 1st Sess., *supra* note 2, at 2765.

[52] *Id.*

[53] *Id.*

[54] *Id.*

> however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole…..[55]

Critically, Senator Howard then said, "To these privileges and immunities … should be added the personal rights guarantied [sic] and secured by the first eight amendments of the Constitution."[56] Noting that these rights were currently then enforceable only against the federal government, he echoed Representative Bingham stating that "[t]he great object of the first section of this [Fourteenth] amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[57] But, said Howard, the first section did not confer any power on Congress, rather this power derived from the fifth section of the proposed amendment.[58] Under the fifth section, Congress had the "authority to pass laws which are appropriate to the attainment of the great object of the amendment."[59] According to Howard, this section was "a direct affirmative delegation of power to

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[55] Corfield v. Coryell, 6 F. Cas. 546, 551-552 (1823); 39th Cong., 1st Sess., *supra* note 2, at 2765.

[56] 39th Cong., 1st Sess., *supra* note 2 at 2765.

[57] *Id.* at 2766. During the House debates on the Enforcement Act of 1871, Representative Bingham clarified his intent as to the meaning and scope of the privileges and immunities clause. The rights embraced by this clause, he said, "are defined in the first eight amendments" to the Constitution of the United States. Cong. Globe 42nd Cong. 1st Sess. App. 84. During these same debates, Representatives Henry Dawes and Jeremiah Wilson also asserted that the first eight amendments were embraced by the privileges and immunities clause of the Fourteenth Amendment. Cong. Globe 42nd Cong. 1st Sess. at 475–477, 481–483 (1871).

[58] 39th Cong., 1st Sess., *supra* note 2, at 2766.

[59] *Id.*

Congress to carry out all the principles of all these guarantees, a power not found in the Constitution."[60] Then, reading the two sections together, he declared that they will "forever disable [the states] from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States."[61]

Howard's articulation of the federal government's authority to provide federal protection of these rights against state intrusion was more than a formula for a corrective role only. It was a concept of an active, prohibitory government, of the type envisioned by both Stevens and Bingham.[62] On June 8, 1866, the Senate, after revising the citizenship language as proposed by Senator Howard, approved the proposed Fourteenth Amendment by a vote of thirty-three to eight.[63] Five days later, the House accepted the Senate's version.[64]

C. "Deprive" And "Deny": The Enforcement Acts of 1870 and 1871

By February 1870, Congress recognized that legislation was needed to address the rising incidents of racial violence, including murders, engulfing portions of the South.[65] Congress then debated what became the Enforcement Act of 1870. Bingham, who authored the bill, sought to provide mechanisms for federal enforcement of rights protected by the Fifteenth Amendment.[66] When the bill reached the Senate, however, Republican John Pool of North

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[60] *Id.*

[61] *Id.*

[62] *Id.* The "appropriate legislation" language of the fifth section of the Amendment also provided Constitutional cover and a measure of permanency for the recently passed CRA of 1866. As such it addressed the concern of Representative Stevens. *See supra* note 31.

[63] *Id.* at 3042.

[64] *Id.* at 3149.

[65] ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION 195 (1990).

[66] CONG. GLOBE, 41st Cong., 2nd Sess. 1459 (1870) [hereinafter 41st Cong., 2nd Sess.].

Carolina articulated an expanded view of the federal government's role under the proposed bill.[67]

Citing the words "deprive" and "deny" in the first section of the Fourteenth Amendment and the words "denied" and "abridged" in the Fifteenth Amendment, Senator Pool said such language described "acts of omission" by a state.[68] It was Pool's view that the federal government must possess the authority to enforce rights secured by the Constitution when individuals deprived other citizens of these rights, or when the state refused to act to secure those rights.[69] In Pool's view, the Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment authorized such legislation.[70] To this end, he proposed additional sections to what became the Enforcement Act of 1870.[71] Pool's proposed Section 6 did not contain a requirement that the target of the action at issue be Black or another race, nor did it require that the perpetrator of the action at issue by a state actor.[72]

Senator William Steward, Pool's Republican colleague from Nevada, proposed an amendment to the stated purpose of the

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[67] *Id*. at 3611–3613.

[68] *Id*. at 3611.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 3612.

[72] *Id.* Section 6 of the Enforcement Act of 1870 reads: "And be it further enacted, That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court,—the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years,—and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States."

Enforcement Act of 1870.[73] In adding "and for other purposes," to the Act, he wanted to clarify that one of the purposes of this language was to enforce the Fourteenth Amendment and the CRA of 1866 which was reenacted under the Act as Section 18.[74] With this clarifying language, federal prosecutors now had Constitutional authority to institute original federal action against individuals where the state has not acted to enforce the rights secured by the Fourteenth Amendment.[75]

As violence in the South continued, Congress revisited the meaning of "deprive" and "deny" during its debates on what ultimately became the Enforcement Act of 1871, also known as the Ku Klux Klan Act of 1871.[76] To this end, Representative Samuel Shellabarger of Ohio argued that the Fourteenth Amendment gave Congress direct enforcement authority when a state denied, through its authorities, equal protection for all.[77] Representative Aaron Perry from Ohio echoed these sentiments, pointedly stating that "deny" as used in the Fourteenth Amendment equated with neglect or inattention to duty; in other words, a refusal to perform.[78]

Representative Jeremiah Wilson of Indiana was explicit, stating that denial meant more than repugnant state legislation.[79] He maintained that when a state government, for whatever reason, failed or refused to execute and apply its laws in an equal manner, "it is the solemn duty of Congress, under the authority of the fifth

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[73] *Id.* at 3690.

[74] *Id.* The reenactment of the CRA of 1866 in Section 18 of the Enforcement Act of 1870, post ratification of the Fourteenth Amendment, removed any question as to the constitutionality of the CRA of 1866.

[75] Section 6 has survived modification over the years and is now codified as 18 U.S.C. § 241.

[76] JEAN EDWARD SMITH, GRANT 544–546 (2001).

[77] CONG. GLOBE, 42nd Cong., 1st Sess. Appendix 67–71 (1871) [hereinafter 42nd Cong., 1st Sess. app.].

[78] *Id*. at 80.

[79] CONG. GLOBE, 42nd Cong., 1st Sess. 482 (1871) [hereinafter 42nd Cong., 1st Sess.].

section of the Fourteenth Amendment, to enforce the protections which the State withholds."[80]

Representative Wilson also challenged legislators who argued that the words "deny" and "deprive" in the Fourteenth Amendment were inserted simply to prohibit states from affirmatively enacting discriminatory legislation.[81] Were that the intent of the Framers, he said, the first section of the Fourteenth Amendment would have read, "no law shall be enacted" or "no Legislature shall enact" [82] to clarify and give meaning to these terms. [83]Absent such clarification, the word "state" [84] as used in the Amendment must refer not only to the legislative branch, but as well to the executive and judicial branches of state government.[85] Wilson was not directly challenged on this assertion. Thus, Wilson and others who voted to approve the Enforcement Act of 1871 made clear that a refusal or inability by the state executive or judicial branch to uniformly enforce constitutionally valid state laws was to deny or deprive the affected citizens of *their* rights under the Fourteenth Amendment. [86]

During the Senate portion of the debates, Senator Pool spoke of failures of state governments to enforce the Constitutional

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[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] Although Wilson did not mention the short distance in years since passage of the Fourteenth Amendment and the debates on the Enforcement Act of 1871, it is fair to say that those in Congress who were present for both enactments would have recalled if Congress intended to limit its enforcement powers to state legislative branches.

[84] 42nd Cong., 1st Sess., *supra* note 79, at 482.

[85] This same point was made by Justice Bradley in *The Civil Rights Cases*, *infra* p. 100.

[86] 42nd Cong., 1st Sess., *supra* note 79, at 482. Representative Wilson's statements on the meaning of "state" reflect Senator Trumbull's understanding of the reach and meaning of the phase "color of law…or custom."

rights of freedmen and the duty of the federal government to protect their rights.[87] As evidence, Senator Pool submitted into the Senate record testimony from about eight witnesses of their first-hand knowledge of assaults, arson, and murder against Blacks in North Carolina.[88] He also submitted correspondence from the governor of North Carolina to the effect that the state militia was unable to properly respond to this violence.[89] Pool said that by virtue of the freedmen's national citizenship, the United States would, through appropriate legislation and its courts, "extend over him within the States the shield of national authority."[90]

D. The Clear Message from Congress

Passage of the Fourteenth Amendment and the enforcement acts conveyed a congressional intent to redefine the relationship between the states and the federal government. As described by Senator Howard, Congress, through the Amendment, intended to forever disable the states from encroaching upon the privileges and immunities of citizens.[91] Further, Senator Pool made clear that failures or unwillingness by the states to protect these privileges would no longer be tolerated. This was ensured through the enforcement regime authorized under Section 5 of the Amendment. Congress also removed from the states their ability to define national citizenship. From then on citizenship became a unitary concept in the sense that state citizenship was derivative of national citizenship and was simply a function of birth or naturalization in the United States. Finally, the Framers declared that the right to assert the first eight amendments to the Constitution against the state was protected by the Fourteenth

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[87] *Id.* at 607–608.

[88] *Id.* at 606.

[89] *Id.* at 607.

[90] *Id.* at 609.

[91] *See supra* note 65.

Amendment. [92]

In furtherance of their goal to provide effective enforcement of the Fourteenth Amendment, Republican lawmakers took the position that the term "state" in Section 1 of the Fourteenth Amendment included all branches of state government and was not limited to the legislative branch. Also, by the words "deprive" and "deny" in Section 1 of the Fourteenth Amendment, these same lawmakers asserted that failure by the states for whatever reason—including omission, inaction, or inability—to grant equal protection of laws to all citizens and to provide equal due process of the law was a form of state action violative of the Amendment.

The Supreme Court, however, had yet to weigh in on its understanding of the new amendments and enforcement acts. This would soon change. By December 1870, what became the *Slaughter-house Cases* was then before the U.S. Supreme Court.[93] Between then and 1873, when the Court issued its decision, Justice Miller had sufficient time to review the language and intent of Congress with respect to the Fourteenth Amendment and the Enforcement Acts.[94] The same would have been true with respect to Justice Bradley in *Cruikshank* and *Civil Rights_Cases*. In

[92] The question of incorporation has generated significant debate on both sides. The direct language from Congressional leaders and sponsors during the debates on the Fourteenth Amendment should be most probative of Congressional intent in this respect. So should the language of the Representatives and Senators who opposed the reach of the Amendment, for they understood exactly what the authors of the Amendment intended. Justice Hugo Black's appendix to his dissent in *Adamson v. California*, 332 U.S. 46 (1947) is compelling on this issue. For a fuller and, in the writer's view, definitive discussion of this topic, *see* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, (1993). The 39th Congress Project. 2. http://ideaexchange.uakron.edu/conlawakron 39th/2.

[93] The Slaughter-house Cases, 83 U.S. 36, 44 (1873).

[94] On July 28, 1868, Secretary of State William Seward announced that a sufficient number of states had adopted the Fourteenth Amendment to make it part of the Constitution.

addition, the Court contemporaneously acknowledged that "[c]ourts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of the particular provisions in it."[95] Justice Robert Jackson said the same many years later.[96]

III. JUSTICES MILLER'S AND BRADLEY'S CONSEQUENTIAL MISUNDERSTANDING OF CONGRESSIONAL INTENT

The events that gave rise to the Supreme Court's assessment of the Fourteenth Amendment began in 1869 when the Louisiana State Legislature confined livestock slaughtering in New Orleans to one area and one company. At the time, New Orleans was infamous for its filth; it had no public sewer system and the city was prone to outbreaks of cholera and yellow fever.[97] These conditions were due in no small part to the livestock slaughterhouses operating in crowded areas of the city, including

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[95] United States v. Union Pacific Railroad Company, 91 U.S. 72, 79 (1875). Although this opinion was issued a year after the Circuit Court *Cruikshank* opinion, the Supreme Court's *Cruikshank* opinion issued in the same term. Justice Davis, a co-justice with Justice Bradley and Waite, wrote the opinion. Bradley and Waite would have been aware of the quoted language and the principle involved at the time Waite drafted the *Cruikshank* opinion. Neither dissented in *Union Pacific*.

[96] LARRY M. EIG, CONG. RESEARCH SERV. 97–589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 5 (2014) ("It is well to keep in mind, however, that the overriding objective of statutory construction has been to effectuate statutory purpose as expressed in a law's text. As Justice Jackson put it 68 years ago, '[h]owever well these rules may serve at times to decipher legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.[*SEC v. Joiner*, 320 U.S. 344, 350–351 (1943)].'").

[97] MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS 190 (2003).

alongside tenements, schools, and hospitals.[98] Livestock butchering along the Mississippi River occurred above the intake for the city's water supply, which also facilitated unhygienic conditions throughout the city.[99]

A. Slaughter-house Regulation

In response to these conditions, Louisiana's Legislature created the Crescent City Livestock Landing and Slaughterhouse Company (Crescent City), a state established monopoly.[100] By creating a private, chartered entity, the State would not have to finance the operation, which it could not afford to do. Louisiana at this time was suffering acute financial difficulties, in part because whites refused to pay taxes to the Reconstruction government and in part because of expenses associated with the damage cause by the Civil War.[101] Louisiana retained regulatory authority over Crescent City under its "police power," an arrangement typically granted by then legislatures to regulate slaughterhouse operations.[102]

Independent butchers, their livelihood threatened by the new law, challenged the state--granted monopoly on four grounds: that it created an involuntary servitude in violation of the Thirteenth Amendment, that it interfered with their (unspecified) "privileges and immunities" of national citizenship given to them under the Thirteenth and Fourteenth Amendments, that it denied the plaintiffs equal protection of the law, and that it deprived them of property without due process.[103]

In a 5-4 decision against the butchers, the Supreme Court's majority found for Crescent City and Louisiana.[104] Justice Samuel Miller, the author of the majority opinion, wrote that the

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[98] Slaughter-house, 83 U.S. at 64*;* Ross, *supra* note 97*,* at 190.
[99] Ross, *supra* note 97, at 191.
[100] *Id.* at 189-90.
[101] *Id.* at 194.
[102] *Slaughter-house*, 83 U.S. at 41.
[103] *Id.* at 66.
[104] *Id.* at 83.

creation of Crescent City and its use requirements was a proper exercise of the reserved power of the state to protect the health and sanitation conditions of the citizens of New Orleans.[105] Justice Field, in his lengthy dissent,[106] asserted that the state charter that created Crescent City amounted to a grant of a monopoly that prevented other slaughter houses from operating in the same geographic area.[107] And, said Field, monopolies that restrict work opportunities were an "invasion of privileges" secured by the Fourteenth Amendment and thus void.[108]

While much of Miller's opinion regarding state police power at the time is supportable, what is not is Miller's claims regarding the meaning of the Fourteenth Amendment's citizenship, and privileges and immunities clauses.[109] Miller read the two clauses together and concluded that national and state citizenship were not only distinct from one another, but also gave rise to separate privileges and immunities.[110] Miller took the language "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," in the second sentence of the Amendment, and compared it to the wording in the first sentence of the Amendment.[111] He then claimed it was "too clear for argument" that the Framers intended to protect only national privileges and immunities, thereby omitting protection for state privileges and immunities.[112] Thus, said Miller, "it is only the former [national privileges and immunities] which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any

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[105] *Id*. at 64.
[106] *Id*. at 83-111.
[107] *Slaughter-house*, 83 U.S. at 86.
[108] *Id*. at 101.
[109] U.S. CONST. amend. XIV, §1.
[110] *Slaughter-house*, 83 U.S. at 74 (only privileges and immunities of citizens of the United States are protected by the Fourteenth Amendment, not the privileges and immunities of citizens of the state).
[111] *Id.*
[112] *Id.*

additional protection by this paragraph of the amendment."[113]

Miller's conclusions in this respect were contrived. His assertion that the phrase "privileges or immunities of citizens of the United States" was a signal that the Framers intended to withhold federal protection in the states against state conduct toward its citizens is without foundation. There is no evidence in the record of debates that Republican Senators or House members constructed the first two sentences of the Amendment for the purpose that Miller described. Rather, Representative Bingham and Senator Howard, along with others, consistently described privileges and immunities as a unitary concept that applied to all citizens of free governments.[114] Further, the very intent of the first clause of the Amendment was to protect the embodied rights from state infringement where such rights were not available either because they were denied or because they were neglected by the states.[115] Justice Miller chose to ignore this, arguing that Congress would not intend to restrain the states. In fact, this is exactly what the Framers had in mind as described in the first paragraph of Part D, Section 1.[116]

But Justice Miller was not finished. Having concluded that there were distinct national and state privileges and immunities, he then defined what those national privileges and immunities were. They included, he said, the right of citizens to peaceably assemble and to assert claims against the federal government, the right to free access to seaports and courts of the United States, the right to demand protection on the high seas, and the entitlement

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[113] *Id.*

[114] *See supra* notes 44.

[115] *See supra* p. 84. *See also* Cong. Globe, 42nd Cong., 1st Sess., *supra* note 77, at 85. (speech by Representative Bingham (States may have concurrent enforcement responsibility with the federal government for protection of privileges and immunities, but the federal government may act independently to enforce any rights denied by the states, including rights denied by commission or omission.)

[116] *See supra* p. 9.

to writs of habeas corpus.[117] These rights, according to Miller, owed their existence and enforcement to the federal government.[118]

As to other rights, such as the right to acquire and possess property, the right to pursue happiness and safety—in general the whole panoply of civil rights thought to be fundamental—Miller made clear that they were a function of state citizenship and as such "lay within the constitutional and legislative power of the States."[119] In other words, according to Miller, the Fourteenth Amendment did not alter the historic locus of enforcement of these rights (or privileges). Miller admitted that the line between federal and state power had not been well defined and that following the war many had argued for a strong national government. But Miller doubted that the purpose of the amendments was to destroy the existing balance—again ignoring compelling evidence to the contrary.[120]

Justice Miller was a moderate Republican who found the treatment of Black citizens by southern whites to be repugnant.[121] He rejected the notion that dismissal of the butchers' claims was also a general denunciation of Black civil rights. According to Miller, the Fourteenth Amendment's equal protection clause was intended to redress state discrimination against the recently emancipated freedmen.[122] Miller believed that Congress, under Section 5 of the Fourteenth Amendment, had express authority to enact legislation curtailing such discrimination.[123] Indeed, Congress had already enacted such legislation in Section 1 of the CRA of 1866.

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[117] *Slaughter-house*, 83 U.S. at 79.

[118] *Id.*

[119] *Id.* at 77.

[120] *Id.* at 82; *see also supra* note 13 (discussing Representative Rogers' understanding of the purpose of the Fourteenth Amendment, a view that neither Stevens nor Bingham thought necessary to rebut).

[121] Ross, *supra* note 97, at 164–65.

[122] *Slaughter-house*, 83 U.S. at 81.

[123] *Id.* at 81. Miller's view in this respect was ignored by the majority in *Plessy v. Ferguson* and its progeny. See *infra* p. 105.

In partial defense of Miller, it is unlikely that he could have clearly foreseen the complete collapse of Reconstruction and the reemergence of white political power.[124] Miller would have known that Congress had recently passed the Enforcement Acts of 1870 and 1871.[125] At the time, these acts seemed to hold considerable promise for protection against individual abuses of Black civil rights, especially given that President Grant had shown a willingness to use legal and military authority in the south to enforce compliance with federal law.[126]

But it is difficult to justify Miller's disregard of the Framers' intent regarding the scope of the Fourteenth Amendment's privilege and immunities clause.[127] The 39th Congress had heard first-hand reports of widespread atrocities and injustices toward the freedmen and Union sympathizers in the former Confederacy.[128] These reports cemented the belief of Congressional Republicans that federal oversight and intervention was necessary when states denied any citizen the privileges and immunities to which all United States citizens were entitled.[129]

Further, it was unnecessary for Miller to eviscerate the privileges and immunities clause. Miller's opinion on the need for Louisiana to address sanitary conditions in New Orleans was sound. There was no denying that New Orleans had experienced repeated health crises, deadly in nature, caused in part by the proximity of

[124] Ross, *supra* note 97, at 250; FONER, *supra* note 65, at 247.

[125] The Enforcement Act of 1871 (or the Ku Klux Klan Act) moved Republicans to the far limits of enforcement of the 14th and 15th Amendments. Under this Act, which was designed to protect freedmen against hostile state action or inaction by state governments, violence that infringed upon civil and political acts became a federal crime punishable by the federal government. Aggrieved individuals could sue under this Act, but enforcement fell to the federal government. Although only a small percentage of violent acts were prosecuted under this Act, the demonstrated willingness of the federal government to prosecute at all resulted in a dramatic decline in Klan violence. *See* FONER, *supra* note 65, at 196–98.

[126] FONER, *supra* note 65 at 197.

[127] *See supra* pp. 11–12.

[128] *See supra* pp. 7–8.

[129] *Id.*

livestock slaughtering to population centers. Field and Bradley, who disliked the claimed monopoly provisions of the legislation that created Crescent City, dismissed the health threats at issue as a pretext for the legislation. Miller, who as a physician earlier in his career had treated and seen first-hand the fatal and wide-spread effects of cholera,[130] correctly saw the health issue in a different light.[131] Finally, there was (and is) no inherent conflict between enforcement of fundamental rights and state efforts to protect its citizens from deadly disease. This is exactly what Judge Washington said in *Corfield*.[132]

The lasting outcome of *Slaughter-house* was a limited understanding of the Fourteenth Amendment's privileges or immunities clause.[133] Under Miller's interpretation, protection from state infringement of citizens' fundamental rights would continue to be the exclusive province of state courts. Further, said Miller, Black people could rely on the equal protection clause of the Fourteenth Amendment for whatever protection they needed against discriminatory state laws.[134]

But such access was of limited value. Equal protection jurisprudence during this period, and for the next sixty-five years, was controlled by the equivalent of a rational basis test. Under this test, state and local laws could survive Constitutional scrutiny if local officials advanced almost any reason, citing the reserved powers doctrine for the law or ruling in question.[135] *Plessy v. Ferguson*[136] was one of the most devastating examples of the weakness of this

[130] Ross, *supra* note 97, at 11-12.
[131] *Slaughter-house*, 83 U.S. at 64.
[132] *See supra* note 58.
[133] McDonald v. City of Chicago, Illinois, 561 U.S. 742, 808–09 (2010).
[134] *Slaughter-house*, 83 U.S. at 81.
[135] *See* Price v. Illinois, 238 U.S. 446, 453 (1915) (legislative enactment not discriminatory unless it is without any reasonable basis or exceeds bounds of reasonable discretion).
[136] Plessy v. Ferguson, 163 U.S 537, at 544 (1896).

jurisprudence. Not until *United States v. Carolene Products Co.*[137] did the Supreme Court suggest a more rigorous test for invalidating state and local laws that targeted certain "discrete and insular minorities."[138] Justice Miller's belief that the equal protection clause would be an adequate substitute for his truncated concepts of the privileges and immunities clause was a grave error.

Although *Slaughter-house* was now the law of the land, imagine the possible development of civil rights jurisprudence had Justice Miller substituted the Framer's understanding of the scope of fundamental rights and the associated privileges and immunities for his own. For example, in pleadings, prosecutors might have asserted that all United States citizens were entitled to federal protection of the Fourteenth Amendment's privileges and immunities clause, as that clause was defined by Senator Howard, and to the rights enumerated in Section 1 of the CRA of 1866.[139] In so asserting, prosecutors would have been able to cite to the enforcement mandates embodied in the other sections of the CRA of 1866[140] and to the Enforcement Acts of 1870 and 1871 as authority for their action.

Proceeding in this manner, arguably, would have been a more productive and effective framework in which to litigate and protect these rights rather than having to proceed under the then existing equal protection regime. As noted above, the difficulty with proceeding under an equal protection claim at that time would have been the defense that the state law in question—for example a law severely limiting ownership of mules on sanitary grounds—had a reasonable basis as determined by the state legislature. If this law did not contain overtly racist content, it likely would have survived a challenge notwithstanding its discriminatory impact. Had

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[137] Carolene Products Co., 304 U.S. 144, 152–153, n. 4 (1938) (statutes directed at racial minorities or statutes aimed at political processes relied upon by minorities may call for more searching judicial inquiry).

[138] *Id.*

[139] These rights included, for example, the right to make and enforce contracts, to sue, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property.

[140] Sec. 4, for example, authorized proceedings against "all and every person" who violated the CRA of 1866.

Miller not severely limited the understanding of the privileges and immunities clause, prosecutors could have challenged this law in federal court under the theory that all citizens had a fundamental right to own farm animals in reasonable numbers for food production.

B. The Colfax Massacre

The Supreme Court was soon to be given another opportunity to pass judgment on the Fourteenth Amendment and, this time, the meaning of Sec. 6 of the Enforcement Act of 1870. As in *Slaughter-house*, the Circuit Court opinion in *Cruikshank*[141] and the follow-up Supreme Court opinion[142] departed significantly from the intent of the Fourteenth Amendment and the Sec. 6 Framers.[143]

The event that gave rise to these cases was the massacre of several Black men on April 13, 1873, in the town of Colfax, Louisiana. On that date a group of about 140 armed white men, most of whom were former Confederate soldiers, attacked a group of lightly armed, mostly Black men who had occupied the Colfax courthouse.[144] The attack on the courthouse was the outgrowth of the disputed 1872 elections in Grant Parish (the location of Colfax) where there had been reports of illegal intimidation of Black voters, and a hole was found in the side of the ballot box through which ballots in favor of white candidates were likely stuffed.[145]

C.C. Nash, the leader of the white group, believed himself to have been the properly elected sheriff of Grant Parish, but Louisiana Governor Kellogg refused to commission Nash.[146] William Ward,

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[141] United States v. Cruickshank, 25 F. Cas. 707 (1874).
[142] United States v. Cruickshank, 92 U.S. 542, 552–553 (1875).
[143] *See supra* Section II-B and II-C.
[144] Estimates of the number in this group vary considerably. This figure is from CHARLES LANE, THE DAY FREEDOM DIED 91 (2008).
[145] *Id.* at 66.
[146] *Id.* at 69–71.

a former slave and a Union Army veteran, had run for a state representative position in the same election, but James W. Hadnot, a white supporter of Nash, was declared the winner of that race.[147] When Hadnot learned that Ward and his supporters were at the courthouse, Hadnot made it known that he along with other white men were going to take the courthouse and kill the Black occupants, including Ward.[148]

On April 13, 1873, Nash and his contingent, which included William Cruickshank and Hadnot, rode into Colfax and surrounded the Courthouse.[149] In the melee that followed, several Black men were killed during the initial fighting. Following a surrender by those remaining, white mobs hunted down any who escaped, killing many of them. The Black men who surrendered were later murdered while in custody, many brutally. Although estimates vary, about 100 Black citizens of Colfax were killed during what became known as the Colfax Massacre. At most, two or three of the white attackers were killed, including James Hadnot.

Federal troops arrived in Colfax about a week after the massacre, but by then Colfax was mostly peaceful.[150] U. S. troops eventually arrested seven white men, including William Cruikshank and Johnnie Hadnot, James' nephew.[151] The U.S. Attorney then obtained indictments against about one-hundred white perpetrators of the massacre and charged them under with violations of Sections 6 and 7 of the Enforcement Act of 1870.[152] Specifically, the U.S. Attorney charged the defendants with eight counts of banding together and conspiracy to deprive certain Black persons, whom he named, of their rights under Section 6 and eight counts under Section 7.[153] The counts under Section 6 were, at count 1, violating the right of the named Black persons to

[147] *Id.* at 66.
[148] *Id*. at 71.
[149] LANE, *supra* note 144 , at 90–107.
[150] *Id.* at 130.
[151] *Id.* at 153.
[152] *Id.* at 124–26.
[153] *Id*.

peacefully assemble, at count 2, violating their right to keep and bear arms, at count 3, depriving them of life and liberty without due process of law, at count 4, of depriving them of protection of persons and property, at count 5, of violating their privileges and immunities, at count 6 of interfering with their right to vote, at count 7, of conspiring to injure those who voted or attempted to vote, and, at count 8, a general charge of violating their rights and privileges as secured by the Constitution and federal law.[154] The counts under Section 7 of the Act repeated the allegations under Section 6, but specified penalties for these violations.[155] They were tried in federal court, three were found guilty of conspiracy, and their appeal became *United States v. Cruikshank.*[156]

Justice Bradley, who was "riding circuit" in the Circuit Court of Louisiana, and Circuit Judge William Woods heard the motion to set aside the guilty verdict.[157] Bradley granted the defendant's motion, noting Judge Woods disagreement, and the convicted white men were set free immediately although each was required to put up $5,000 as bail.[158]

Justice Bradley began his opinion by noting that the indictments at issue were authorized by the Enforcement Act of 1870.[159] He then discussed at length his views on fundamental rights, Congressional enforcement power under the post-Civil War amendments, and whether, under these amendments, the Enforcement Act rested on proper Constitutional authority.[160] Specifically, as to the Fourteenth Amendment, Bradley asserted that the federal government had only a limited role with respect to fundamental or secured rights, rights that were inherited and predated the Constitution.[161] Examples of such fundamental or secured rights

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[154] LANE, *supra* note 144, at 124–26.
[155] *Id.*
[156] United States v. Cruikshank, 25 F. Cas. 707, 708 (D.C.C. La. 1874).
[157] *Id.*
[158] LANE, *supra* note 144, at 212.
[159] *Cruikshank*, 25 F. Cas. at 708.
[160] *Id.* at 709–14.
[161] *Id.* at 714.

included claims of denial of life, liberty, and property.[162] Only in instances of failure by a state to comply with its protective duty of these rights, as manifested by arbitrary and unjust state legislation, did the federal government have authority to initiate enforcement measures or legislation to correct obnoxious state laws.[163] Absent this circumstance, Bradley declared that Congress was without authority to legislate prospectively for the direct enforcement of citizens' privileges and immunities.[164]

Having laid out his beliefs as to federal enforcement under the post-Civil War Amendments, he turned to each of the indictment counts.[165] Without any mention of the facts that supported the indictments or any reference to Congressional intent, he dismissed them all.[166] In the process, he declared that Section 6 of the Enforcement Act of 1870 was unconstitutional.[167]

As to the first count, Bradley did not mention or discuss Section 6. He noted that this First Amendment right was now protected by the Fourteenth Amendment against interference by the states.[168] In so asserting, he implied that the First Amendment was incorporated by the Fourteenth. But he dismissed this count on the grounds that enforcement of the rights guaranteed by First Amendment was left to the states.[169] Bradley then said Congress could enforce the Fourteenth Amendment if the states violated the First Amendment.[170] But Bradley did not address whether the defendants, as opposed to the state, had acted unlawfully under Section 6 as had been alleged.[171]

Bradley simply and cryptically dismissed the second count, conspiracy to interfere with the right of certain citizens to

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[162] *Id.* at 710.
[163] *Id.*
[164] United States v. Cruikshank, 25 F. Cas. at 710–11.
[165] *Id.* at 714–16.
[166] *Id.* at 716.
[167] *Id.* at 715.
[168] *Id.* at 714–15.
[169] *Id*.
[170] *Id*.
[171] *Id*. at 709–14.

bear arms, for the same reason as the first.[172] Again, he made no mention of the facts. Bradley also dismissed the third count on the ground that the unlawful conduct was not attributable to the state, the same fault he attributed to the first two counts.[173]

In his dismissals of counts one, two, and three of the indictment because the indictment failed to name the state as an actor, Justice Bradley disregarded the language of Senator Pool and Representative Jeremiah Wilson.[174] Both legislators were clear that in circumstances where states failed to act, for whatever reason, the federal government had authority to provide the missing protection.[175] In Bradley's narrow conception, however, the state had fulfilled its duty under the Fourteenth Amendment if it simply refrained from passing any law to abridge the privileges and immunities of citizens.[176] Even if the state government took no affirmative action to secure citizens' rights, or if other branches of state government were unwilling or unable to ensure equal enforcement of state laws, the federal government, in Bradley's view, could not directly enforce these privileges and immunities.[177]

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[172] *Id*. at 715.

[173] *Id*.

[174] *See supra* pp. 7–9.

[175] *See infra* fn. 177.

[176] Some historians have argued that Bradley's concept of state duty included omissions by the state or failures to act as he seemingly implied in his *Slaughter-house* dissent. (*Slaughter-house,* 83 U.S. at 121). His opinion in *Cruikshank*, however, does not support such a reading. The composite of Bradley's language in *Cruikshank*, although at times obscure, points to a view that federal enforcement was limited solely to corrective remedies for repugnant state laws that interfered with citizens privileges and immunities. United States v. Cruikshank, 25 F. Cas. at 710–711, 714 (1874). More importantly, it could not have been Bradley's view that state inaction or inability in the face of horrific violence triggered original and permissible federal intervention. This is apparent given the clear failure of the state of Louisiana and Grant Perish to act both before (LANE, *supra* note 144, at 85–86) and in the immediate aftermath of the Colfax massacre. If Bradley had believed that state or local law enforcement omissions were grounds for original federal prosecution, the facts of the massacre provided ample room for Bradley to sustain the trial court findings.

[177] United States v. Cruikshank, 25 F. Cas. at 714.

The difficulty for Bradley then was to find a way around the obvious failure by Louisiana and Grant Parish to properly protect Black citizens at the Colfax courthouse.[178] For this, he read Section 6 and 7 of the Enforcement Act to require an allegation or showing that the state was the offender or that it had attempted to deprive citizens of their fundamental rights without due process or equal protection of the laws.[179] Sections 6 and 7 of the Act, however, contained neither a state action requirement nor a due process or equal protection predicate. Senator Pool, the author of Section 6 and his supporters, were clear that Section 6 was aimed at conduct by individuals where the state, for whatever reason, was unwilling or unable to act. They understood at the time they debated the Enforcement Acts of 1870 and 1871 that certain parts of the South were characterized by widespread violence against freedmen.[180] As said by Senator Pool during the debates, without rebuttal, these sections were aimed at conduct by individuals where the state, by acts of omission or neglect, failed to protect its citizens.[181]

As to the fourth count, Bradley cited the equal protection clause of the Fourteenth Amendment but concluded that the count did not allege an equal protection violation.[182] Instead, Bradley said, the indictment plainly referred to rights secured by CRA of 1866, which, as he stated earlier, required an allegation that the alleged conspiracy was a product of the race of the injured parties.[183] In his words, the racial predicate "ought not to have been left to inference; it should have been alleged."[184] But Bradley was not required to determine whether race was a casual factor in the indicted crimes.[185] The indictment was founded on

[178] LANE, *supra* note 144, at 85-86.
[179] *Cruikshank*, 25 F. Cas. at 715.
[180] *See* discussion of the Enforcement Act of 1871, *supra* p. 8.
[181] 42nd Cong., 1st Sess. app., *supra* note 77.
[182] *Cruikshank*, 25 F. Cas. at 715.
[183] *Id.*
[184] *Id.*
[185] *Id.* at 708, 715.

Sections 6 and 7 of the Enforcement Act of 1870, neither of which required a showing or proof that the conduct at issue occurred because of race.[186] He also said the count was defective on account of vagueness and generality, a claim he also used to dismiss the fifth and eight counts of the indictment.[187]

Turning to the sixth count, Justice Bradley seized the opportunity to give his views on the constitutionality of Section 6 of the Enforcement Act of 1870. This count charged the defendants with of conspiracy to prevent and hinder certain Black citizens of the United States from exercising their right to vote at any election to be held thereafter in Louisiana or Grant Parish.[188] Bradley acknowledged that this count was grounded in Section 6 of the Act, which used identical language.[189] But Bradley said the application of these sections had to be read in connection with the first section of the Act.[190] He then asserted that "[t]he law [a reference to Section 6 of the Enforcement Act] on which this count [six] is founded is not confined to cases of race discrimination… ."[191] Rather, …[i]t is general and universal in its application."[192] As such, he said, the count (six) was not encompassed by "any valid and constitutional law of the United States."[193] In other words, Sec. 6 of the Act as written was unconstitutional because it was not directed at race or other characteristics.[194]

Thus, Bradley completely ignored the Framer's' assertion that the Enforcement Acts of 1870 and 1871 were authorized and

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[186] *Id.* at 708; Appendix.
[187] *Id.* at 715.
[188] United States v. Cruikshank, 25 F. Cas. at 715.
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Cruikshank*, 25 F. Cas. at 715. As to the seventh count, an allegation to injure or oppress Black citizens because they had exercised their right to vote, Bradley dismissed this count on the same grounds as he dismissed count six. *Id.*

permitted under Section 5 of the Fourteenth Amendment.[195] In a befuddling end to his dismissal of count six, Bradley implied that had the count alleged race as a causal factor, it would have had a constitutional basis.[196]

Further, Bradley's dismissal of the sixth (and seventh) counts disregarded the plain language of the statute and drew unjustified inferences from its structure. Section 1 of the Enforcement Act of 1870 was merely a broad statement of the right of qualified citizens to vote in any election without distinction as to race.[197] Accordingly, the proscribed acts and the described criminal penalties set forth in Section 6 and Section 7 applied to all persons and to all citizens irrespective of their race.[198] Section 6 of the Act was specifically directed at punishment of acts of violence, threats of violence, and intimidation toward "*any* citizen with intent to prevent or hinder his free exercise and enjoyment of *any* right or privilege granted or secured to him by the Constitution or laws of the United States, or "*because of"* his having exercised the same …" (Emphasis added).[199] Accordingly, there was no basis for Bradley's assertion that any of the indictments were defective because they did not allege race as a "because of" or casual factor.

Instead, Section 6 was a plain and unambiguous presentation of Senator Pool's purpose as expressed during the debates, i.e., to protect all persons from acts of violence and intimidation in circumstances where the state failed or was unable to provide the needed protection and response. The only predicate to invoking Section 6 of the Act was a showing that the affected citizens had

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[195] *See* Smith, *supra* note 76.

[196] *Cruikshank*, 25 F. Cas. at 715. Again, an allegation of race in the sixth count would not have changed the absence of a required racial predicate in Sec. 6.

[197] *See infra* Appendix for language of the first section of the Enforcement Act of 1870.

[198] *See infra* Appendix for the language of Section 6 and 7 of the Enforcement Act of 1870.

[199] *See infra* Appendix for the language of Section 6.

exercised or had attempted to exercise a federal right.[200] The facts in *Cruikshank* (which Bradley failed to describe) provided this predicate.[201] His assertion that the sixth count of the indictment should have alleged race as a causal factor had no statutory foundation. His dismissal of the seventh count because the indictment failed to attribute the conduct at issue to race was similarly without foundation.

Having erroneously required a racial predicate for counts six, and seven, Bradley was able to view the crimes committed as "ordinary." There was nothing ordinary, however, about the mass murder of Black citizens who had surrendered to white mob rule only to be subsequently murdered while in the custody of the white mob. Nor was there anything ordinary about the collapse of state government, particularly in Grant Parish where, at the time of the murders, government was non-existent.

Also, Bradley could have noted, which he did not, that Mr. Nash, who led the Colfax attacks, was the elected deputy sheriff of Grant Parish, and that James W. Hadnot, one of the other participants and a leader in the mob attacks, was the elected state representative from Colfax. Although their elections were contested, both Mr. Nash and Mr. Hadnot may have been, at the time of the attacks, state actors. Accordingly, Bradley could have found that the failure of Nash and Hadnot to grant any due process or equal protection to those murdered by the mob implicated the state. Because the indictment, however, did not allege that the state was the offender, Bradley likely would have dismissed any allegation regarding Nash and Hadnot as missing a necessary element. Bradley would have been wrong in this respect for the reasons set forth by Senator Pool, Representative Jeremiah Wilson, and others. Bradley's failure in *Cruikshank* to acknowledge, let alone to give weight to, Congressional intent regarding Section 6, and

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[200] There is no doubt, however, that the Framers, in drafting the Enforcement Acts, had in mind the growing violence in the South directed at the Black community. *See* FONER, *supra* note 65, at 184–85, 195.

[201] LANE, *supra* note 144, at 90–107.

to apply its plain language to the Colfax Massacre facts is incomprehensible.

Because of the split Circuit Court opinion, the matter was certified to the Supreme Court.[202] Writing for the Court (which included Bradley), Chief Justice Waite began his discussion by noting, as did Bradley below, that the counts in the indictment were based upon Section 6 of the Enforcement Act of 1870.[203] Following his full quotation of Section 6, Waite started his discussion with counts one, two, and three.[204]

As to count one, Waite asserted that the right to peaceably assemble for a lawful purpose predated the Fourteenth Amendment, and, for this reason, protection of this right resided with the states, just as it always had.[205] The right to assemble and to petition Congress, however, was a right of national citizenship.[206] According to Waite, had the indictment in count one alleged a conspiracy to prevent a meeting for such a purpose (to petition Congress), then and only then would the indictment have been "within the statute" (Section 6 of the Enforcement Act).[207]

But that is not what Section 6 said (and still says). Section 6, as noted earlier, protected "the free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States."[208] (Emphasis added.) It follows, from the quoted language, that the First Amendment in its entirety was protected by Section 6, not just the phrase after the last comma in the Amendment. Further, Waite's discussion in count one ignored the Framers' intent to incorporate the First Amendment (and the other first eight Amendments) into the panoply of rights enforceable by the federal government against the states.

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[202] United States v. Cruickshank, 92 U.S. 542, 546 (1875).
[203] *Id.*
[204] *Id.* at 551–554.
[205] *Id.* at 552
[206] *Id.* at 552–553.
[207] *Id.*
[208] *See infra* Appendix for the language of Section 6.

Waite dismissed count two, which concerned the right to bear arms, because as with count one, the right in question was left to the states to protect.[209] Waite thus dismissed counts one and two on grounds similar to Bradley's dismissal. Bradley, however, had at least noted that the indictment failed to allege that the state had abridged any privilege or immunity of its citizens protected by the Fourteenth Amendment, acknowledging that the Fourteenth Amendment, but for an alleged pleading error, could have been relevant.[210] Waite took no notice of the Fourteenth Amendment, and thereby closed off any foreseeable future claim that the First Amendment was incorporated into the Fourteenth. In dismissing these counts, Waite, like Bradley, also ignored the principles of state neglect or omission laid down by Representative Wilson, Senator Pool, and others, a principle applicable when, as here, by doing nothing and failing to act, the state had not protected these rights.

As to count three, Waite implied that the indictment was nothing more than a charge of murder and false imprisonment which were matters for the state, not the United States.[211] These reasons mirrored those stated by Bradley. Again, Waite made no mention of the underlying facts, nor did he give any indication that he was aware of the Framers' intent as to section 6 of the Enforcement Act. Also, Waite, like Bradley, failed to acknowledge that Nash and Hadnot, leaders of the mob that committed the massacre at Colfax, were arguably state actors.[212]

As to Counts four, six, and seven, Waite dismissed them under Bradley's rationale that the indictment in these counts did not allege race as a causal factor.[213] Significantly, however, Waite did not declare, as Bradley did, that section 6 of the Enforcement Act of 1870 was not supported by the Constitution.[214] Thus, section 6

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[209] *Cruickshank*, 92 U.S. at 553.
[210] United States v. Cruikshank, 25 F. Cas. at 715.
[211] Cruickshank, 92 U.S. at 553–554.
[212] *See supra* discussion at p. 18.
[213] *Cruickshank*, 92 U.S at 554–57.
[214] *Id*. at 554–56.

survived, barely, and later survived several cuts to other provisions of the Enforcement Act of 1870.[215]

Waite left counts five and eight to the end of his discussion, dismissing both, as had Bradley, as vague and general.[216] Unlike Bradley, however, he expounded at length on the requirements of criminal pleading, concluding that the indictment as to these Counts was not sufficient in law because it lacked certainty and precision as to the particulars of the offenses.[217]

C. Assessing the fallout from *Cruikshank*

Cruikshank's immediate effect on the prosecutor, James Beckwith, was embarrassment and concern for future prosecutions.[218] Federal prosecutors, for example, would now have understood that nothing in Bradley's or Waite's *Cruikshank* opinions reversed Justice Miller's narrowing of the privileges and immunities clause of the Fourteenth Amendment and the limited role he assigned to the federal government.[219] Regarding the First Amendment, prosecutors and the general public might have thought that Bradley's dissent in *Slaughter-House* and his *Cruickshank* Circuit Court opinion kept alive, slightly, a possible opening for incorporation of at least a portion of the Bill of Rights into the Amendment. Waite's opinion, however, ended any hope in this respect. There is no way to calculate the societal harm of Waite's First Amendment discussion. Freedmen or any other group, especially in the South, who assembled for a lawful purpose were left without federal protection and subject to the vagaries of local authorities.

Bradley's truncated concept of the state effectively gutted section 6 of the Act. In insisting that Congress had limited the

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[215] S*upra* note 75*,* it is currently codified at 18 U.S.C. § 241.
[216] U.S. v. Cruickshank, 92 U.S. at 559.
[217] *Id.* at 557-59.
[218] LANE, *supra* note 145*,* at 222–23.
[219] At least one historian argues that *Slaughter-house* rendered the Fourteenth Amendment's privileges and immunities clause almost meaningless. *See* FONER, *supra* note 3 at 171.

Fourteenth Amendment to purely corrective action for "obnoxious law," Bradley left no room for Senator Pool's Fourteenth Amendment enforcement vision. He offered no sign in *Cruikshank* that he understood section 6 of the Enforcement Act to be aimed at individual conduct—conduct often facilitated by state failure or unwillingness to secure, and thus deny, full enjoyment of rights by all citizens.[220]

Waite only partially rescued section 6 from Bradley's false understanding. Though he did not go so far as to declare section 6 of the Act as unconstitutional, he did not commit himself one way or the other on this question. Prosecutors might have presumed that section 6 had survived, but it would have been clear that it survived in abridged form. This is so because Waite continued to insist that claims under the Act required a racial predicate. In addition, at no point in his opinion did Waite suggest that state neglect or omission could be grounds for affirming the indictment.

It follows that so far as the Fourteenth Amendment was concerned, federal prosecutors could assume that they were left with only equal protection or due process claims under the Fourteenth Amendment. This is right where Miller had left it.

According to one source, after Waite's opinion was issued and during the next two Republican administrations, 1876 through 1884, federal prosecutors brought 974 Enforcement Act cases in the South but prevailed on only 167 of them.[221]

D. "Running the Slavery Argument into the Ground"[222]

[220] Early in Bradley's opinion, however, he said that section 6 applied to all citizens and protected any right or privilege granted or secured by the Constitution. United States v. Cruikshank, 25 F.Cas. at 709. Bradley's full opinion makes clear that his initial acknowledgement of the intent of Sec. 6 was not the basis of his later conclusions.

[221] LANE, *supra* note 144, at 252. It is unclear if these figures include guilty pleas. Nevertheless, this is about a seventeen percent conviction rate compared with the rate today of close to ninety percent.

[222] The Civil Rights Cases, 109 U.S. 3, 24 (1883).

Several Black plaintiffs, in different parts of the country, challenged their denial of accommodations at a hotel, a theater, an opera house, and a railroad car under the Civil Rights Act of 1875 ("CRA of 1875").[223] Under this Act, businesses that catered to the general public could not discriminate on account of race in providing facilities and accommodations.[224] Their cases were consolidated and became *The Civil Rights Cases*.[225]

At issue was the constitutionality of the first two sections of the Act. Section 1 declared that all citizens, without regard to race, color, or previous condition of servitude, were entitled to full and equal enjoyment of various public facilities such as inns, theaters, public conveyances, and other places of public amusement. Section 2 stated that any person who violated section 1, except for reasons applicable to every citizen, would be subject to fine or imprisonment. By now the composition of the Supreme Court had changed with Justice John Marshall Harlan replacing Justice David Davis.[226] Bradley writing for the majority, found that sections 1 and 2 of the CRA of 1875 were unconstitutional on the ground that these sections were not directed at correcting state legislation.[227] Justice Harlan was the lone dissenter.

Bradley reiterated the position he had adopted in *Cruikshank* on the meaning and application of the Fourteenth Amendment. According to Bradley, the Amendment was directed at "state action of a particular character," not the wrongful acts of an individual.[228] Congress could only enforce the Fourteenth Amendment by adopting corrective legislation to undo the effects of state laws that impaired rights protected by the Amendment.[229] He directed readers to *Cruikshank* for a fuller discussion of his

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[223] *See infra* Appendix for text of the CRA of 1875.
[224] *See infra* Appendix for section 1 of the CRA of 1875.
[225] *The Civil Rights Cases*, 109 U.S. at 3.
[226] RUSSEL W. GALLOWAY, JUSTICE FOR ALL? THE RICH AND POOR IN SUPREME COURT HISTORY, 1790–1990 71 (1991).
[227] *The Civil Rights Cases*, 109 U.S at 13, 19.
[228] *Id.* at 11.
[229] *Id.*

understanding of the Amendment.[230] Also, said Bradley, one who suffered harm caused by an individual acting without state sanction or state action must vindicate his or her rights through the laws of the state.[231] As before, Bradley's limited understanding of state action left no room for Senator Pool's incorporation of state inaction as grounds for prosecution.[232]

Bradley then found that the first two sections of the Civil Rights Act of 1875 were not corrective of state laws nor did they target adverse state legislation; instead they were primary and direct in the sense that they took control of public accommodation questions leaving no room for state legislation.[233] As such, they were beyond the authority given to Congress under the Fourteenth Amendment and, accordingly, were void.[234] Again, Bradley failed to give effect to the scope of federal authority under section 5 of the Fourteenth Amendment as defined by Senators Howard, Pool, and other Congressional leaders.[235]

Justice Harlan's dissent took issue with Bradley's

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[230] *Id.* at 12.

[231] *Id.* at 17.

[232] For example, public officials with knowledge of but ignoring the widespread refusal of individual restaurant owners to serve Black customers would fall within the language of section 6 of the Enforcement Act of 1870. Enforcement Act of 1870, §6, 16 Stat. 140 (1870) ("That if two or more persons shall band or conspire together... or upon the premises of another... threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States... shall be held guilty of [a] felony.").

[233] *The Civil Rights Cases*, 109 U.S at 19.

[234] *Id.*

[235] Bradley noted that the commerce clause gave Congress direct and plenary authority to legislate, a circumstance that he claimed did not apply to the Fourteenth Amendment. *Id.* at 18. Bradley's assertion supports a recent observation of Foner that Congress, in passing the Civil Rights Act of 1964, anchored the law on the commerce clause rather than the more logical Fourteenth Amendment. To have done otherwise, according to Foner, would have required the Supreme Court to have disavowed the opinions of Bradley (and others) on the enforcement scope of the Amendment. *See* FONER, *supra* note 3, at 172.

understanding of enforcement under the Amendment. In Harlan's view, the power of Congress under the Amendment was not restricted to correcting obnoxious state laws. Rather, section 5 of the Amendment, in express terms, gave Congress the authority to enforce, either through affirmative or prohibitory legislation, all the provisions of the Amendment.[236] Section 5, according to Harlan, gave Congress authority to blunt not only the effect of state legislation hostile to the citizens' fundamental rights, but also to combat the hostility of corporations and individuals to such rights.[237] Further, and in accord with prior understandings of rights created by the federal government, citizenship for freedmen was a new constitutional right and as such, the federal government had primary and direct enforcement authority over this new right.[238] Harlan's understanding in this respect was consistent with the intent of the Fourteenth Amendment's Framers.[239]

Harlan also discussed state regulatory roles in licensing public conveyances, theaters, inns, and places of amusement. In a lengthy examination of each of these arenas of public operation, he pointed out that all of them operated in the public interest (railroads, for example, provided public transportation) and were heavily regulated.[240] Inns (although not private boarding houses) and places of amusement were similarly licensed and regulated by the states either under long-held common law principles or by statute. As such their legal right to operate came from the public, which included all citizens.[241] Because of this publicly-granted right, the regulated entity became infused with a duty to serve all members of the public without discrimination.[242] Operators of railway companies, inns, and places of amusement thus became agents of the state,

[236] *The Civil Rights Cases*, 109 U.S. at 46.
[237] *Id.* at 54.
[238] *Id.* at 54-56.
[239] *See supra* pp. 5-6.
[240] The Civil Rights Cases, 109 U.S. at 37–42.
[241] *Id.*
[242] *Id.*

and, in Harlan's view, citing *Munn v. Illinois*,[243] their acts of discrimination were adverse state action within the meaning of the Fourteenth Amendment.[244]

Finally, Harlan took issue with Bradley's views on race discrimination.[245] Bradley had said earlier in his opinion that not every act of discrimination involved the federal government or the recently passed amendments.[246] To suggest otherwise, he said, would run the slavery argument into the ground.[247] Bradley then opined, in a burst of dicta, that at some point after emerging from slavery, having the aid of legislation, a man must take the rank of a mere citizen and cease to be the "special favorite of the laws …."[248] He concluded that "[m]ere discriminations on account of race or color were not regarded as badges of slavery."[249]

Harlan agreed with Bradley that the government had no interest in regulating social intercourse.[250] Whether one person chooses to have social interaction with another person was not a governmental concern. But Harlan distinguished these rights from the rights at issue. Civil rights were not the same as social rights.[251] According to Harlan, the rights protected by the Act of 1875 were civil rights only,[252] the same category of rights protected by the CRA of 1866, and the same rights deemed fundamental and under the protection of the Fourteenth

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[243] Munn v. Illinois, 94 U.S 113 (1877).

[244] *The Civil Rights Cases*, 109 U.S. at 37, 58–59 ("Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created") (internal citations omitted). *Id.* at 43.

[245] *Id.* at 26.

[246] *Id.*

[247] *Id.* at 24.

[248] *Id*. at 25.

[249] *Id*.

[250] *The Civil Rights Cases*, 109 U.S. at 59.

[251] *Id*.

[252] *Id*.

Amendment.[253] Further, Harlan said it was unfair to claim that the recently freed "colored race" was seeking special favors under the law.[254] Instead, in his view, "[w]hat the nation, through congress, has sought to accomplish in reference to that race is, what had already been done in every state in the Union for the white race, to secure and protect rights belonging to them as freemen and citizens; nothing more."[255]

Not until over eighty years later did Congress apply a fix to the outcome of *The Civil Rights Cases*.[256] While Bradley's views may have been popular at the time in the North and South, during the intervening years they exerted a coercive and dehumanizing effect on the daily lives of Back people in South. Following *The Civil Rights Cases*, operators of inns, theaters, amusement parks, and other facilities open to the public were given free reign, at least from the federal government at this time, to discriminate as they pleased against Blacks. Miller's narrow rendering of the privileges and immunities clause, Bradley's narrow understanding and application of the Fourteenth Amendment to state laws repugnant to the Amendment, and now Bradley's declaration that the Civil Rights Act of 1875 was unconstitutional, left the Black community with little room to maneuver in their fight for equal standing with the White community. The situation worsened in the following cases.

IV. THE FULLER COURT'S FURTHER EROSION OF CONGRESSIONAL INTENT

In the thirteen years since *Slaughter-House*, the application of the privileges and immunities clause of the Fourteenth Amendment remained with the limits assigned by Miller. He had solidified the states as the principal, if not the only,

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[253] 39th Cong. 1st Sess., *supra* note 2, at 2765 (1866).
[254] *The Civil Rights Cases*, 109 U.S. at 61.
[255] *Id*.
[256] *See* The Civil Rights Act of 1964 (codified as amended in scattered sections of 42 U.S.C.).

enforcers of fundamental rights and the rights set forth in the first eight Amendments. Further, in the years since *Cruikshank*, section 6 of the Enforcement Act of 1870 remained where Bradley and Waite had dropped it. As such, the Framers' concept of circumventing states that deprived and denied Fourteenth Amendment rights was filtered through a state action requirement. This result has continued to the present.[257]

The Waite Court had substantially squandered the Framers' goal of a fairer America. Where the conduct at issue was committed by a private individual or groups of private individuals without the presence of a state actor, the inaction of the state left the victims of terror and violence to the states for recourse. The flourishing of lynching in the early part of the twentieth century would seem to be a prime example of the deficiency of this regime. The Fuller Court, however, would add another dimension to the unchecked racial horrors in the South with the development of the "separate but equal" doctrine, a principle that became embedded and notorious in many, if not most, Southern civic, educational, and economic institutions for the next few decades, if not longer.[258] This doctrine obscured the language and thus the intent of the Fourteenth Amendment's equal protection clause. According to the Fuller Court, direct state action to separate the races under separate but equal principles did not violate the Amendment.

A. Riding in Comfort

In 1890, the Louisiana legislature mandated that all railroad companies carrying passengers in Louisiana provide separate (but allegedly equal) coach cars for Blacks and Whites.[259] Nurses attending children of another race were exempt. Writing for the eight to one majority in what assuredly is the most infamous of the Reconstruction cases, *Plessy v. Ferguson*, Justice Brown began his discussion of the Fourteenth Amendment by noting:

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[257] FONER, *supra* note 65, at 172–173.
[258] *Id.* at 160.
[259] For an interesting discussion of the principal actors in *Plessy*, *see* Louis Menand, *In the Eye of the Law*, THE NEW YORKER, Feb. 4, 2019, at 18.

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.[260]

As to the facts, Brown noted that the Louisiana law in question pertained to intrastate commerce only.[261] As such, the only question before the Court was whether the statute was a reasonable regulation.[262] According to Brown, the reasonableness of state police power was entitled to wide latitude and was to be measured against the customs, usages, and traditions of the people, consistent with the goal of promoting "public peace and good order."[263] With this test at hand, and without further discussion of the customs, usages, and traditions of the people, Brown concluded that the Louisiana statute did not deprive the "colored man" of equal protection under the Fourteenth Amendment.[264]

Justice Brown adopted Justice Miller's *Slaughter-House* construction of citizenship and privileges and immunities to determine the Amendment's scope.[265] Miller, it will be recalled, said citizenship consisted of separate United States citizenship and state citizenship. From this, Miller had reasoned, without citation to any Congressional authority, there also existed separate and distinct privileges and immunities for citizens of the United States and for citizens of a state.[266] The Fourteenth Amendment, according to Brown, prohibited states from enacting hostile legislation that interfered with the privileges and immunities granted by United States citizenship.[267] This formulation, first by Miller and now Brown, however, meant little to the everyday lives of Black people because by now, thanks to Miller, there was little in the

[260] Plessy v. Ferguson, U.S 537, 544 (1896).
[261] *Id.* at 546.
[262] *Id.* at 550.
[263] *Id.*
[264] *Id.* at 550-51.
[265] *Id.* at 543.
[266] *See supra* pp. 89-90.
[267] *Plessy*, 163 U.S. at 543.

way of privileges and immunities of citizens of the United States to protect. Further, by inference, Justice Brown left the protection of so-called state privileges and immunities to the states with no role for the federal government.

Justice Brown's notion of bundling purely social activities, like choosing dinner companions, with the freedom of Blacks to enjoy inns and theaters on the same terms as Whites, mirrored those of Justice Bradley. Access by all races to theaters, inns, and other public places, however, fit within the notion of enjoyment of freedom and life identified by Senator Howard, Representative Stevens and other Framers as one of the Fourteenth Amendment's privileges and immunities.[268] Brown attempted to justify his opinion near the end by asserting:

> Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.[269]

Justice Harlan, as most know, was the lone dissenter in *Plessy*. Principal among his arguments, Harlan noted, as he did in *The Civil Rights Cases*, that railroads were heavily regulated by the state and, as such, were infused with a public purpose and interest. It was impermissible, he argued, for a public authority to know or consider the race of those otherwise entitled to its benefits.[270] He also attacked the claim that the statute in question did not have a discriminatory purpose. According to Harlan, the statute, under the guise of providing equal treatment to both Blacks

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[268] *See supra* pp. 82, 84.
[269] *Plessy*, 163 U.S. at 551-52.
[270] *Id*. at 553-54.

and Whites, was simply a state legislative measure to exclude Blacks from railroad coaches occupied by Whites.[271] Thus, the statute was state action of the purest sort, action that had a discriminatory purpose that fell squarely within the ambit of Rev. Stat. § 1979 (formally section 2 of the CRA of 1866) and the Framers' intent under the Fourteenth Amendment.

Finally, in his lengthy dissent, he noted toward the end that "the thin disguise of 'equal' accommodations for passengers in railroad coaches would not mislead anyone, nor atone for the wrong this day done."[272]

B. Further Setback

The erosion of the Framers' intent did not end with *Plessy*. In October 1903, the grand jury for the Eastern District of Arkansas indicted twelve White men for Enforcement Act violations in what ultimately became *Hodges v. United States*.[273] The indictments were based on the undisputed facts of a practice at the time known as "whitecapping."[274] The *Hodges* indictment alleged that about fifteen White men armed with guns attacked a group of Black men who had been newly hired at a sawmill in Poinsett County, Arkansas.[275] The purpose of the attack, as alleged in the indictment, was to coerce the owner of the mill to fire the mill's Black workers and to coerce the Black workers to leave the premises.[276] The mill owner sought help from the local justice of the peace who, instead of assisting the owner, joined ranks with

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[271] *Id*. at 557.
[272] *Id.* at 562.
[273] 203 U.S. 1 (1906, *overruled by* Jones v. Alfred H. Mayer Co., 392 U.S 409, 411 (1968)).
[274] Whitecapping describes a racial motivated effort, usually accompanied by violence or threats of violence, by White agrarian workers to drive Blacks from employment or from tenant farmer status.
[275] *Hodges*, 203 U.S. at 2–4.
[276] *Id*. at 3-4.

the defendants and, apparently, adopted their goals.[277] The mill owner gave in to the mob's demands.[278]

The indictment alleged that the defendants violated Rev. Stat. section 1977 (1874) (formerly part of section 1 of the Civil Rights Act of 1866), and Rev. Stat. section 5508 (1874) (formerly section 6 of the Enforcement Act of 1870)[279]. The defendants filed a demurrer to the indictment, contending that the offenses under sections 1977 and 5508 were not federal claims and were triable only in state court.[280] The District Court of the United States for the Eastern District of Arkansas (Judge Trieber), dismissed the demurrer and, following a trial the jury convicted three of the defendants.[281] On a writ of error to the Supreme Court, Justice Brewer, writing for the seven to two majority, concluded that the matters alleged were not within the jurisdiction of the United States.[282] Brewer reversed the lower court ruling and remanded the case with instructions to sustain the demurrer.[283]

His began his opinion, after quoting §§ 1977 and 5508, by asserting that the Fourteenth and Fifteenth Amendments were restrictions on state action and, because no action on the part of the state was alleged, these statutes were not applicable to the charges contained in the indictment.[284] In other words, according to Brewer, the Fourteenth (and Fifteenth) Amendment were restrictions on state action.[285] Accordingly, these statutes were not justified by either Amendment.[286] Brewer then devoted most of opinion to the Thirteenth Amendment and the government argument

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[277] Martha R. Mahoney, *What's Left of Solidarity? Reflections on Law, Race, and Labor History*, 57 BUFF. L. REV. 1515, 1524–25 (2009).
[278] *Id.* at 1525.
[279] *Hodges*, 203 U.S. at 4.
[280] *Id.*
[281] *Id.*
[282] *Id.* at 13, 20.
[283] *Id.* at 20.
[284] *Id.* at 14.
[285] *Hodges*, 203 U.S. at 14.
[286] *Id.*

that interference with the right to perform contracts, including contracts for labor, reduced the targets of the interference to a condition of slavery.[287] In addressing this question, Brewer said the Thirteenth Amendment provided relief from compulsory service of one to another and was not aimed at acts outside the strict definition of involuntary servitude.[288] Thus, impediments to the formation or completion of contracts were not encompassed by the Thirteenth Amendment.[289] Such incidents were a matter for state courts.[290]

Brewer, like Justices Waite and Bradley in *Cruickshank*, displayed a remarkable misunderstanding of the Fourteenth Amendment and the reach of § 5508. Brewer simply asserted, without any citation to the legislative history of the Amendment or § 5508, that it was "beyond dispute" as had been "repeatedly held," that the Fourteenth Amendment did not justify §§ 1977 and 5508.[291] He made no attempt to flesh out the meaning of "state," or state action. Nor did he acknowledge the framer's insistence that state inaction, in the form of depriving or denying the protection of the state, was a form of state action violative of the Fourteenth Amendment and actionable under §5508.

The outcome of *Hodges* was a major setback to the cause of equal rights.[292] Brewer had reinstated a damaging portion of Bradley's *Cruikshank* circuit court opinion (but now as an opinion of the Supreme Court), thus crippling the ability of federal prosecutors to effectively reach the conduct of individuals under the Fourteenth Amendment.[293] Thereafter, the indispensable language of

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[287] *Id.* at 16–20.

[288] *Id.* at 16–17.

[289] *Id.* at 17–18.

[290] *Id.* at 20.

[291] *Hodges*, 203 U.S. at 14.

[292] *See* Mahoney, *supra* note 277, for a fuller discussion of the impact of *Hodges* on § 1799.

[293] The Court did not give full recognition to the scope of §5508 until *United States v. Price*, 383 U.S. 787, 806 (1965) ("We conclude, therefore, that it is incumbent on us to read § 241 [the former § 5508 and Sec. 6 of the

§§ 1977 and 5508, so carefully crafted by the Framers, became mired in controversy.[294] *Hodges* was not overruled until sixty-two years later by *Jones v. Alfred H. Mayer Co*.[295]

V. CONCLUSION

Historians assert that foundation and nourishment of Jim Crow came from many sources,[296] but the Supreme Court, with its commanding authority, was a powerful facilitator and abettor of the despair that was to come. The outcomes of the cases discussed above thus fed the already shifting public and political narrative regarding the status and treatment of Blacks in the post-Civil War era. The will and vision of the Framers was no match for the combined effect of these forces.

The Waite and Fuller courts, by largely ignoring the intent of the Framers, an intent informed by the post-war evidence of brutality toward Black citizens, provided an almost worst-case scenario of outcomes for the cause of racial justice: a severely and unnecessarily restricted understanding of the privileges and immunities clause, a misreading and misapplication of Sec. 6 of the Enforcement Act of 1870, a hostile reading of the term civil rights, and, apart from economic regulation, an unlimited interpretation of permissible state police power. Further, by narrowly defining state action, the Waite and Fuller Courts confined the Fourteenth Amendment's reach to correction of state legislative enactments thought to have violated the Amendment. Thus, the plight of the Black community was left for decades to the uncertainty of the undeveloped jurisprudence of equal protection and to the caprice of state courts. This outcome was tragic for the Black community

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Enforcement Act of 1870] with full credit to its language."); *see also United States v. Mosley*, 238 U.S. 383, 386 (1915) ("It is not open to question that this statute [the former § 5508 and Sec. 6 of the Enforcement Act] is constitutional …").

[294] Byrd v. Sexton, 277 F.2d 418, 429, n. 22 (8th Cir. 1960).

[295] *Hodges*, 203 U.S. at 14.

[296] FONER, *supra* note 65, at *xxi-xxiv*.

and ultimately disabling for the rest of America.

VI. APPENDIX

1. Relevant amendments to the Constitution of the United States[297]:

Thirteenth Amendment (passed by Congress January 31, 1865, ratified December 6, 1865)

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

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

Fourteenth Amendment (passed by Congress June 13, 1866, ratified July 9, 1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

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[297] The Constitution Amendments 11-27, National Archives

Fifteenth Amendment (passed by Congress February 26, 1869, ratified February 3, 1870.

Section 1.The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

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

2. Relevant federal statutes:

Civil Rights Act of 1866[298]

CHAP. XXXI. –- *An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and

[298] Act of April 9, 1866, c. 31, § 1, 14 Stat. 27, reenacted by § 18 of the Enforcement Act of 1870, Act of May 31, 1870, c. 114, § 18, 16 Stat. 140, 144, and codified in §§ 1977 and 1978 of the Revised Statutes of 1874, now 42 U.S.C. §§ 1981 and 1982.

to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Sec. 2. *And be it further enacted,* That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

Enforcement Act of 1870 (effective May 30, 1870)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all citizens of the United States who are or shall be otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

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Section 6. And be it further enacted, That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free

exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court,—the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years,—and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

Section 7.And be it further enacted, That if in the act of violating any provision in either of the two preceding sections, any other felony, crime, or misdemeanor shall be committed, the offender, on conviction of such violation of said sections, shall be punished for the same with such punishments as are attached to the said felonies, crimes, and misdemeanors by the laws of the State in which the offence may be committed.

Civil Rights Act of 1875

'Section 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude. '

Sec. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of $500 to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall, also, for every such offense, be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not

less than $500 nor more than $1,000, or shall be imprisoned not less than 30 days nor more than one year: Provided, that all persons may elect to sue for the penalty aforesaid, or to proceed under their rights at common law and by state statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this provision shall not apply to criminal proceedings, either under this act or the criminal law of any state: And provided, further, that a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively.'