

— CHAPTER TWO —

**Reconstruction, the Fourteenth Amendment,
and the Creation of the Civil Rights Act of 1871**

I. Introduction: Placing Reconstruction-Era Civil Rights Enforcement in Context

A. Why (and How) History Matters

Section 1983 was first enacted as Section 1 of the Civil Rights Act of 1871 (“Ku Klux Klan Act”),¹ one of a series of Reconstruction civil rights statutes addressing widespread violence in the southern states and those governments’ failure to prevent harms to freed blacks and white sympathizers. The fact that the debates leading up to the passage of the Ku Klux Klan Act have received so little attention from scholars is surprising. Because the 1871 Act was one of the first statutes passed under Section 5 of the 14th Amendment, one would expect judges and scholars to refer often to these congressional debates in order to glean some indications of early congressional interpretations of the famously open-ended phrases found in Section 1 of the 14th Amendment,² and to gain insight on a contemporary Congress’s understanding of the scope of its own authority under Section 5.³ Familiarity with the legislative history is also of course essential for any proper evaluation of subsequent court opinions’ interpretation of the scope of potential governmental liability under § 1983, because so

¹ Act of Apr. 20, 1871, ch. 22, 17 Stat. 13, § 1 (1871).

² Examples of scholarship comparing arguments in the 42nd and 39th Congresses include (Crosskey 1954; Avins 1967; Zuckert 1986); and, especially, (Kaczorowski 1985; Kaczorowski 1986; Kaczorowski 1987; Kaczorowski 1987b; Curtis 1986: 157-68; Scaturro 2000).

³ There is a precedent for this kind of broad contextualism. The Department of Justice successfully argued in its brief in the 1966 case *U.S. v. Guest*, 383 U.S. 745, that Section 5 encompassed the power to legislate directly against private individuals because one of the first enforcement statutes, the Ku Klux Klan Act of 1871, was passed under the authority of Sec. 5 with that very goal in mind. *See also* (Frantz 1964).

much of the legal commentary and Supreme Court opinions refer to the original intent of the 42nd Congress.⁴ For all of these reasons, this Chapter offers an analysis of the congressional debate, by examining the 1871 statute in light of the broader statutory scheme for protecting civil rights during Reconstruction. This kind of broader view, reaching beyond the debates in the 42nd Congress to include an analysis of the debates and reception of the early Reconstruction measures – including the Thirteenth Amendment, the Civil Rights Act of 1866, and the Fourteenth Amendment – can help to provide a more complete and therefore accurate depiction of the background assumptions that were likely to be commonplace among the supporters of the 42nd Congress who voted for the 1871 Ku Klux Klan Act.

Using a broader historical lens in this study serves an additional goal as well. Because today's debates concerning the constitutional status of governmental affirmative duties to protect against "private," third-party acts of violence⁵ and more general worries about turning § 1983 claims into a font of tort law both turn on interpretive questions concerning the scope of the protections afforded by the Due Process Clause, this Chapter also provides a useful review of the Reconstruction-era debates concerning the proper interpretation of the substantive scope of the Fourteenth Amendment. Reviewing the original understanding during the congressional and ratification debates will help us to assess whether contemporary constitutional tort doctrines are faithful to the original hopes of the Reconstruction Congresses. Although it is obviously futile to try to excavate from the Congressional Globe and ratification debates clear-cut answers to specific, contemporary doctrinal questions, it is nonetheless worthwhile to examine the range of

⁴ See Chs. 3-6 *infra*.

⁵ See discussion of *DeShaney* in Ch. 5 *infra*.

assumptions and supporting theories, and to attempt to assess their prominence in the debates.⁶ One of the goals of this Chapter is to demonstrate that a careful examination of

⁶ William Nelson offers a similar caution:

The framers of the Fourteenth Amendment simply never took advantage of the many opportunities they had to specify its precise boundaries. But the ambiguities of the amendment for purposes of today's doctrinal issues should not lead to a conclusion that the amendment had no meaning for its supporters. It did have meaning. But the meaning the amendment had for them existed on a conceptual level different from the doctrinal level on which most scholars have tended to examine it . . .

See (Nelson 1988: 7). Nelson also offers a candid acknowledgement at the outset of his book that, during the debates in the 39th Congress, most of the key issues being debated were never resolved in the sense that any consensus was reached:

[H]istory can never tell us how the framing generation would have resolved inconsistencies that it did not, in fact, resolve. The present impasse in Fourteenth Amendment scholarship results from continued efforts to accomplish the impossible task.

(Nelson 1988: 6). Although I agree with Nelson's observations, I would argue further that even when the commitments of the framers of the 14th Amendment are examined at a higher level of abstraction – i.e., evaluating their position on fundamental rights or privileges and immunities, rather than ask more specifically whether, say, they believed desegregation of schools was mandated by Section 1 – the evidence supports competing interpretations. I disagree, for example, with Nelson's insistence that even the most radical Republicans were concerned about states' rights. My reading of the materials suggests instead that they likely for pragmatic purposes avoided emphasizing the implications of some of their positions for states' rights. Moreover, when the enforcement legislation they approved in the 1870s is also taken into account, it becomes even less convincing to argue that states' rights was a goal that was deemed equally as important protecting fundamental rights.

Earl Maltz offers an example of a more precise way out of these interpretive dilemmas. In his 1990 book, he suggests that if it can be determined that conservative Republican votes were required for passage of a bill or proposed amendment, then their narrower view of the measure's scope should trump all others. *See, e.g.*, (Maltz 1990: 106). The result of such an approach is that a very small minority of a majority coalition will be able to hold the larger group hostage, in the sense that the small group will be able to force its will on the rest of the coalition. This hardly seems like a fair way of acknowledging competing views in a coalition. Perhaps, if the purpose of the investigation is to determine which view prevails and will thus control a court's construction of a statute or provision, some might view that kind of "law office history" to be appropriate. It, however, hardly seems like an acceptable approach to scholarship which aims to describe, in all their complexity, competing structures of discourse about rights and federalism that have risen to prominence and receded in influence at different points in our history. Kay offers an alternative solution to the "summing problem" that would require only allowing the consensus views shared by all members of the majority coalition to be deemed authoritative. Kay's approach might not work well when applied to the case of the 14th Amendment, because with respect to questions regarding the scope of rights and the nature of their enforcement, there was no consensus between the most conservative and Radical Republicans, unless consensus is defined as the narrower interpretation of rights, which would make Kay's approach reach the identical conclusion that Maltz does. (Kay 1988: 247-51)(arguing that as long as the positions are not contradictory, one should rely on the consensus position); *cf.*(Boyce 1998: 954-5)(rejecting such an approach).

Other discussions of originalist approaches to interpretation that I have found helpful include (Brest 1980; Brennan 1990; Kay 1988; Farber 1989; Bassham 1992; Barnett 1999; Whittington 1999; Whittington 2002). For other views about the role of history in legal scholarship and judicial decision-making, *see* (Kelly 1965; Weicek 1988; Flaherty 1996; Kalman 1998; Richards 1997).

the debates over the 1871 Ku Klux Klan bill can help illuminate the framers' understanding of the substantive rights protected by the Fourteenth Amendment as well as their views about congressional enforcement powers. Doing so will also provide the basis to discern the extent to which the original promise of the Reconstruction Amendments has been lost. Even if it is impossible to produce "one right answer" about original intent, it is much easier to detect those interpretive answers that, given the historical evidence, fall outside the range of plausibility. Building on the arguments of many Progressive Constitutionalists,⁷ I will suggest in Chapters 4 and 5 that much of the Rehnquist Court's contemporary constitutional torts doctrine is based upon a surprisingly ill-supported set of arguments about the original understanding of the Republican supporters of the 14th Amendment and subsequent enforcement legislation.

B. Fourteenth Amendment Scholarship: Moving Beyond the Incorporation Debate

Despite the existence of a huge body of scholarship examining the purpose and ramifications of the Fourteenth Amendment, few scholars have focused their attentions on the enforcement legislation of the early 1870s, in order to inform their interpretations of the motivations of the Reconstruction Republicans and the scope of the Fourteenth Amendment.⁸ Instead, for much of the twentieth century, scholars focused on the speeches in the 39th Congress when debating whether or not the supporters of the Fourteenth Amendment intended to incorporate the Bill of Rights.

⁷ See discussion in Ch. 1 *supra*.

⁸ For notable exceptions, *see* (Kaczorowski 1985; Kaczorowski 1986; Kaczorowski 1987; Curtis 1986: 157-68; Zuckert 1986; Scaturro 2000). For earlier examples, *see* (Crosskey 1954; Avins 1967). Everette Swinney's 1966 dissertation was one of the first revisionist histories addressing the enforcement debates, but his narrative neglects the constitutional dimensions of the debates. *See* (Swinney 1987).

In a response to Justice Hugo Black's dissenting opinion in *Adamson v. California* (1947),⁹ Charles Fairman first put forth his arguments concerning the incorporation question in a 1949 law review article that was considered to be extremely compelling by members of the Supreme Court and established a consensus in the legal academy.¹⁰ Fairman focused his argument on two general lines of attack: the meaning of the phrase "privileges or immunities," and Republican proponents' own statements about the scope of Section 1 of the 14th Amendment. Rejecting Justice Washington's interpretation of Art. IV's privileges or immunities clause in the widely cited *Corfield v. Coryell*,¹¹ Fairman endorsed more a narrow interpretation, which held that the standard was merely protection against discrimination – and not a guarantee of fundamental, substantive rights.¹²

One reason the incorporation debate became so long lived is that Fairman's use of the evidence remained extremely suspect. Although it is true, as will be evident in the discussion below, that the debates in the 39th Congress concerning Section 1 of the

⁹332 U.S. 46 (1947). Amar offers an interesting analysis of Black's "mechanical" theory of total incorporation, noting that Black declined to highlight references to the open-ended language in *Corfield v. Coryell*, discussed below: "For Black, Justice Washington's words conjured up the specter of judges invalidating statutes by invoking nontextually specified fundamental rights and by giving constitutional status to common-law rights like freedom of contract. The specter haunting Justice Black had a name. Its name is *Lochner*." (Amar 1998: 178).

¹⁰(Fairman 1949) Fairman's 1949 article was the 19th most-cited law review article between World War II and 1985. (Brandwein 1999) (*citing* "The Most-Cited Law Review Articles," *California Law Review*). Despite a comprehensive response by William Crosskey, charging Fairman with ignoring speeches and other evidence that refuted his position, Fairman's work remained influential. (Crosskey 1954). *See also* (Crosskey 1953) for a preliminary response to Fairman's article.

¹¹ 6 F. Cas. 546 (C.C.E.D. Pa. 1823). In *Corfield*, Justice Washington held that the Article IV privileges or immunities are those that "are, in their nature, fundamental; which belong, of right, to the citizens of free governments; and which have, at all times, been enjoyed by citizens of the several states which compose this Union . . ." He continued by stating that these guarantees fell 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." *Id.* at 551. Washington clearly suggested that any specific rights mentioned under these headings were not meant to be viewed as a complete list: "These, and many others which might be mentioned, are strictly speaking, privileges or immunities." *Id.*

¹² (Fairman 1949: 12).

Fourteenth Amendment were not extensive, there are nevertheless a set of direct and concise statements by the Amendment's authors and sponsors suggesting that incorporation was a goal. Fairman dealt with these statements by either ridiculing the arguments themselves, or by challenging the credibility of the author.¹³ Some of Fairman's interpretations of the speeches by John Bingham suggest also that Fairman simply did not understand Republican antebellum constitutional theory, and so did not have the proper background context to interpret Bingham's arguments.¹⁴ By dismissing Republican interpretations of the Article IV privileges or immunities clause, Fairman could then portray them as "confused"¹⁵ or "unschooled"¹⁶ when they claimed that *Barron* had been wrongly decided, or when others, like John Bingham, argued that the states had always been bound by the Bill of Rights but that Article IV lacked an enforcement mechanism for the federal government.

In other cases, Fairman simply ignored inconvenient evidence. For example, when Fairman turned to an analysis of the debates on the final version of the Amendment, he overlooked or dismissed entirely clear statements indicating that the

¹³ See (Curtis 1986: 98,120-128) (discussing efforts by Fairman and Raoul Berger to discredit the two leading proponents of the Amendment, John Bingham and Jacob Howard).

¹⁴ For example, Bingham argued that Article IV's privileges or immunities clause and the 5th Amendment Due Process Clause protected all of the guarantees contained in the Bill of Rights and thus obliged states to comply with them. Bingham acknowledged that the guarantees were only "declaratory" in nature; these provisions did not allow for the federal government to enforce these provisions against the states. Bingham was very clear to acknowledge that an amendment was necessary to overturn *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), in order to ensure that the states will be forced to comply with these guarantees. See e.g., Cong. Globe, 39th Congress, 1st Sess. 1089-90 (remarks of Rep. Bingham). Despite these speeches, Fairman persisted in claiming that Bingham was confused in asserting that the states were bound by these guarantees, because the Court had already found to the contrary in *Barron*.

Bingham was not alone in thinking the Court's decision in *Barron* was wrongly decided. Curtis found over thirty statements by Republicans in the 38th and 39th Congresses, from 1864 to 1866, suggesting that the Bill of Rights should limit states. (Curtis 1986: 112) See also (Amar 1998: 140-162) (endorsing Marshall's opinion in *Barron*, criticizing the "declaratory theory" of the "*Barron* contrarians", but also acknowledging that "once the Civil War came, *Barron* seemed plainly anachronistic").

¹⁵ (Fairman 1971: 1287).

¹⁶ (Fairman 1971: 1136).

Amendment's proponents meant to secure, at a minimum, all the rights found in the first eight amendments.¹⁷ In recent years, law professors like Michael Kent Curtis¹⁸ and Akhil Amar¹⁹ have provided convincing challenges to Fairman's position.²⁰ Indeed, Curtis' refutation of Fairman's arguments is so convincing and comprehensive, it is difficult to understand how this debate came to preoccupy scholars and legal practitioners for such a long duration.²¹

¹⁷ See, e.g., Cong. Globe, 39th Cong., 1st Sess. 1088-94 (remarks of John Bingham); *id.* at 1291-93 (same).

¹⁸ (Curtis 1986). In addition to criticizing Fairman's selective use of the evidence in the Congressional Globe, Curtis argues convincingly that many of Fairman's errors of interpretation in his early work were due to his unfamiliarity with the tradition of antislavery legal thought that influenced the more radical Republican proponents of the Fourteenth Amendments. (Curtis 1986: 6-7). One of the key tenets of antislavery legal thought was that the liberties protected in the Bill of Rights applied to the states, even prior to the passage of the Fourteenth Amendment, despite the Court's 1833 ruling in *Barron v. Baltimore*. A second tenet was that the privileges or immunities clause in Article IV protected fundamental rights of United States citizens against infringement by state governments. Brandwein attributes Fairman's acceptance of the Supreme Court's ruling in *Barron*, and his derogation of the views of its opponents, to his "catholic" or Court-centered approach to constitutional history. (Brandwein 1999: 106)(citing Sanford Levinson, *Constitutional Faith* (1986)).

For more on antebellum abolitionist legal theories, see (Nelson 1974), (Wiecek 1977), (Maltz 1988). For their influence on Republicans in 1866, see (Curtis 1986: 42-56). For examples of scholars other than Crosskey incorporating antislavery constitutional theory in analyses of the 39th Congress, see (ten Broek 1964; ten Broek 1951; Graham 1950; Graham 1954; Graham 1968). Curtis points out that, although these scholars had the background knowledge needed to make sense of the Republican arguments in the 39th Congress, they nevertheless deferred to Fairman's position and defended a selective incorporation thesis. See, e.g., (Curtis 1986: 110-112).

¹⁹ (Amar 1992; Amar 1998).

²⁰ (Fairman 1949: 25).

²¹ The considerable influence of the scholarship of Raoul Berger, who argues that the Fourteenth Amendment did not incorporate any of the Bill of Rights, demonstrates the continuing impact of these anti-incorporation arguments. See (Berger 1977; Berger 1981). For criticisms of Berger's thesis, see, e.g., (Soifer 1979)(focusing on the scope of the privileges or immunities clause), (Murphy 1978), (Curtis 1982), and (Curtis 1986: 47-48, 113-117). Berger responds to his critics in (Berger 1983; Berger 1986). Berger's views, for example, have found disciples among leading conservative lawyers – perhaps most notably former Attorney General Edwin Meese, whose speeches before the ABA lamented the incorporation of First and Fourth Amendment guarantees against state governments.

Berger, like Fairman, slights antislavery legal thought by offering a very narrow interpretation of the original understanding of the scope of the Article IV privileges or immunities clause. According to Berger, the clause was intended to guarantee that states would treat migrants on equal terms with its own citizens; the clause did not regulate state's authority over its own citizens. (Berger 1977: 39). Curtis, however, convincingly shows that Bingham (and others who, for example, cited Justice Washington's opinion in *Corfield v. Coryell*) supported the position that the Article IV privileges or immunities clause protected substantive rights:

[When Republican] congressman referred to the denial of freedom of speech [in the South] to citizens of other states [Northern abolitionists], they were not simply referring to a narrow or conventional understanding of the privileges or immunities clause by

C. *Reevaluating the Constitutional Politics of Reconstruction*

More recently, Bruce Ackerman has resurrected interest among scholars in the legitimacy of the unconventional ratification procedures established for the Thirteenth and Fourteenth Amendments.²² Ackerman's model of higher-lawmaking includes four stages: 1.) "signaling," which occurs when a political movement raises the visibility of constitutional issues; 2.) "proposal," when the movement offers a platform for reform; 3.) "mobilized popular deliberation," which occurs when the movement confronts opposition (often via conflicts between branches) and the contest is evaluated by the public through a series of elections; and 4.) "legal codification," when a successful mobilization is

which northerners would be allowed the same freedom to attack slavery as people were in the southern states themselves – which is to say none. Instead, they espoused a theory fully protecting freedom of speech against infringement.

(Curtis 1986: 39)

Bingham, like other leading Republicans, read article IV, section 2 as protecting the privileges or immunities of citizens of the United States, including those in the Bill of Rights, from state infringement. . . . Both in his prototype and in his final version of the Fourteenth Amendment, Bingham used the words *privileges or immunities* as a shorthand description of fundamental or constitutional rights. Use of the words in this way had a long and distinguished heritage. Blackstone's *Commentaries on the Laws of England*, published in the colonies on the eve of the Revolution, had divided the rights and liberties of Englishmen into those 'immunities' that were the residuum of natural liberties and those 'privileges' that society had provided in lieu of natural rights.

(Curtis 1986: 64); *see also* (Curtis 1986: 75)(discussing Blackstone); *cf.* (Amar 1998: 166-9) (observing that Americans used the terms rights, privileges or immunities interchangeably in the 18th and 19th centuries).

In the 1869 case, *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869), the Court interpreted the Article IV privileges or immunities clause as merely guaranteeing citizens of one state visiting or doing business in another only those rights given to its people by the law of the second state. Although the Supreme Court clearly provided support for Berger's narrow reading, other legal historians have noted that the Court's decision in *Paul v. Virginia* departed from a series of holdings in cases offering a much broader interpretation, holding that Art. IV, sec. 2 was intended to secure the basic fundamental rights of citizens of the United States. (Anteau 1967). *See, e.g., Conner v. Eliot*, 59 U.S. (18 How.) 591 (1856), and, esp. *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa 1823). In the debates in the 39th Congress, leading proponents of Section 1 clearly endorsed Justice Washington's opinion in *Corfield*. *See, e.g., Cong. Globe*, 39th Cong., 1st Sess. 2765-6 (remarks of Sen. Howard). Further discussion of the history of privileges or immunities doctrine, the Court's *Slaughterhouse* decision, and their impact on constitutional torts claims, can be found in Ch. 3 *infra*.

²² (Ackerman 1998).

endorsed by the Supreme Court, whose role it is to synthesize the new constitutional values with the old and to preserve the results of the last sustained “moment” of popular higher lawmaking.²³ Although this framework yields interesting insights, and it successfully highlights many of the (procedures-based) constitutional dimensions of Reconstruction politics, there are serious drawbacks to Ackerman’s attempt to fit the Reconstruction era into his four-stage framework. One of the most serious problems²⁴ is Ackerman’s argument that the 14th Amendment achieved permanent legitimacy with the Court’s decision in *Slaughter-House* – an argument that can only appear credible if one sweeps aside evidence of the Republicans’ own understanding of the scope of the Amendment.²⁵

The group of scholarship I have found most helpful is that which focuses on issues about the *substantive* scope of the 14th Amendment, while not obsessing about the implications for the incorporation debate.²⁶ For many Republicans during Reconstruction, the list of rights they sought to protect extended far beyond the boundaries of the enumerated rights contained in the Bill of Rights.²⁷ Yet, as 14th

²³ Ackerman divides the Reconstruction period into two different instances of higher lawmaking: the presidential model (directed by Lincoln) producing the 13th Amendment, and the congressional model (directed by the radical Republicans) producing the 14th and 15th Amendments.

²⁴ Another problem with his focus on the procedural dimensions of constitutional change is that it leads him to (in some respects) praise the Johnson administration for its leadership in promoting the conflicts that led to a more sustained popular consideration of the Reconstruction policies. This “contribution” seems rather paltry when one considers the financial and physical costs of Johnson’s obstruction.

²⁵ For the best critique of Ackerman’s Reconstruction arguments on these grounds, see (Smith 1999: 2042)(suggesting that “Ackerman slights the moral principles of the architects of Reconstruction”).

²⁶ See (Graber 1999: 358)(questioning the current significance of the incorporation debate and suggesting that these questions are well settled, with the possible exception of the Second Amendment). For examples of scholarship moving beyond the incorporation debate and considering the broad scope of the Radical Republicans views concerning fundamental rights, see (Kaczorowski 1986; Kaczorowski 1987; Heymann 1991).

²⁷ When referring to these rights in the 1860s and 1870s, Republicans often used the terms “fundamental rights,” “natural rights,” and “civil rights” interchangeably. In what follows, I will usually refer to “unenumerated rights.” I do so in part to emphasize that the incorporation debate misses much of the Republican agenda when it focuses exclusively on the Bill of Rights. Republican supporters of the 14th amendment clearly thought that the Privileges or Immunities Clause would protect much more than the

Amendment scholarship narrowed its focus to the incorporation question, it tended to shield from view some of the more radical aims of Republican advocates of enforcement legislation, which were based on the principle that state governments had an affirmative duty to protect citizens from private violence, in many instances.

There is no denying that these interpretive questions are extremely difficult, primarily because during this era, politicians, lawyers, and judges used a complicated rights vocabulary – and one about which there existed no consensus regarding key terms.²⁸ Foner describes the basic framework:

At the outset of Reconstruction most Republicans still adhered to a political vocabulary inherited from the antebellum era, which distinguished sharply between natural, civil, political, and social rights. The first could not legitimately be circumscribed by government; slavery had always been wrong, fundamentally, because it violated the natural rights – life, liberty, and the pursuit of happiness – common to all humanity. Equality in civil rights – equal treatment by the courts and civil and criminal laws – most Republicans now deemed nearly as essential, for an individual’s natural rights could not be secured without it. Although Radicals insisted black suffrage must be part of Reconstruction, the vote was commonly considered a “privilege” rather than a right; requirements varied from state to state, and unequal treatment or even complete

provisions in the Bill of Rights. “Fundamental rights” is also a helpful term, because it suggests that Republicans defined these rights as those that are the essential guarantees for citizenship in a free society. I am more cautious about endorsing the phrase, “natural rights” because it tends to cause confusion. For example, many wrongly identify natural rights with theories of natural law describing rules for human flourishing. *See e.g.*, (Nelson 1988: 21-7)(distinguishing rights claims based on natural law and natural rights). In the twentieth century, natural rights talk can more easily be confused with theories of human rights describing liberties that are deemed essential to human dignity. For these reasons, rather than use natural rights language, I prefer to use the substitutes, “fundamental civil rights” or “unenumerated constitutional rights.” These phrases avoid unnecessary confusion and also have the benefit of calling attention to the fact that the definition of these rights depends upon a political theory defining the core prerequisites of citizenship in a constitutional democracy.

²⁸(Primus 1999: 153-160). The purpose of Primus’s book is to demonstrate, through a study of three periods of history, the contingency of rights claims. He offers a useful corrective to analytical philosophers’ approaches to rights definition, and he persuasively argues that rights claims must be examined in their political contexts in order to understand the purposes they served. In his section on Reconstruction, however, Primus fails to highlight the degree to which there existed disagreements about what counted as a fundamental right. He describes the tripartite schema of civil, political, and social rights as forming a “shell game” in which one rights claim – like the right to vote – would “migrate” from one category to another during the course of Reconstruction. I want to emphasize in this chapter that there were in addition disagreements about the list of fundamental rights, rights not enumerated in the Bill of Rights, that should be included within the category of privileges and immunities of citizens.

exclusion did not compromise one's standing as a citizen. And social relations – the choice of business and personal associates – most Americans deemed a personal matter, outside of the purview of the government.²⁹

Much of the interpretive difficulties in examining the “original understanding” of the Reconstruction framers of amendments and supporters of enforcement legislation is due to lack of consensus over this schema of natural, civil, political, and social rights. In speeches, for example, many politicians might have declared that freed blacks' or others' “fundamental rights” or “privileges and immunities” should be protected, but they often had in mind very different notions of what specific types of activities should be protected. The complexity is compounded further when one moves beyond the differences of opinion among Republican politicians and lawyers and attempts to incorporate the positions of leading Democrats of the day, who referred to these same terms with their own distinct understandings of their meanings. This confusion contributed to the long duration of the incorporation debate, and it is also responsible for fueling current scholarly debates concerning the Court's abandonment of Reconstruction in cases like *Slaughterhouse* and the *Civil Rights Cases*.³⁰

I have already mentioned the literature on “Progressive Constitutionalism” that has attracted the attention of many constitutional theorists.³¹ In recent years, a number of constitutional historians have offered more support for these theories by focusing their attention on the lost promise of the Reconstruction Amendments, especially the

²⁹ (Foner 1988: 231); *see also* (Hyman and Wiecek 1982: 386-438).

³⁰ *See* discussion in Ch. 3 *infra*.

³¹ *See* Ch. 1 *supra*.

Fourteenth Amendment.³² The purpose of this Chapter is to offer a preliminary evaluation that original promise. I will seek to explore, by examining the Reconstruction politicians' own statements of their goals and aspirations, the degree to which their constitutional vision overturned traditional theories of liberal constitutionalism, especially the public/private distinction. Careful attention to the original aspirations of the Republican Congresses can demonstrate what was lost in the failure of Reconstruction, and can help us grasp the extent to which the Supreme Court narrowed the protections in the Reconstruction Amendments, in ways that contravened the hopes and intentions of their Republican supporters in Congress. Highlighting the original constitutional aspirations of the legislators that passed the Reconstruction-era civil rights statutes, rather than the narrowing doctrines introduced by the Supreme Court, will also provide an independent vantage point from which to evaluate the interpretations of contemporary judges and scholars defending a narrow reading of these provisions.³³ Although the interpretive task is a difficult one, one goal of this study is to sharpen the focus on the unenumerated fundamental rights the Republican supporters of the 14th Amendment sought to protect, a neglected topic in much of the 14th Amendment scholarship addressing the debate over the incorporation of the Bill of Rights. The

³² My study of the Reconstruction Era generally, and the Fourteenth Amendment in particular, is most indebted to the works of Robert Kaczorowski, who emphasizes the extensive sweep of the radical Republican constitutional reforms. (Kaczorowski 1985; Kaczorowski 1986; Kaczorowski 1987; Kaczorowski 1987b). *See also* (Scaturro 2000). Other Reconstruction historians pay less attention to the original promise of the Reconstruction Amendments for constitutional law, and focus on the *political* failure of Congressional Reconstruction and the subsequent narrowing interpretations of the Supreme Court. *See e.g.*, (Les Benedict 1974; Gillette 1979; Foner 1988).

William Nelson also offers a helpful overview of the debates in the 39th Congress, but his conclusions rely on an uncritical acceptance of the Republicans' assurances that their approach would not upset the federal system. While it is true that many Republicans avoided stirring up controversy by declining to highlight the potentially radical implications of their proposals, they were adamant in acknowledging that the Fourteenth Amendment provided a "floor" of protection for fundamental rights. (Nelson 1990); *see also* (Hyman 1973: 435-40) (emphasizing Republicans' concern for states' rights).

³³ *See* Chs. 3-6 *infra*.

second goal is to examine the contributions that a review of the debates in the 42nd Congress can offer to contemporary scholarship concerning the state action limitation and government liability for harms committed by both public and private actors.

II. The Radical Republicans Remake the Constitution

A. The Thirteenth Amendment and the Dawn of a New Age of Federalism

The Thirteenth Amendment³⁴ opened the door to a dramatic shift in the relations between the states and the federal government. Before the Civil War, states exercised primary responsibility for the protection of personal liberties, but with the Amendment the federal government now shared authority in this domain. Some Democratic opponents of the proposed Amendment had argued that the changes were so great that it put the Amendment beyond the scope of Article V:

You cannot, under the power of amendment, contravene the letter and spirit of the Constitution; . . . you cannot subvert republicanism; . . . you cannot destroy the liberty of the States; . . . you cannot decide the status of citizens of the States.³⁵

The Congressional debates over the Thirteenth Amendment provided little clarification about the provisions' scope. Did Section 1 only abolish slavery, or are certain rights

³⁴ The text reads:

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

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

³⁵ (Maltz 1990: 18) (citing remarks of Democratic Rep. Pendleton, Cong. Globe, 38th Cong., 2nd Sess. 223 (1865)); (Vorenberg 2001: 107-112).

inextricably linked with the status that follows its abolition?³⁶ Could Congress attempt to guarantee that those rights, however defined, are protected?³⁷

The political brokering during the ratification process prevented any possibility of developing even a modest consensus over the meaning of the Amendment. Previously, in May of 1865, President Johnson had decided to recognize Arkansas, Louisiana, Tennessee, and Virginia. By the fall of 1865, the other southern states had proceeded to hold elections for new legislators, governors, and members of Congress. Most of these southern governments that did ratify the Thirteenth Amendment did so only conditionally, based on assurances from the Johnson administration that Section 2 would not permit the federal government to interfere with the states.³⁸ Indeed, almost immediately after forming, these new governments began to set up “black codes.”³⁹ In 1865, as southern states like Mississippi and South Carolina began introducing the black code legislation, and as more and more reliable reports of violence against blacks began

³⁶ See generally (Hyman and Wiecek 1982: 389) (“If the Amendment aimed only at the termination of formal slavery without leaving a door open for further federal intervention in the states, why the enforcement clause?”).

³⁷ For more on the debates concerning the scope of the Thirteenth Amendment and the resulting contest over its legacy, see (Vorenberg 2001). Kaczorowski stresses Republicans’ statements equating abolition and the protection of fundamental rights, while Vorenberg suggests that during the debates in Congress Republicans deliberately avoided highlighting the implications for discriminatory laws and the citizenship status of freed blacks in order not to lose Democrats’ support. When they did provide specifics about the implications of the Amendment, it was only to reassure Democrats that political rights such as the right to vote clearly fell outside the ambit of the provision. (Kaczorowski 1986); cf. (Vorenberg 2001: 190-1). See also (Maltz 1990: 27) (“[A]n amendment that was clearly understood to go beyond the simple abolition of slavery could not have passed Congress. If this is accepted as the appropriate measure of the original understanding, then the Thirteenth Amendment should be construed narrowly.”)

During the ratification debates in the Union states, more attention was paid to the potentially huge transfer of power from the states to Congress. Section 2 of the Amendment was at the center of the ratification debates in states like New York, with a much more powerful Democratic minority. Fears about the potential for Congress to rely on Section 2 to challenge discriminatory state laws led Kentucky, along with Delaware and New Jersey, to vote against ratification. (Vorenberg 2001: 218-19).

³⁸ (Vorenberg 2001: 228-33).

³⁹ These “black codes” included a set of laws concerning vagrancy, legal apprenticeships, limits on the travel, renting land in urban areas, hunting, owning guns – all of which were designed to force ex-slaves into oppressive labor contracts. By 1866, all the other southern state government followed the lead of Mississippi and South Carolina and passed similar black codes, although some deliberately avoided referring explicitly to race in these measure, in order to avoid challenges under the Civil Rights Act of 1866. (Foner 1988: 198-210).

streaming into Washington, Republicans in Congress began to defend a much broader view of the federal power.⁴⁰

B. The Early Days of Thirty-Ninth Congress

One obvious use of federal power was the decision by the Republican caucus in December 1865 to deny seats in 39th Congress to representatives of rebel states.⁴¹ More radical Republicans justified their position by reference to the Constitution's Guarantee Clause, but it was clear that the radical view was not universally supported in Congress.⁴² When Congress established a Joint Committee on Reconstruction in order to investigate conditions in the South, there was a concerted effort to achieve a balance among radical, moderate, and conservative Republican members.⁴³

C. Bingham's Call for a New Amendment

Just days after the December opening of Congress, a moderate Republican representative, John Bingham of Ohio, introduced a resolution proposing a new amendment. The proposal authorized Congress to pursue all "necessary and proper" legislation to secure all persons in every state "equal protection in their rights to life, liberty and property."⁴⁴ On February 3, 1866, the Committee voted 9 to 4 to endorse another draft amendment proposed by Bingham, which was nearly identical to his earlier

⁴⁰(Foner 1988: 225)("News of violence against the freedmen and the passage of the Black Codes aroused an indignation that spread far beyond Radical circles. . . . Many Northerners who did not share the Radicals' commitment to black political rights insisted that the freedmen's personal liberty and ability to compete as free laborers must be guaranteed or emancipation would be little more than a mockery.").

⁴¹ Cong. Globe, 39th Cong., 1st Sess. 2, 3-5 (1866).

⁴²(Foner 1988: 232, 239-41).

⁴³(Foner 1988: 239)(observing that Charles Sumner was left off the Committee in order not to upset the balance).

⁴⁴ Cong. Globe, 39th Cong., 1st Sess. 114 (1866). After a lengthy speech on January 9, defending his proposal, Bingham agreed to postpone further debate. *See id.* at 157-8.

proposal to the House of Representatives. The Joint Committee's proposed amendment provided that:

The Congress shall have the power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several states equal protection in the rights of life, liberty, and property (5th Amendment).⁴⁵

Bingham's proposal was open to competing interpretations, a problem which was perhaps caused by his tendency to assume that certain tenets of constitutional law were so obvious that they need not be spelled out. From Bingham's perspective, the only change to the original Constitution that was absolutely necessary was the addition of an explicit congressional enforcement power. One objection to this approach, advanced most strenuously by the conservative Republican Representative from New York, Robert Hale, was that the equal protection section would permit Congress to pass uniform legislation on all matters having to do with life, liberty, or property.⁴⁶ Recognizing that others shared Hale's concerns and that he would not likely gain enough support to ensure passage, Bingham agreed on February 28 to allow the resolution to be postponed.⁴⁷

D. The Radical Republican Reconstruction Policy

Also in February 1866, congressional Republicans responded to the black codes with a new reconstruction policy offering even stronger protections for the rights and liberties of the freed blacks. In order to make explicit the kinds of protections thought to

⁴⁵ Cong. Globe, 39th Cong., 1st Sess. 1033-4 (1866).

⁴⁶ Cong. Globe, 39th Cong., 1st Sess. 1063-5 (1866); (Curtis 1986: 70-1).

⁴⁷ Cong. Globe, 39th Cong., 1st Sess. 1095 (1866). On June 5, 1866, after the House had already accepted the new Joint Committee proposed amendment, Bingham again requested that his original proposal be postponed because "the amendment already passed by the House covers the whole subject." Cong. Globe, 39th Cong., 1st Sess. 2980 (1866). *See also* (Kaczorowski 1987b: 95, n. 37)(quoting that passage and asserting that Bingham's statement "has been ignored in every study of the Fourteenth Amendment"); *but see* (Zuckert 1986: 124)(quoting Bingham's statement in an article examining the original intent of Section 5).

be implicit in the Thirteenth Amendment's guarantee of liberty, Republicans in Congress passed the second Freedman's Bureau Bill,⁴⁸ which allowed blacks to take complaints about unfair labor practices or other acts of discrimination and intimidation to federal agents and to seek the federal government's protection. Many Democrats fought the bill, declaring it unconstitutional by virtue of its attempt to go beyond the enumerated or implied powers of Congress (and also because of the provisions for military trials, which were considered to violate the procedural guarantees of the Fifth Amendment).⁴⁹ Johnson's veto message provided a sharply worded attack on Congress' policies, describing them as "immense patronage," without support in the Constitution.⁵⁰

During this busy spring, Congress continued debating the Civil Rights Bill.⁵¹ The purpose of the act was two-fold. The first section of the Act declared: "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." The purpose of this provision

⁴⁸ The Freedman's Bureau was established by Congress in March 1865, and was assigned the responsibility of establishing schools for the freedmen and providing aid to the elderly, the ill, and orphans. Act of March 3, 1865, ch. 90, 13 Stat. 507; (Foner 1988: 142-3).

⁴⁹ See e.g., Cong. Globe, 39th Cong., 1st Sess. 318-9 (1866) (remarks of Sen. Johnson); *id.* at 623 (remarks of Rep. Kerr).

⁵⁰ (Foner 1988: 247) In July, Republicans were able to muster a veto-proof majority and secured its passage into law, making sure to incorporate changes to the legislation in order to curtail the role of the executive branch in implementing the functions of the Bureau. Cong. Globe, 39th Cong., 1st Sess. 421 (1865) (Senate); *id.* at 688 (House); Act of July 16, 1866, ch. 200, 14 Stat. 173; (Whittington 1999: 120).

Despite these efforts by Congress to curtail Johnson's role in implementing Reconstruction policies, as commander-in-chief, the president would nevertheless have an important impact because he filled the ranks of commanding officers with opponents of Reconstruction. (Foner 1988: 342). The Reconstruction Act of 1867, for example, which required all orders to subordinate army commanders to obtain the support of General Grant, did nothing to diminish Johnson's power in selecting who would serve as commanders; indeed, after the fall 1867 elections, emboldened by the December defeat of an early impeachment motion by a wide margin in the House, Johnson fired a number of military commanders and replaced them with more like-minded officers. (Foner 1988: 354).

⁵¹ See, e.g., Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (remarks of Sen. Trumbull); *id.* at 1117 (remarks of Rep. Wilson); Act. of April 9, 1866, ch. 31, §1, 14 Stat. 27. For a reprint of the Act, see Library of Congress, American Memory, *A Century of Lawmaking for the New Nation: U.S. Congressional Documents and Debates, 1774-1875*, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=014/llsl014.db&recNum=58>

was to challenge the *Dred Scott* holding denying citizenship to all blacks.⁵² The second purpose of the Act was to make explicit the rights citizens were to enjoy equally without regard to race: making contracts, access to the courts, and “full and equal benefit of all laws and proceedings for the security of person and property.” The bill also clearly defined the enforcement powers, by authorizing Bureau officials, federal district attorneys and marshals to bring suit against violators in federal court.⁵³

Questions remained about the scope of these guarantees: Were the laws providing for “the security of person and property” primarily private rights, such as state laws regulating contracts and property? Or did the bill encompass the fundamental civil rights contained within the Bill of Rights?⁵⁴ Was Congress authorizing the federal government to guarantee prohibitions against both official and private violations of civil rights?⁵⁵ Many Republicans had contended that the Thirteenth Amendment did indeed give Congress the authority to legislate against all denials of the rights of freedmen guaranteed

⁵² Many supporters of the bill believed that the 13th Amendment would overrule the Court’s holding in *Dred Scott*. Others argued that, in order to explicitly guarantee to blacks the status of citizen a new amendment would be required. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 574 (1866) (remarks of Sen. Johnson); *id.* at 1291-2 (remarks of Rep. Bingham).

⁵³ (Foner 1988: 243-4).

⁵⁴ Trumbull quoted Justice Washington’s definition of privileges or immunities in *Corfield v. Coryell*, which suggests that he then believed that the fundamental rights associated with U.S. citizenship may be broader than, but certainly encompass, the protections contained in the Bill of Rights. Cong. Globe, 39th Cong., 1st Sess. 474-5 (1866) (remarks of Sen. Trumbull). *See also id.* at 1757 (remarks of Sen. Trumbull) (“To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights which belong to free citizens as free men in all countries such as the rights enumerated in this bill, and they belong to them in all States of the Union. The rights of American citizenship mean something.”).

Amar also defends the position that the phrase “security of person and property” would have been understood to encompass all the fundamental rights of free persons, including the Bill of Rights protections. *See* (Amar 1998: 195). *See also id.* at 178 (describing the two-tiered view of the Civil Rights Act, with a fundamental rights core, and an equal rights outer layer). *See also* (ten Broek: 1965: 189-90) (defending the two-tiered view); (Curtis 1986: 71-2) (same); (Kaczorowski 1986: 895-903) (defending the fundamental rights view and emphasizing its endorsement in one of the earlier cases addressing the constitutionality of the Civil Rights Act, *United States v. Rhodes*, 27 F. Case. 785 (C.C.D. Ky. 1867)).

⁵⁵ (Kaczorowski 1987: 53-4] (*citing* Cong. Globe, 39th Cong., 1st Sess. 500 (1866)). *But see* (Maltz 1990: 70-8)(defending interpretations of the Act applying a state action limitation).

by the Amendment.⁵⁶ When discussing Section 3 of the Act, Senator Trumbull stated very clearly that the bill contemplated federal court jurisdiction “over all persons committing offenses against the provisions of this act, and also over the cases of persons who are discriminated against by State laws and customs.”⁵⁷ Trumbull’s statement suggests that he had in mind enforcement cases involving private denials of rights, cases involving challenges to existing state legislation, and cases involving state inaction or customs involving arbitrary or unequal enforcement of state laws.⁵⁸ Kaczorowski also emphasizes an exchange between Senators Cowan and Trumbull. Cowan expressed concern that Section 2 of the Act would allow the federal government to subject state judges performing their duties as they thought fit to criminal prosecutions. When challenged on this point, Cowan posed a question of clarification: “Is there not a provision by which State officers are to be punished?” In response, Trumbull asserted, “Not State officers especially, but everybody who violates the law. It is the intention to punish everybody who violates the law.”⁵⁹

This view of the Thirteenth Amendment’s scope was, at that point, extremely controversial.⁶⁰ If the authority to guarantee prohibitions of rights violations by private individuals or entities was allowed, then Congress would assume a large portion of the

⁵⁶ When discussing an early proposal for a civil rights bill and recommending postponement until after the ratification of the 13th Amendment, Sherman read allowed Section 2 of the 13th Amendment and described it as “not only a guarantee of liberty to every inhabitant of the United States, but an express grant of power to Congress to secure this liberty by appropriate legislation”. Cong. Globe, 39th Cong., 1st Sess. 41 (remarks of Sen. Sherman).

⁵⁷ Cong. Globe, 39th Cong., 1st Sess. 475 (1866).

⁵⁸ This view of the Act’s scope was later endorsed by the Supreme Court in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). See also (Kohl 1969).

⁵⁹ See, e.g., Cong. Globe, 39th Cong., 1st Sess. 475 (1866) (remarks of Sen. Trumbull) (pointing to the analogy of the Fugitive Slave Act and *Prigg*; *id.* at 1119 (remarks of Rep. Wilson) (same); (Kaczorowski 1987b: 63-4).

⁶⁰ The conservative Republican Senator from Pennsylvania, Edgar Cowan, accused Senator Trumbull of distorting the Amendment’s original meaning. Cong. Globe, 39th Cong., 1st Sess. 499 (1866); see also (Vorenberg 2001: 236-239).

state's authority over the criminal and private laws. The more moderate alternative was to interpret the Thirteenth Amendment as authorizing Congress to legislate against violations of civil rights by state government alone.⁶¹ The motivation for this dilution was relatively benign, if unrealistic: the more moderate Republicans thought that once state officials were made to respect the civil rights of freed blacks, then the private violations would cease, as equal enforcement by the states became more likely.⁶²

President Johnson, however, was not appeased by even the most moderate interpretations of the scope of the Civil Rights Act. He attacked the measure for being “a stride towards centralization, and the concentration of all legislative powers in the national Government.”⁶³ On March 27, the president vetoed the Act, justifying his action with the argument that Congress lacked authority to pass it. Although this confirmed Bingham's worries that the Thirteenth Amendment alone might not provide sufficient authorization,⁶⁴ the Republicans in Congress were able to override his veto on

⁶¹ Of course, even this conception of congressional authority did not sit well with Democrats who believed that the Thirteenth Amendment did nothing more than abolish slavery. They remain opposed to any interpretation that would authorize Congress to enforce additional rights, however defined.

⁶² Even Trumbull's more expansive interpretation of the scope concerned Congress's hypothetical powers. His goal was “to provide the *threat* of national assumption of jurisdiction over civil rights in order to force states to fulfill that role themselves.” (Les Benedict 1974b: 79-80)(emphasis added). It should be noted that Benedict, however, does not believe that Trumbull intended for the federal government to assume jurisdiction in cases involving private discrimination. Although the Freedmen's Bureau Bill might suggest that Trumbull's goals were this radical, Benedict argues that the Bureau Bill was justified by Trumbull under temporary war powers. Because the Civil Rights Act was intended to be permanent, Benedict doubts that Trumbull would have approved of such a dramatic expansion in federal authority. (Les Benedict 1974b: 80-1, n.34; Les Benedict 1974: 147-9). Part of the reason for Benedict's doubt is Trumbull's later opposition to the Ku Klux Klan legislation in 1871. *Id.* Kaczorowski explains the shift in terms of Trumbull's political calculation to join the Liberal Republicans. Because Trumbull changed his position in response to these electoral consideration and political ambition, he provides an excellent example of why reading the debates in the 42nd Congress to help understand those in the 39th Congress requires a careful attention to the broader political context. (Kaczorowski 1987b: 67).

⁶³ (Foner 1988: 250). Foner also notes “what was most striking about the message was its blatant racism; what had been muted in the Freedmen's Bureau veto now became explicit.” *Id.* For a reprint of the president's veto message, see Cong. Globe, 39th Cong., 1st Sess., 1679-81 (1866).

⁶⁴ Bingham, along with Democrats focusing on constitutional objections to the Civil Rights Act, believed that Congress was not authorized under Section 2 of the 13th Amendment to pass the Civil Rights Act. Many of the specific rights mentioned in the Act had been denied to free blacks in the North, so it was not

April 9th, the first veto override of a major piece of legislation in American history.⁶⁵

Now the more moderate Republicans realized that there was no hope for future cooperation with the president, and they committed themselves to work as a party to secure protections for the civil rights of the freedmen.⁶⁶

E. The Debate over the Fourteenth Amendment

Meanwhile, throughout April the Joint Committee continued debating various modifications to proposals for a new amendment.⁶⁷ On April 28, the Committee voted 10 to 3 to pass another Bingham proposal. The new proposal provided: “Sec. 1 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.”⁶⁸ The Joint Committee reported this final proposed amendment on April 30 to the House and Senate.⁶⁹ The House passed the proposal without making any changes to the language on May 10.⁷⁰ During the Senate debate, a provision declaring all persons born or naturalized in the United States citizens of the United States

clear how an Amendment abolishing slavery would authorize overturning those rights. Cong. Globe, 39th Cong., 1st Sess. 1122-23 (1866). Moreover, even though Bingham disagreed with the Supreme Court’s decision in *Barron*, and other case law interpreting the scope of Article IV’s Comity Clause, he recognized that a constitutional amendment was needed to specifically and permanently overturn those doctrines. Cong. Globe, 39th Cong., 1st Sess. 1291 (1866) (remarks of Rep. Bingham).

⁶⁵ (Whittington 1999: 120); Cong. Globe, 39th Cong., 1st Sess. 1809 (1866) (Senate); *id.* at 1861 (House of Representatives).

⁶⁶ (Foner 1988: 250-1).

⁶⁷ *See* (Nelson 1988: 54-57)(discussing the proposal by former Rep. Robert Dale Owen and Bingham’s proposals to modify it).

⁶⁸ (Curtis 1986: 58) (*citing* Benjamin B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction*, 39th Congress, 1865-1867 106 (1914)).

⁶⁹ Cong. Globe, 39th Cong., 1st Sess. 2286 (1866) (remarks of Rep. Stevens); *id.* at 2265 (remarks of Sen. Fessenden).

⁷⁰ Cong. Globe, 39th Cong., 1st Sess. 2545 (1866).

and of their state of residence was added.⁷¹ The final version passed the Senate on June 8, and the House quickly approved of the modified resolution on June 13.⁷²

Although contemporary scholars typically focus on the meaning of provisions in Section 1 of the Fourteenth Amendment, what most concerned Congress during the debates over the Amendment were questions affecting their political power.⁷³

Republican members of Congress were well aware that, if freedmen were not granted suffrage rights, then, as a direct result of the Thirteenth Amendment, the three-fifths compromise would be annulled and the southern states could count the freedmen as individuals, a change which would cause enormous expansion of power for the southern states in the House of Representatives and the Electoral College.⁷⁴ To deal with the representation issue, Section 2 of the proposed amendment provided for a reduction in representation in proportion to the number of male citizens denied the suffrage. This approach, avoiding any reliance on race explicitly, was designed to prevent the southern states from relying on literacy tests and property requirements to bar blacks from voting, while retaining the ability to also count them to boost its representation in the House.⁷⁵ Because much of the debate in the Joint Committee dwelt on these matters, less attention was paid to the meaning of the open-ended clauses of Section 1.⁷⁶

⁷¹ Senator Howard proposed this change, and Senator Fessenden explained that the purpose of the provision was “to prevent a State from saying that though a person is a citizen of the United States he is not a citizen of the State” *Id.* at 2896-97 (remarks of Sen. Fessenden).

⁷² Cong. Globe, 39th Cong., 1st Sess. 3042 (1866) (Senate); *id.* at 3148-8 (House).

⁷³ (Curtis 1986: 14).

⁷⁴ (Foner 1988: 252).

⁷⁵ (Foner 1988: 253). Section 3 originally proposed to exclude all persons who had aided the Confederacy from voting until 1870. Senate Republicans, worrying that this provision would be too divisive during the ratification debates, substituted a provision that barred all those who had taken an oath to support the Constitution and then aided the Confederacy from holding either national or state office. Section 4 prohibited the payment of the Confederate debt.

⁷⁶ (Curtis 1986: 15) (“Distressingly, the issue that seems primary to us today, the meaning of section 1 of the amendment, received relatively little discussion.”). Foner emphasizes that Republicans rejected alternatives, like the Owen proposal, which defined these rights with greater precision. (Foner 1988: 257);

There was, therefore, no precise consensus over the definition of phrases like “privileges or immunities” within the text of Section 1. As the history of the incorporation debate attests, notions of the fundamental rights of citizens of the United States were not self-defining terms around which a widespread consensus could be reached. It might also be the case that the implications of Section 1’s guarantees of civil rights were so much more controversial, that any extended debate or open speculation was intentionally avoided. There is, however, no evidence of a “conspiracy” among radical Republicans to remain silent about the implications of Section 1’s open-ended phrases so as not to endanger the Amendment’s ratification prospects.⁷⁷ Indeed, when discussing the definition of the privileges or immunities clause, Senator Howard not only quoted from the *Corfield* opinion, he also elaborated in great detail about the list of rights he thought were guaranteed by Section 1, including the provisions in the Bill of Rights.⁷⁸

In addition, while it is true that, when they were confronted with Democrats’ federalism-based concerns, Republicans did insist that Section 1 was respectful of state’s traditional authority over personal liberty, this insistence does not warrant the inference that they believed that Section 1 only secured equality rights or protected in absolute terms only a very narrow set of rights. Supporters of the Amendment argued that the states would now be under the supervisory authority of the national government, and

but see (Maltz 1990: 90-92)(speculating, on the basis of the voting patterns alone, that members of the Joint Committee believed the Bingham final proposal “must have aimed at a narrower class of rights”).

⁷⁷ *Cf.* (Berger 1977: 99-116); *and* (Nelson 1988: 59-60, 60-1, n.121)(emphasizing that Section 1 was the focus of public debate about the Amendment, and rejecting the Berger’s conspiracy charges). Furthermore, in his discussion of both the 1866 campaign speeches and the ratification debates, Curtis cites numerous Republican speeches that directly addressed the scope of Section 1. (Curtis 1986: 141-51). Berger’s conspiracy argument should be distinguished from the different accusations of conspiracy advanced by early progressive historians, like Charles and Mary Beard, who argued that radical Republicans were engaged in a conspiracy to protect property rights. For further discussion, *see* (Graham 1938; Graham 1968).

⁷⁸ Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (remarks by Sen. Howard); *but see also id.* at 2765 (“[these rights] are not and cannot be fully defined in their entire extent and precise nature.”) (same).

within the boundaries established by the national guarantees of rights protection.⁷⁹ There was a range of views about the size of those boundaries, but virtually all supporters (and opponents) of the Amendment, inside and outside of Congress, believed significant restrictions were being placed on the states.⁸⁰

Furthermore, Republicans likely “preferred to allow both Congress and the federal courts maximum flexibility in implementing the Amendment’s provisions.”⁸¹ There is some evidence that Republicans welcomed the Court’s participation in the future implementation of the Amendment. Although Section 5 of the Fourteenth Amendment clearly gave Congress the authority to enforce the protections in Section 1,⁸² the Republicans in Congress also intended to give the Supreme Court a role to play in preventing states from infringing upon those rights on some future date when the Republican Party might no longer comprise a majority in Congress. It is precisely this concern which led the Republicans to shelve Bingham’s early proposal, which merely

⁷⁹ (Foner 1988: 259). *See also* (Kaczorowski 1987b: 54)(arguing that, while “Republicans acknowledged the constitutional revolution in which they were engaged,” they intended to restrict congressional “protection of fundamental rights to situations in which states and localities failed to protect them”). *See also* (Kaczorowski 1996: 918-8) (arguing that the Citizenship Clause secured rights against infringement by public or private actors).

⁸⁰ Kaczorowski provides a helpful overview of antebellum legal theories concerning federal citizenship, which held that the Comity Clause secured fundamental rights of United States citizens. A major thesis in his work is that Republicans consciously sought to provide a more secure footing for arguments supporting the primacy of national citizenship. They accomplished this with the passage of the 14th Amendment. Even the Amendment’s opponents acknowledged the implications of establishing, through Section 5, the authority of Congress to enforce all rights, privileges and immunities of United States citizens. *See, e.g.*, (Kaczorowski 1986: 885-890)(discussing the treatises of John Codman Hurd and Chancellor Kent) *See also* (Amar 1998: 137-163). In his discussion of antebellum legal thought, Amar describes numerous opinions applying the Bill of Rights guarantees against states that were justified by appeal to natural rights, English common law, or on textual grounds (not every amendment began with “Congress shall not...”). Many of the cases cited did not even acknowledge Marshall’s opinion in *Barron*. Amar, however, does not include a discussion of the declaratory theory of the Comity Clause and the substantive rights of U.S. citizenship found in the works of Hurd and others, but he does refer to Curtis’ discussion of unorthodox legal theories. *See* (Curtis 1986: 42-4)(discussing Joel Tiffany’s antislavery legal treatise).

⁸¹ (Foner 1988: 258)

⁸² Sec. 5 Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

authorized Congress to enforce Article IV's privileges or immunities clause and the Fifth Amendment's due process clause.

On the other hand, it is also clear that Republicans believed that Sections 2 through 4 of the Amendment would guarantee that Republicans in Congress would, for the foreseeable future, retain the power authorized under Section 5 to enforce the provisions of Section 1. This may explain why they appeared less determined to work out a consensus about the proper interpretation of the Section 1 clauses. Despite their attention to questions about structure and powers, the framers of the Fourteenth Amendment nevertheless failed to address in a direct manner the scope of Section 5.⁸³ Why did the Republicans fail to be as careful to define their authority under Section 5 as they were to protect their party's interests in Sections 2 through 4? One possible reason for this lack of resolution is that the scope of the Section 5 power was indirectly linked to one's position about the scope of the guarantees in Section 1.⁸⁴ Although I disagree with Nelson's claims that the "equal rights" and "absolute rights" views garnered nearly equal amounts of support from Republicans, he does offer a helpful description of the significance of the choice between those competing interpretations of Section 1:

If section one guarantees nothing beyond equality, then Congress's section five enforcement power would have a limited scope analogous to the

⁸³ After the rise of the KKK and other forms of violence in the South, Republicans began to worry more about these newer private sources of oppression, which were just as much a threat to the rights of the newly freed blacks as were the earlier (and continuing) state-sponsored forms, such as the Black Codes, yet there was still debate about the authority of Congress to rely on its Section 5 powers to combat the Klan. *See* discussion below *infra*.

⁸⁴ This link was expressly acknowledged by Justice Miller in the *Slaughterhouse Cases*. Although no congressional statute was involved, the majority opinion emphasized Congress's independent authority to legislate to protect Privileges and Immunities. If the Court permitted a broad, fundamental rights interpretation of the clause, then congressional authority over the states would be (in the Court's view) excessively large, bringing the "entire domain of civil rights" under the domain of Congress rather than the states. This would "fetter and degrade the State governments by subjecting them to the control of Congress" and constitute a revolution in "the relations of the State and Federal governments to each other . . ." 83 U.S. 36, 78 (1873). Of course, this was precisely what Republican supporters of the Amendment intended. For further discussion of *Slaughterhouse*, see Ch. 3 *infra*.

interstitial power of the courts: Congress could legislate only upon a proper showing that state law discriminated unequally. In contrast, if section one is read as a basic guarantee of absolute rights, then Congress's section five power would support the passage of any legislation designed to protect those rights.⁸⁵

The Republican proponents of the Amendment did offer some indications of their views about Congress's Section 5 powers, which provide indirect support for the position that they were attempting in Section 1 to guarantee fundamental rights in absolute terms.⁸⁶

For example, when introducing the new proposal to the Senate, Senator Howard argued:

The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees. How will it be done under the present amendment? As I have remarked, they are not powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end. This is done by the fifth amendment.⁸⁷

In addition, Bingham, when requesting that his original proposal be permanently shelved, stated that he believed the final version of the 14th Amendment accomplished everything he had hoped to do when introducing his first resolution: "the amendment already passed by the House covers the whole subject."⁸⁸ Bingham evidently did not believe that his original proposal had failed, so it is questionable to use the turn to an alternative amendment as conclusive evidence that the latter drastically reduced the powers of Congress.⁸⁹ The sole difference between the two proposals is that the Bingham proposal potentially allowed Congress to legislate whenever and in whatever manner it chose to guarantee civil liberty, while, with the 14th Amendment, Congress was

⁸⁵ (Nelson 1988: 122-3).

⁸⁶ (Zuckert 1986).

⁸⁷ Cong. Globe, 39th Cong., 1st Sess. 2766 (1866).

⁸⁸ Cong. Globe, 39th Cong., 1st Sess. 2980 (1866).

⁸⁹ See also (Kaczorowski 1986: 915; Kaczorowski 1987: 95, n. 37) The passage is still ignored by the Supreme Court. Justice Kennedy's opinion in *Boerne* defended the Court's remedial interpretation of the Section 5 power by highlighting the failure of Bingham's original proposal. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

given only the supervisory authority to step in when states had failed to protect these rights – either by passing discriminatory legislation or by failing to protect them in absolute terms.⁹⁰ The Republican supporters of the 14th Amendment never acknowledged that, in their view, the judiciary would have the sole authority to define the scope of the rights in Section 1.⁹¹

III. Congressional Reconstruction, the Fifteenth Amendment, and the Enforcement Acts

A. From Civil Rights to Political Rights, and Back Again

The Republicans' shift towards a political rights agenda was as swift as it was surprising. In 1867 alone, Congress passed legislation to enfranchise blacks in the District of Columbia, to extend manhood suffrage in the territories, and then, after a great deal of legislative skirmishing, Congress incorporated a suffrage requirement in the Reconstruction Act of 1867.⁹² Although the manhood suffrage provision applied only the

⁹⁰ (Engel 1999: 130). Whether this change – the introduction of a federal supervisory power – is “revolutionary” or “conservative” is a matter of some debate in the literature. *Cf.* (Kaczorowski 1986)(describing the 14th Amendment as the linchpin of Republicans’ “Revolutionary Constitutionalism”); *and* (Hyman 1973: 439)(defining “revolutionary” as entailing the complete destruction of states *qua* states); (Les Benedict 1974: 76)(arguing that because Section 1 only “limited states’ alternatives in framing and possibly administering laws involving these rights” and “did not transfer to the national government the power to frame all laws touching on them” that it provides an example of “Republicans’ fundamental constitutional conservatism”). Benedict does acknowledge that a more expansive understanding of Section 1 may have shaped Republicans’ support for the Ku Klux Klan Act of 1871. *Id.* at n. 28.

⁹¹ (Engel 1999: 133)(“The broad manner in which Republicans understood Congress’ power to enforce the Thirteenth Amendment by ‘appropriate’ legislation militates against the claim that the same text in the Fourteenth Amendment limited congressional discretion.”).

⁹² (Foner 1988: 272-6). In the Reconstruction Act of 1867, Congress divided the South, except Tennessee, into five military districts which would temporarily govern in place of the reconstituted governments previously endorsed by Johnson. The Reconstruction Act of 1867 imposed a series of requirements on the Southern governments seeking readmission: 1.) the creation of new constitutions incorporating manhood suffrage (the state constitutional conventions would exclude all those falling within the “disability” clause of Sec. 2 of the Fourteenth Amendment), 2.) approval by a majority of registered voters, 3.) ratification of the Fourteenth Amendment.

former states of the Confederacy,⁹³ the events of 1867 accomplished what had been thought impossible just one year ago during deliberations over the Fourteenth Amendment. Although radicals like Senator Charles Sumner and Representative Thaddeus Stevens expressed disappointment over the failure to incorporate provisions for land distribution in the Reconstruction Act, it nonetheless seemed like a hopeful era was dawning for southern blacks and their supporters.

Perhaps this hopefulness contributed to complacency. After the 40th Congress opened in special session on March 4, 1867, Sumner and Stevens continued to press for land distribution, but their bills were summarily rejected.⁹⁴ These failures signaled the fate of the Republican Party. Now concerned about maintaining its hold on the southern states, radical and moderate Republicans held opposing views about the future of their party. Radicals like Stevens hoped for an alliance of blacks and white laborers, while moderates were concerned about the implications of such a strategy for capital investors. Instead, they sought to achieve a coalition including both blacks and white property owners, and they strived to assure the latter their rights of ownership would be protected.⁹⁵

The fall 1867 elections also provided cause for concern. In the southern states, where the elections were held to consider the calls for constitutional conventions, Republicans won handily, benefiting from an enormous turnout of black voters, but the numbers of white voters in most of the states were less than had been hoped.⁹⁶ In the Northern states, the Democrats' performance was even more worrying. Democrats

⁹³Tennessee, which in 1865 had been the first state to reorganize, passed a suffrage law for freedmen in 1867, in order to help shore up the Republican Party. (Trelease 1995: 7).

⁹⁴ (Foner 1988: 308-9).

⁹⁵ (Foner 1988: 310).

⁹⁶ (Foner 1988: 314) (noting black turnout ranged from 70 percent in Georgia to 90 percent in Virginia).

gained control of New York and California, and nearly cost Rutherford B. Hayes the Governorship of Ohio. These results gave the moderate wing of the party the incentive to seize control of the party's agenda.

After Johnson's impeachment debacle,⁹⁷ the election of 1868 offered further evidence of the waning influence of the radical wing of the Republican Party. Grant's earliest supporters were the New York commercial businessmen who had once supported Johnson, and who were now seeking a moderate candidate who would pursue fiscal policies providing stable conditions for future investments in the southern states. Radicals had originally hoped that Johnson's impeachment would put radical Benjamin Wade in a position to serve as the Republican candidate, but after that battle was lost they attempted to shape the party platform to their liking. The convention, however, produced a platform that was drained of all radical zeal. It left the issue of black voting rights in the North up to each state.⁹⁸

Although radicals were less than enthusiastic about Grant, it was clear that they needed to support a candidate who would win against the Democrats. Their nominee, former New York Governor Horatio Seymour, failed to rein in his running mate, the racist Francis Blair, who campaigned against Reconstruction policies.⁹⁹ The Democrats' chances thus depended on their ability to stir up racial strife. During the campaign, Democrats throughout the South used their economic clout to intimidate blacks. Merchants threatened to cut off the credit of blacks who attended Republican meetings, and landlords threatened conviction unless their workers repudiated the Republican

⁹⁷ (Foner 1988: 336-7) For an analysis of Johnson's impeachment, focusing on the episode's contribution to the process of defining the constitutional powers of the presidency, see (Whittington 1999: ch. 4).

⁹⁸ (Foner 1988: 337-8).

⁹⁹ (Foner 1988: 339-40) (describing Blair's racist speeches).

party.¹⁰⁰ Although they ultimately failed to win the election, their campaign succeeded in inciting violence throughout the South. The Ku Klux Klan, which had been in existence since its creation in Tennessee in 1866, expanded its reach across the South.¹⁰¹

B. The Rise of the Ku Klux Klan

The Klan's "reign of terror" included assassinating Republican congressmen,¹⁰² members of state legislatures, and former delegates to the constitutional conventions.¹⁰³ In Camilla, Georgia, a band of 400 armed whites, including the town's sheriff, fired upon blacks participating in an election parade, killing or wounding dozens of participants.¹⁰⁴ Similar acts of violence occurred in other states. In Louisiana, white mobs invaded Republican meetings, swarmed plantations, and killed hundreds of blacks. In the face of this violence, military commanders did nothing; Johnson had appointed men who were opposed to Reconstruction.¹⁰⁵ Republicans in Georgia and Louisiana abandoned the Presidential campaign, and Seymour won those states. Grant won every state but eight, yet his margin of 53% in the popular vote indicated that the Democrats had most likely captured the majority of the white electorate.¹⁰⁶ In the South, the strength of the Republican Party in the 1868 election was in inverse proportion with that of the Klan.

¹⁰⁰ (Foner 1988: 341).

¹⁰¹ Other white supremacist groups, using tactics identical to the Klan, included the Knights of the White Camelia, the White Brotherhood, the Invisible Empire, or the Knights of the Rising Sun. When referring generally to the violence caused by white supremacists, I will use the term "Klan". See also (Trelease 1995: 69) (discussing secrecy and confusion surrounding the proper names of these organizations in many areas).

¹⁰² (Trelease 1995: 154)(describing the assassination of Congressman James M. Hinds, of Little Rock, Arkansas).

¹⁰³ (Foner 1988: 426)("At least one tenth of the black members of the 1867-68 constitutional conventions became victims of violence during Reconstruction, including seven actually murdered.").

¹⁰⁴ (Trelease 1995: 117; Foner 1988: 342).

¹⁰⁵ (Foner 1988: 342) (quoting Commanding Gen. Lovell Rousseau, a supporter of President Johnson, who, after refusing to protect blacks, warned them to stay away from the polls and desist from political activities, exclaimed with approval that the "ascendance of the negro in this state is approaching its end.").

¹⁰⁶ (Foner 1988: 343).

Opponents of Reconstruction continued resorting to violence to achieve their objectives. After the 1868 elections, the Klan and other supremacist groups spread throughout every state in the South.¹⁰⁷ The overriding objective was to wipe out the transformations produced by Radical Reconstruction. To do this, they made it their goal to obliterate root and branch the Republican Party apparatus, black grassroots political organizations, like the Union Leagues, and ultimately to restore white supremacy in every sphere of life.¹⁰⁸ Black officials reported living in constant fear of violent attacks or assassination.¹⁰⁹ Political leaders like Georgia state legislator, Abram Colby, who had also founded a successful branch of the Equal Rights Association, were rounded up from their homes and beaten mercilessly.¹¹⁰ During these attacks they were told that they were being punished for their political work.¹¹¹ In Mississippi, another political activist, Jack Dupree, who had served as president of a Republican Party association, was murdered and dismembered, all in front of his family, because he was known as a leader who “would speak his mind.”¹¹² To escape being murdered, a number of local leaders abandoned their homes and property.¹¹³ Others were punished for winning political

¹⁰⁷(Trelease 1995: 27) (offering the best state-by-state survey of Klan atrocities); (Foner 1988: 430)(noting that Klan activity was more common in counties where blacks made up a minority or a small majority of the total population). A few counties stood out because of the scope of Klan’s terror and violence. In Florida’s Jackson County, over 150 people were killed. In North Carolina’s central Piedmont region, there were by one count twelve murders, nine rapes, fourteen arson cases, and over 700 beatings. *Id.* at 430-31.

¹⁰⁸ Senator John Sherman recited on the floor of the Senate the oath of one Klan organization in North Carolina, in order to emphasis the group’s political aims. The oath required, for example, that prospective member declare they were not members of a Union League, and that they will prevent anyone holding “radical views” from becoming a member. It also required that they swear they would “oppose all Radical and negroes in all of their political designs; and that should any Radical or negroe impose on, abuse, or injure any member of this brotherhood, you will assist in punishing him in any manner the camp may direct. ...” Cong. Globe, 42nd Cong., 1st Sess. 153 (1871).

¹⁰⁹ (Foner 1988: 426).

¹¹⁰ (Trelease 1995: 235, 319).

¹¹¹ (Foner 1988: 426).

¹¹² (Foner 1988: 426; Trelease 1995: 287).

¹¹³ In York County, South Carolina, the site of perhaps the most extensive Klan violence, most of the black population slept out every night in the woods, during every season of the year. Many eventually fled the county, leaving their homes, crops, and possessions. (Trelease 1995: 366).

office by facing a public whipping at the hands of Klansmen, who then warned the newly elected official to abandon his post.¹¹⁴

The Klan also targeted Republican political activities directly, showing up at campaign headquarters or during party meetings to commit violent assaults on the blacks in attendance. In St. Landry, Louisiana, on the eve of the 1868 election, a group of white supremacists began rounding up black Republicans, and over the course of two days over 200 blacks had been murdered or injured. The remaining blacks were presented with red badges and taken as a group to the polls. The Grant ticket failed to receive a single vote, despite the fact that there were 1,071 registered Republican voters in the parish.¹¹⁵

As part of this effort to restore white supremacy in the south, these groups expanded their focus beyond political organizations, by directing many of their violent attacks on the labor system. A Klan leader in Alabama organized white employers who were convinced that the courts were unreliable allies in their efforts to control black laborers. These Klansmen resolved “to do by fear what they were unable to make them do by law.”¹¹⁶ Klan members organized to intimidate and punish those black workers who questioned the distributions of crops at harvest time or demanded unpaid wages. In some cases, Klansmen would attack and whip and drive off black workers before they could claim their portion of the harvest at season’s end.¹¹⁷ They targeted blacks who had achieved any small measure of economic standing, and in some cases resorted to killing their livestock to reestablish their dependence on their white employers.

¹¹⁴ (Foner 1988: 427).

¹¹⁵ (Joint Comm 22; Trelease 1995: 128-9).

¹¹⁶ (Foner 1988: 429)(quoting from KKK hearings in Alabama).

¹¹⁷ (Foner 1988: 429).

The Klans' targets reached beyond party organizing and the labor system to include any social organization or behavior that contributed to or reflected blacks' elevated status in society. Even in states, such as Kentucky, where it would not be until 1870 that blacks would be granted the right to vote, the Klan focused on black churches, schools – any social institution that contributed to the autonomy of blacks.¹¹⁸ Blacks who were accused of rudeness, who failed to tip their hat or yield their place on a sidewalk, were beaten and whipped and harassed. Rather than condemn these violent atrocities, leading members of the Democratic Party dismissed these reports as unreliable or the product of Republican Party propaganda.¹¹⁹ The Democrats would not accept responsibility for their part in creating a climate, through their years of incessant denigration of freed blacks and the Republican Party, conducive to violence and to the rise of the Klan.¹²⁰ The Democrats were complicit in more recent ways in failing to control the growth and violence of the Klan. The Klan's strength varied from county to county throughout the southern states, and typically its members were most active in counties controlled by the Democratic Party, with local officials who, if not themselves members of the Klan, condoned its methods.¹²¹

Even in the areas controlled by the Republican Party, the Klan could not be contained. Although some blacks and Republicans held local offices, including that of sheriff and justice of the peace, once Klan members were arrested, it was extremely difficult to find witnesses to testify against them, and it was common to find others who

¹¹⁸ (Foner 1988: 428; Trelease 1995: 89-91).

¹¹⁹ See, e.g., Cong. Globe, 42nd Cong., 1st Sess. 153 (1871) (remarks of Senator Garrett Davis of Kentucky); (Trelease 1995: 154)(citing reports in the Democratic newspaper, the *Arkansas Gazette*, charging that Republicans were responsible for the escalating violence and arguing that the Republicans assumed the disguises in order to place the blame on the Democrats).

¹²⁰ (Foner 1988: 434).

¹²¹ (Trelease 1995: 64)(asserting that Klans were active “in no more than a quarter of all Southern counties between 1867 and 1871”).

were willing to perjure themselves to protect a fellow Klan member. Jury nullification was common in these cases, because support for the Klan usually reached beyond its membership to include large segments of the community.¹²² Still, part of the lack of efficacy was due to the position taken by the Republican Party leadership, who dissuaded blacks from organizing with weapons to defend themselves.¹²³ Republicans wanted to rely on the legal system to restore order, not resort to the violent methods of their foes.

C. The Southern States' Attempts to Combat the Klan

Accordingly, blacks sent pleas for protection to the Republican governors in the South. Local officials requested the calling up of state militias or the support of federal troops. Governors in many states tried to respond with new legislation making it a crime to go in public in disguise, and increasing sentences for assault, conspiracy, and murder.¹²⁴ Many governors used detectives to try to infiltrate the Klan, to secure evidence which might prove helpful in future prosecutions.¹²⁵ In some states, new legislation was passed requiring counties to pay damages to citizens whose liberty or

¹²² (Foner 1988: 435).

¹²³ (Foner 1988: 436)(noting reports of acts of violence committed by freedmen were rare). There were practical obstacles to taking such a course of action as well. In contrast to white southerners, many of whom had either served in the Confederate army or grew up using weapons, very few blacks had military experience and the rest were inexperienced shooters, with access to more primitive weapons. Another practical consideration was that violence tended to escalate if blacks retaliated, and often the Klan would not hesitate to target the families of those who had resisted. There was therefore good reason to urge caution to their constituents who wish to organize in self-defense. Indeed, what has been described as “the bloodiest single instance of racial carnage in the Reconstruction Era” occurred as a result of blacks attempting a strategy of armed self-defense in Colfax, Louisiana. The “Colfax massacre” resulted in the murder of up to 280 black men in 1873. (Foner 1988: 437; Rable 1984: 126-9).

¹²⁴ In Arkansas, the legislature passed on March 13, 1869 the functional equivalent of an extremely harsh anti-gang injunction: Any member of a white supremacist group were required to resign their membership within thirty days or face fines of at least \$500 as well as a prison sentence from one to ten years. (Trelease 1995: 174). In the 1871 debates in Congress, Representative O.P. Snyder of Arkansas attributed the Governor’s success in obtaining sworn affidavits and information about Klan activities to this law. Klan member came forward to offer evidence of their intent to disassociate from the Klan. *Id.* at 174 (citing 42nd Cong., 1st Sess. Part II, app. at 200 (1871).

¹²⁵ (Trelease 1995: 155).

property was injured by a mob.¹²⁶ Beyond passing the laws, the states did little to enforce them. Many of these Governors, still conscious of the need to appeal to white voters in order to remain in office, wanted to demonstrate moderation and avoid the escalation of violation that would surely have followed if they had allowed majority-black state militias to organize.¹²⁷

In states where governors could count on more broad-based support from white Republicans, they were more proactive. In November 1868, the Arkansas Governor, Powell Clayton, placed ten counties under martial law and organized a state militia, actions which led to the arrest of large numbers of Klansmen, several of whom were executed by military courts.¹²⁸ Tennessee Governor William G. Brownlow, recruited a biracial militia and declared martial law in early 1869, which led many townspeople to circulate petitions and newspapers to write editorials denouncing Klan violence.¹²⁹ In Texas, after his election in November 1869, Governor Edmund J. Davis created a new integrated State Police force, which, was responsible for over the course of two years, made over 4,500 arrests, and contributed to a sharp curtailing of Klan activity.¹³⁰

The use of martial law remained extremely controversial. North Carolina Governor William W. Holden's use of the state militia gave rise to such a strong opposition that it gave rise to an impeachment battle and effectively ended his

¹²⁶ (Foner 1988: 438).

¹²⁷ (Foner 1988: 438-9).

¹²⁸ (Trelease 1995: ch. 10).

¹²⁹ When Governor Brownlow resigned to enter the United States Senate in February 1869, his successor, DeWitt Senter, ended martial law seven days after it was invoked, and, in an effort to attract Democratic support in the upcoming gubernatorial election, he disbanded the militia by August of that year. (Trelease 1995: ch. 11). Although, as a result of Senter's policies, no Klan member was ever convicted of terrorist acts in Tennessee, Klan violence did drop dramatically. Although there is no clear evidence, many historians believe that Klan leaders, capitulating to Brownlow's policy instating martial law, issued a disbandment order in the spring of 1869. (Trelease 1995: 183).

¹³⁰ (Foner 1988: 440; Trelease 1995: ch. 9).

administration. Following the example set by Governor Clayton in Arkansas, Holden decided to send state militia units to counties experiencing widespread violence. Despite the lack of constitutional authority to do so, Holden put all the elements of martial law into effect, by suspending the local courts, setting up military commissions for the trials of all those arrested by the militia, and ignoring writs of habeas issued by the North Carolina Chief Justice.¹³¹ After Democrats appealed to the federal courts under the 1867 Habeas Corpus Act, Holden was forced to release all those who had been arrested, impeached and expelled from office, and the North Carolina campaign ended in failure.¹³²

Faced with violence and political defeat, one Klan victim could only exclaim: I consider a government which does not protect its citizens an utter failure.”¹³³ Only a few of the Republican-controlled state governments had the political will to use the force necessary to intimidate the Klan into submission. Yet, rather than follow the lead of Arkansas, most Republican governors “sought stability through conciliation.”¹³⁴

D. Congressional Republicans and the Ambiguous Legacy of the Fifteenth Amendment

While the southern governors focused on the Klan, Republicans in Congress began debating measures to protect black suffrage. On February 26, 1869, Congress

¹³¹ (Trelease 1995: 216-25).

¹³² (Foner 1988: 441). The Republicans lost control of North Carolina in the 1870 election, part of a pattern of Democratic victories across the South, including in the Alabama and Georgia election. Although Georgia’s Bullock Administration had never been committed to the goals of Reconstruction, the overall pattern of the 1870 elections suggested that Republicans had failed to make any headway with white voters, despite their efforts to focus on economic policies that could attract new white voters. Although blacks remained solid supporters of the Republican Party, their turnout during the 1870 elections was in some areas of the South affected by the violence, and may have influenced the outcome in Alabama, Florida, and Georgia.

¹³³ (Foner 1988: 443-4)(citing the KKK hearings in South Carolina, at pp. 625-8).

¹³⁴ (Foner 1988: 444). In some states, like South Carolina, governors were faced with more limited options because of the low numbers of white Unionists or Republicans; in these states, calling out the militia and invoking martial law would require summoning up an all black military and perhaps instigating a full-blown race war. (Trelease 1995: 377).

passed the Fifteenth Amendment, which granted to the federal government the authority to ensure that state action did not hinder voting rights on the basis of race, and the Amendment was ratified just over a year later.¹³⁵ Ratification alone was considered quite a victory, especially given that in 1868, only eight Northern states had yet extended the suffrage to black citizens. In March 1870, the American Anti-Slavery Association voted to disband, believing its agenda had been fulfilled. The organization's president, Wendell Phillips, described the Amendment as being "the completion and the guaranty of emancipation itself."¹³⁶ Blacks organized parades and processions across the country to celebrate this milestone.

Yet the Fifteenth Amendment ironically produced a less than ideal political environment for blacks. For many northern Republicans, suffrage meant that blacks had the power to present their claims and demands to the government on the same terms as everyone else. According to Congressman James A. Garfield, "the Fifteenth Amendment confer[red] on the African race the care of its own destiny. It places their fortunes in their own hands."¹³⁷ Any special protection by the state was now thought by many to be wholly unnecessary. In private correspondence, President Grant wrote that "Reconstruction is [now] completed."¹³⁸ Indeed, Grant had campaigned using the slogan "Let Us Have Peace," and so it would be reasonable to assume that he would follow the same conciliatory policy many of his party's governors had in the South. Grant's choices for positions in his Cabinet did not inspire confidence; the main criteria appeared to be

¹³⁵ (Foner 1988: 446-7)(describing more sweeping versions of the Amendment that were rejected because of their unpopularity with nativist Northern States, or racism in the West (concerned about extending suffrage to recent influxes of Chinese immigrants).

¹³⁶ (Wang 1995: 1015).

¹³⁷ (Foner 1988: 449) (citing letter from Garfield to Robert Folger, April 16, 1870).

¹³⁸ (Wang 1995: 1016).

personal friendship or return payment on old favors. The Cabinet contained no southern Republicans, and indeed it included more supporters of the Johnson administration's policies than those of Congressional Reconstruction.¹³⁹ It appeared that Grant would use the Amendment as justification for turning the nation's attention away from the South.

The Amendment also provoked resentment among southern Democrats.¹⁴⁰ States controlled by the Democratic Party quickly formulated new policies to limit black voting power, in ways that would circumvent the literal terms of the Fifteenth Amendment.¹⁴¹ Although a considerable number of Democrats in southern and border states proclaimed their commitment to a "New Departure,"¹⁴² the rise of state-mandated segregation laws and poll tax requirements made it clear that these professions were insincere. In Kentucky, Delaware, Maryland, Georgia and West Virginia, where the Democrats remained in power or returned to power in the years between 1867 and 1870, as well as in the "New Departure" states of Virginia, Tennessee, and Missouri, where Democrats quickly took control of their coalitions with moderate or Liberal Republicans, principles of white supremacy were reinforced in the statute books. Kentucky, for example, in 1872 still forbade blacks from testifying in court. Delaware was one of the first states to mandate segregation in places of public accommodation. In Tennessee, Democrats proposed a new constitution mandating segregation in public schools and making

¹³⁹ (Foner 1988: 444-5).

¹⁴⁰ Some Republicans thought it would be wise to attempt to placate Southern Democrats. When a group of blacks organizing a celebration in Cincinnati invited Chief Justice Samuel Chase to speak on the occasion, he wrote to suggest that they lobby Congress to amend the disability provisions in the Fourteenth Amendment. (Wang 1995: 1016).

¹⁴¹ Radicals who had objected to the final wording of the Amendment had feared just such a response.

¹⁴² (Perman 1984: 21; Foner 1988: 412-414) (describing the movement's successes in Virginia, Tennessee, and Missouri); and *id.* at 415 (describing the thinly disguised racial animus reflected in the rhetoric of the Taxpayers' Conventions). In other states, such as West Virginia and Mississippi, where the New Departure movement failed to catch hold, it was clear that the Democrats were not willing to accept civil and political rights for blacks.

payment of a poll tax a prerequisite for voters. Delaware, Maryland, and Kentucky set up systems of segregated school financing, requiring black schools to be funded solely with the proceeds of taxes paid by black parents.¹⁴³ Virginia also incorporated a ban on voting for all those who previously failed to pay poll taxes. Maryland introduced property requirements in 1870.¹⁴⁴ Georgia's poll tax resulted in a dramatic reduction in the numbers of black voters. Republicans in other southern states pointed to Georgia and Tennessee as examples of what would come if the party fell out of power.

During this period, southern Republicans found themselves with little influence in Washington. Northerners maintained control of all the key gatekeeping posts in Congress, and southern representatives were unable to win for their districts a proportionate share of federal spending.¹⁴⁵ Most in the Republican Party were willing to defend the achievements of Reconstruction,¹⁴⁶ but they also rejected calls for further change and expressed reluctance to defend any further expansion of the state's responsibilities.¹⁴⁷ Amos T. Akerman observed that the Reconstruction Amendments produced a government that was "more national in theory," but that "even among Republicans, [there is] as hesitation to exercise the powers to redress wrongs in the states." Akerman also cautioned that, "unless the people become used to the exercise of

¹⁴³ (Foner 1988: 421-2).

¹⁴⁴ (Foner 1988: 422; Gillette 1979: 41).

¹⁴⁵ For example, the South received only 15% of all the funds devoted to internal improvements in the Forty-First Congress. (Foner 1988: 430).

¹⁴⁶ In 1870 for example, despite considerable dissension within the Republican Party, Congress added new requirements to the process of restoration, forbidding new state constitutional amendments abridging the right to vote, hold office, or access to education. (Foner 1988: 452-3).

¹⁴⁷ (Foner 1988: 451-2)(citing failure of bills providing for a national land commission, and the rejection of numerous other proposals predicated upon the growth of national authority, including a national railroad commission, a Bureau of Health, the nationalization of the telegraph industry, and increasing federal responsibility for public education).

these powers now, while the national spirit is still warm with the glow of the late war, . . . the 'states' rights' spirit may grow troublesome again.”¹⁴⁸

E. Congressional Republicans and the First Phase of Enforcement Legislation

Soon, however, the growing reports of the Ku Klux Klan's atrocities overcame the Republican Party's ambivalence about national power and Reconstruction. Reports of violence from their constituents were shaking members of Congress from the complacency encouraged by the passage of the Fifteenth Amendment in 1869. Senator George E. Spencer of South Carolina informed colleagues that “every mail brings to us the details of some revolting tragedy,” and “nothing but the most stringent of all laws and regulations will check this era of bloodshed and dethrone this dynasty of the knife and the bullet.”¹⁴⁹ Moderates like John Sherman, who had just one year earlier voted against Sumner's bill for additional “fundamental conditions” on the readmission of southern states, now agreed that federal intervention was necessary: “If that is the only alternative,” Sherman would soon declare before the 42nd Congress, “I am willing to . . . again appeal to the power of the nation to crush, as we have once before have done, this organized civil war.”¹⁵⁰

In 1870, Congress passed the first two Enforcement Acts, under the authority granted to it under the Fourteenth and Fifteenth Amendments. Although Republicans maintained a strong majority in both houses during the 41st Congress,¹⁵¹ the enforcement

¹⁴⁸ (Foner 1988: 454)(quoting letter from Akerman to Charles Sumner, April 2, 1869).

¹⁴⁹ (Wang 1995: 1019)(citing Cong. Globe, 41st Cong., 2d Sess. 3669 (1870) (remarks by George E. Spencer).

¹⁵⁰ (Foner 1988: 454) (citing Cong. Globe, 42nd Congress, 1st Sess. 820 (1871)).

¹⁵¹ Senate: 61 Republicans, 10 Democrats, and 2 Conservatives; House of Representatives: 164 Republicans and 67 Democrats.

debates were complicated by differences of opinion among Republicans about states' rights and electoral trends that would soon split the party apart.

Debates over the first enforcement bill began in May 1870. John Bingham's House bill¹⁵² focused on penalties for state and federal officials' interference with the voting process, and established as a federal offense violence committed by private individuals in order to prevent other citizens from voting, the Senate version was far more comprehensive.¹⁵³ The Senate bill equated any "voting prerequisite," such as registration, with the right to vote itself. Unlike the House bill, therefore, the Senate version made it clear that it also covered actions by federal or state officers to hinder voting registration. The Senate bill, with the Klan violence in mind, targeted conspiracies against citizens' enjoyment of rights secured by the Constitution or federal laws, and offered more severe penalties than the House bill did for individual violators. The Senate's proposed enforcement machinery was also more elaborate, authorizing election supervisors, who would be given the authority to make arrests, as well as providing for other deputies to monitor the polls.

While the debate in the House was brief, resulting in an overwhelming partisan support for the bill,¹⁵⁴ in the Senate, Republicans were divided. A few were troubled by provisions in the Senate bill, brought under the Fourteenth Amendment's disability

¹⁵² Cong. Globe, 41st Cong., 2nd Sess. 1459, 3503 (1870) (remarks of Rep. Bingham) For a reprint of H.R. 1293, see Library of Congress, American Memory, *A Century of Lawmaking for the New Nation: U.S. Congressional Documents and Debates, 1774-1875*, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llhb&fileName=041/llhb041.db&recNum=4451>.

¹⁵³ Cong. Globe, 41st Cong., 2nd Sess. 3559-62 (1870). For a reprint of Sen. No. 831, see Library of Congress, American Memory, *A Century of Lawmaking for the New Nation: U.S. Congressional Documents and Debates, 1774-1875*, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsb&fileName=041/llsb041.db&recNum=4393>.

¹⁵⁴ Cong. Globe, 41st Cong., 2nd Sess. 3504 (1870).

provisions, which were designed to prevent former rebels from holding office.¹⁵⁵ Even more Republicans expressed their concern that the scope of the Senate bill was so comprehensive, it would displace states' authority to regulate state elections, which had traditionally been a state responsibility.¹⁵⁶ Radical Republicans responded that any adequate measure to protect suffrage rights must be comprehensive enough to address the Ku Klux Klan's attempts to intimidate candidates, activists and voters.¹⁵⁷ The radicals appeared to win on that point, because, during the remaining Senate debate, even more amendments were accepted.¹⁵⁸ Senator Pool's amendment provided for criminal penalties for private individuals' violations of the Fourteenth and Fifteenth Amendments, an approach that was ultimately incorporated as the controversial Section 6 of the Enforcement Act of 1870. In justifying his approach as being consistent with the state action limitations found in both amendments, Pool argued: "If a State by omission neglects to give every citizen within its borders a free, fair, and full exercise and enjoyment of his rights, it is the duty of the United States Government to go into that State."¹⁵⁹ Another section included punishments for individuals who relied upon economic threats to prevent blacks from voting.¹⁶⁰

The Senate passed the bill on May 20,¹⁶¹ and it was adopted in the conference committee soon after. After final passage in both houses,¹⁶² President Grant signed the

¹⁵⁵ *Id.*, at 3490; (Wang 1995: 1026).

¹⁵⁶ (Wang 1995: 1027-8) (discussing John Sherman, Oliver P. Morton, and John Pool)

¹⁵⁷ Cong. Globe, 41st Cong., 2nd Sess. 3487 (1870) (remarks of Sen. Morton); *id.* at 3519 (remarks of Sen. Cameron).

¹⁵⁸ Cong. Globe, 41st Cong., 2nd Sess. 3613 (1870) (remarks of Sen. Pool).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 3678 (remarks of Sen. Morton). Morton's amendment was included as Section 5 of the final bill. In addition, amendments addressing voting fraud in Northern cities were added to the bill.

¹⁶¹ *Id.* at 3690.

¹⁶² *Id.* at 3872-81, 3884 (House).

Act on May 31, 1870. The Enforcement Act of 1870¹⁶³ consisted of 23 sections. Section 4 of the Act established penalties for all individuals who used bribes, threats or intimidation to prevent voters from registering or going to the polls. Section 5 covered economic threats, and Section 6 made private conspiracies to intimidate or injure voters, or anyone attempting to exercise constitutional rights, a federal crime. The final version of the legislation provided for the appointment of election supervisors who would have the authority to bring cases of electoral fraud or intimidation to federal court. By any measure, the first Enforcement Act was an extensive and important piece of legislation to enforce the Fifteenth Amendment.¹⁶⁴

Republicans, however, remained preoccupied about the Democratic Party's successes in Northern urban areas. Because they recognized that the fall elections of 1870 would offer a reliable indication of their party's prospects in the 1872 presidential election, they approved the passage of new enforcement provisions in the recently passed Naturalization Act.¹⁶⁵ Two sections of the legislation focused on voting and election fraud. In order to deal with the election fraud in the large Northern cities with growing Democratic bases, these sections placed under direct federal control all of those congressional elections held in cities with populations of 20,000 or more.

After the 1870 election, the New York Times reported that, as a result of the implementation of enforcement legislation in that city alone, voter registration was

¹⁶³ Act of May 31, 1870, ch. 114, 16 Stat. 140. For a reprint, see Library of Congress, American Memory, *A Century of Lawmaking for the New Nation: U.S. Congressional Documents and Debates, 1774-1875*, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=016/llsl016.db&recNum=175>.

¹⁶⁴ The first Act's coverage was so broad, its sponsors emphasized that it was also meant to enforce the Fourteenth Amendment and to implement policy established in the Civil Rights Act of 1866. For that reason, they entitled the legislation, "An Act for enforce the Fifteenth Amendment, and for other purposes." For an excellent overview and analysis of the Act's sections, see (Swinney 1987: 63-87).

¹⁶⁵ Act of July 14, 1870, ch. 254, 16 Stat. 254. For a reprint, see Library of Congress, American Memory, *A Century of Lawmaking for the New Nation: U.S. Congressional Documents and Debates, 1774-1875*, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=016/llsl016.db&recNum=288>.

reduced by an estimated 20,000 to 30,000 individuals.¹⁶⁶ These efforts to prevent registration fraud, however, failed to produce the results Republicans had hoped for. In New York City, although Democrats failed to increase their seats, they were able to hold on to their previous gains, despite the enforcement effort, which had been based on the Republicans' assumption that those previous gains were the product of fraud. In addition, the Democrats performed relatively well throughout the country. In the House, the number of Democratic seats increased from 69 in the third session of the Forty-First Congress to 100 in the first session of the Forty-Second Congress.¹⁶⁷

Even more troubling was the outcome in the southern states. With the aid of Ku Klux Klan terrorism, the Democrats continued to produce strong gains. The Democrats won eighty percent of the seats in the state legislature, as well as almost all of the state's seats in the House. In Florida, the Republican vote declined drastically because of Klan violence. In Alabama, Democrats assumed control of the lower house of the state legislature. In Texas, Democrats won three of the state's four seats in the House of Representatives.¹⁶⁸

These gains were not surprising, given the scale of violence unleashed by the Klan in the fall of 1870. In October 1870, a group of armed white supremacists attacked a Republican Party organization meeting in Eutow, Alabama, killing four men and leaving fifty-four others injured.¹⁶⁹ During this same month, in Laurensville, South Carolina, whites banded together to conduct a "negro chase," roaming the countryside in

¹⁶⁶ (Wang 1995: 1046).

¹⁶⁷ In the Senate, the Republican Party retained control of over three-fourths of the seats. After the 1870 elections, there were 57 Republicans, 15 Democrats, and two vacancies.

¹⁶⁸ (Wang 1995: 1047).

¹⁶⁹ (Trelease 1995: 271-3).

armed groups, forcing black men from their homes, terrorizing their families, and killing an estimated thirteen black citizens.¹⁷⁰

The first Enforcement Act had failed to fulfill its purpose of protecting blacks from intimidation and ensuring that their access to the polls was secured. Some in Congress blamed President Grant for failing to make use of the new powers granted to his administration under the first Enforcement Act.¹⁷¹ Others concluded that the first two enforcement measures were inadequate, and almost immediately after the elections, new enforcement bills and amendments were introduced in both houses.

John Bingham reported a lengthy new bill from the House Judiciary Committee in February 1871. It supplemented the previous enforcement legislation with new measures, including the requirement of a written ballot in congressional elections, a more extensive system for supervising elections, and the removal of all enforcement cases from state to federal courts. Democrats attempts to filibuster, but the measure quickly passed both houses and Grant signed it into law on February 28, 1871.¹⁷² Despite this victory, Republicans knew that regulating elections, even when the rules were adequately enforced, would not be enough to secure peace in the South. The Senate created a Select Committee on Southern Outrages, with the responsibility of investigating the Klan atrocities.¹⁷³ New solutions were needed.

¹⁷⁰ (Foner 1988: 427; Trelease 1995: 350-2).

¹⁷¹ (Wang 1995: 1047, n. 127)(citing letter from Charles Sumner to Gerrit Smith, Aug. 20, 1871).

¹⁷² Act of February 28, 1871, ch. 99, 16 Stat. 433 (amending Act of May 31, 1870). The Democrats' filibuster lasted from around midnight February 23 to the morning of February 25. For a reprint, see Library of Congress, American Memory, *A Century of Lawmaking for the New Nation: U.S. Congressional Documents and Debates, 1774-1875*, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=016/llsl016.db&recNum=468>.

¹⁷³ (Achtenberg 1999: 8); Cong. Globe, 41st Cong., 3d Sess. 598 (1871).

IV. Enforcing the Fourteenth Amendment: The Civil Rights Act of 1871

A. The Klans' Reign of Terror Continues

With the exception of Arkansas and Texas, the southern states had entirely failed to control or even make significant inroads in suppressing the Klan and protect their citizens. The enormity of the task was overwhelming. Membership in the Klan was estimated to have reached 550,000,¹⁷⁴ a number which, if true, encompassed over half the population of white men in the South.¹⁷⁵ Freedmen throughout the South remained desperate for state assistance. In Meridian, Mississippi, during an 1871 trial of three black men who were charged with making “incendiary speeches,” courtroom observers fired shots, killing the Republican judge and two of the defendants. In the riots that followed, witnesses reported that nearly all the leading blacks of the town, perhaps around thirty in total, were murdered.¹⁷⁶ In the fall of 1870, churches and schools were burned in the area surrounding Tuskagee in Kentucky.¹⁷⁷ In York County, South Carolina, the violence grew to an indiscriminate assault on the entire black population. In that county, nearly the entire white population (approximately half the residents of the county) joined the Klan, and proceeded to commit eleven murders and hundreds of attacks and whippings. By February 1871, thousands of blacks in the county had left their homes and lived in the woods at night to escape assault.¹⁷⁸ In other areas of the South, blacks felt more vulnerable in the more rural areas, and, in an attempt to seek

¹⁷⁴ (Joint Comm: 8).

¹⁷⁵ Cf. (Glazer 1992: 1395)(stating that the estimated 260,000 Confederate deaths “amounted to somewhere between one-fourth and one-third of the region’s able-bodied white men”).

¹⁷⁶ (Foner 1988: 428).

¹⁷⁷ (Foner 1988: 428) If they were serving black schools, teachers, whether white or black, female or male, were frequent victims of assault throughout the southern states.

¹⁷⁸ (Foner 1988: 431).

protection from local officials, many blacks moved to larger towns and cities.¹⁷⁹ These efforts to seek protection from local officials were in vain, however, and many began to send new pleas to Washington, asking for assistance. Representative Perry in a statement before Congress supporting new legislation, eloquently portrayed the crisis in the southern states:

Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsity of it; grand and petit juries act as if they might be accomplices. In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice. Of the uncounted scores and hundreds of atrocious mutilations and murders it is credibly stated that not one has been punished.¹⁸⁰

B. Butler's House Bill 3011

At the same time that the third enforcement act was debated, during the final two weeks of February, one of the most radical House members, Benjamin Butler, attempted to push through the first proposal for Klan legislation.¹⁸¹ He saw no need to wait for the reports of the Senate's newly created Select Committee on Outrages. Representative Cobb of North Carolina introduced Butler's House Bill 3011, and it was referred to the Joint Committee on Reconstruction, which was chaired by Butler.¹⁸² After some minor formal changes were made to the wording, Butler presented the Joint Committee's report

¹⁷⁹ (Foner 1988: 81) (the population in the South's ten largest cities doubled between 1865 and 1870).

¹⁸⁰ Cong. Globe, 42d Cong., 1st Sess., pt 2, app. at 78 (1871) (speaking in support of the Ku Klux Klan Act).

¹⁸¹ For a detailed overview of the "prehistory" of the Ku Klux Klan Act of 1871, focusing on the failed attempts in the 41st Congress and the early days of the 42nd Congress to pass Klan legislation, see (Achtenberg 1999) (arguing that proper interpretation of § 1983 requires an analysis of all the debates on Klan legislation, rather than a narrow review of the discussions in the 42nd Congress, and noting that the much-criticized legislative history recounted by the Supreme Court in *Monroe* and *Monnell* begins in the 42nd Congress).

¹⁸² Cong. Globe, 41st Cong., 3d Sess. 1185-86 (1871). For a reprint of the bill, see Library of Congress, American Memory, *A Century of Lawmaking for the New Nation: U.S. Congressional Documents and Debates, 1774-1875*, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llhb&fileName=041/llhb041.db&recNum=10923>.

recommending his bill.¹⁸³ The bill criminalized all conduct typical of the Klan: intimidating citizens by gatherings of disguised mobs, physical violence, arson, shooting into homes, or economic coercion. The bill also criminalized membership in organizations that required its members to take an oath to support these violent tactics and to protect fellow members who did so. Another section of the bill established communal liability in each county for any losses or damages resulting from Klan violence.¹⁸⁴ The core of the bill was a proposal, which was based on the example of the Freedmen's Bureau, to establish a system of commissioners to address allegations of Klan violence. Democrats, along with a small group of Republicans, were concerned that this would result in a huge bureaucracy of nearly 950 commissioners,¹⁸⁵ and that the incentives of the system (a fee per case basis) would encourage the commissioners to bring charges on the basis of flimsy evidence.¹⁸⁶ Despite these criticisms, Butler began fighting to bring his bill to the floor, in order to ensure that it would be considered by the 41st Congress, rather than the more conservative 42nd Congress, where the Republicans would no longer have a two-thirds majority in the House, but he ultimately failed in that effort. Because appropriations bills took precedence, Butler was unable to bring his bill to the floor until February 28, with only three days remaining in the session. Frustrated with Democratic maneuvering, Butler motioned to suspend the rules of the House, which would give his bill priority over all other business until disposed of by a prior vote. Such motions required a two-thirds majority, and Butler's fell two votes short, which he

¹⁸³ (Achtenberg 1999: 9); Cong. Globe, 41st Cong., 3d Sess. 1321, 1457 (1871). For the revised bill, see Library of Congress, American Memory, *A Century of Lawmaking for the New Nation: U.S. Congressional Documents and Debates, 1774-1875*, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llhb&fileName=041/llhb041.db&recNum=10940>.

¹⁸⁴ In effect, this meant the richest citizens of each town would be held liable for violence that occurred within its borders.

¹⁸⁵ The bill authorized that many commissioners, but it did not require that so many be appointed.

¹⁸⁶ (Achtenberg 1999: 11) (citing news coverage in New York newspapers).

blamed on three “no” votes issued by Republican representatives and other Republicans who abstained from voting. Ultimately, Butler placed the highest blame upon Speaker James Blaine, for allowing the Democratic maneuvering, and for failing to help Butler muster the necessary votes.¹⁸⁷

When Butler was forced to reintroduce his bill in the 42nd Congress,¹⁸⁸ he was immediately confronted with numerous tactics by Democrats to delay the debate.¹⁸⁹ In addition, Butler faced additional obstacles because of the pro-tariff Republicans’ economic agenda. The tariff issue preoccupied many Republicans, who were considering strategies for an early adjournment to avoid a floor vote on tariff reduction proposals. These Republicans appeared to be willing to postpone Klan legislation in order to protect tariffs, a preference that Democrats exploited for their own benefit.¹⁹⁰ They planned to issue motions for final adjournment on a regular basis, in the hopes that they could delay Klan legislation until December or later, at which point they hoped the support for such measures would pass. The first motion to adjourn was actually issued by Republican Representative Henry Dawes,¹⁹¹ and after the overwhelming support of the motion in the House, the motion was sent to the Senate. Because the Constitution forbids either house to adjourn for more than three days without the consent of the other, the Senate’s position on this issue was crucial. The Senate, unlike the House, remained firmly in the grip of the radical wing of the Republican Party, and quickly disposed of the House adjournment

¹⁸⁷ (Achtenberg 1999: 10); Cong. Globe, 41st Cong., 3d Sess. 1761-2 (1871).

¹⁸⁸ Normally, following Article I of the Constitution, each new Congress meets in December. In 1867, during its battles with Johnson and in an attempt to capitalize on its successes in the 1866 election, Congress added an additional session to begin on March 4.

¹⁸⁹ Cong. Globe, 42nd Cong., 1st Sess. 116, 124-6 (1871); *see also* Achtenberg 1999) (discussing Democrats’ refusing to consent to the printing of the bill, attempting to halt all other business until finalizing appointments for standing committees, and objecting to the bill’s introduction without one full day’s notice).

¹⁹⁰ (Achtenberg 1999: 14-15)

¹⁹¹ Cong. Globe, 42nd Cong., 1st Sess. 11 (1871).

motion.¹⁹² The two houses were working at cross purposes: The Senate needed the support of the House to pass Klan legislation, but the House continued to push for adjournment.¹⁹³

C. The Republicans Retreat to Caucus

In an effort to move beyond this stalemate, Republicans in each house met in party caucuses. Butler called a caucus of House Republicans on March 9th, which was attended by approximately one-half of the House Republicans.¹⁹⁴ During the three-hour meeting, Speaker Blaine read a letter from President Grant stating that he wanted Congress to enact Klan legislation, and no other legislation, before it adjourned.¹⁹⁵ Butler tried then to convince the House Republican Caucus to commit to voting only on outrage legislation, but when this effort failed he was able to convince the members to endorse the establishment of a Committee of Five, with himself serving as chair, that would draft and report a new Klan bill. Butler hoped to have the caucus commit to approving whatever bill the new committee produced, but he was unable to do so.

Meanwhile, the Senate Republicans convened their own caucus on March 10th.¹⁹⁶ Senator Oliver Morton of Ohio defended a bill similar to Butler's H.R. 3011, but the Senate Republican Caucus failed to reach a consensus. Before adjourning, the Senate Republicans decided to create their own Committee of Five, head by Senator Morton. The following day, the Senate caucus approved of a resolution that stated Congress will

¹⁹² Cong. Globe, 42nd Cong., 1st Sess. 16 (1871).

¹⁹³ By the end of March, the House had passed three additional motions to adjourn sine die. (Achtenberg 1999: 16-7, 32, 36).

¹⁹⁴ Details about caucus negotiations can be found in (Achtenberg 1999)(citing reports from New York newspapers).

¹⁹⁵ (Achtenberg 1999: 19)

¹⁹⁶ Details about caucus negotiations can be found in (Achtenberg 1999: 19-21)(citing reports from New York newspapers).

stay in session until the Klan legislation was passed. In addition, the resolution stated that the Klan legislation would be the only legislation under consideration, so as to appease those pro-tariff Republicans who remained concerned about the prospects of tariff reduction bills. Beyond these statements, the Senate caucus was unable to agree upon the type of Klan legislation it would accept. There were a few supporters of a scheme similar to that proposed by Butler, but others preferred a less complex alternative, offered by Representative Shellabarger, in House Bill 7,¹⁹⁷ authorizing the President to use the military to suppress the Klan. With its caucus at a stalemate, the Senate decided to have the Morton Committee of Five meet with Butler's Committee to negotiate a new bill.

D. The Morton-Butler Committee Proposal

The Morton-Butler Committee held its first meeting on March 13. Morton and Butler advocated swift passage of Butler's H.R. 3011, but because there still remained significant support for Shellabarger's H.R. 7, the Committee negotiated a compromise measure that combined sections from the proposals of both Butler and Shellabarger, along with another proposal by committee member, Ulysses Mercur. The Morton-Butler Committee Bill contained eighteen sections.¹⁹⁸ The first twelve were derived from the Butler bill sections establishing as federal crimes various Klan activities, and creating a system of commissioners with broad authority to make arrests, conduct investigations and

¹⁹⁷ Cong. Globe, 42nd Cong., 1st Sess. 32 (1871). For a reprint of the bill, see Library of Congress, American Memory, *A Century of Lawmaking for the New Nation: U.S. Congressional Documents and Debates, 1774-1875*, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llhb&fileName=042/llhb042.db&recNum=259>.

¹⁹⁸The Morton-Butler Committee proposal was later introduced as H.R. No. 189. See Cong. Globe, 42nd Cong., 1st Sess. 173-5 (1871). For a reprint of the bill, see Library of Congress, American Memory, *A Century of Lawmaking for the New Nation: U.S. Congressional Documents and Debates, 1774-1875*, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llhb&fileName=042/llhb042.db&recNum=1163>

call for military assistance. In addition, as with Butler's bill, the new Morton-Butler bill established collective liability on citizens of counties affected by Klan violence. Another section, incorporated from Shellabarger's bill, granted to the President the authority to use military force to put a halt to Klan activity and to enforce the equal protection of the laws whenever a state failed to do so. The remaining three sections, taken from Mercur's proposal, focused on the procedures by which jurors would be selected.

Given that the bill simply combined elements of proposals that had already attracted heated opposition, it is not surprising that the Morton-Butler Committee proposal was promptly denounced, even in the Republican caucuses.¹⁹⁹ When Senator Morton presented the proposed bill to the Senate caucus, a number of leading senators objected to its scope. During his meeting with the House Republican Caucus, Butler also met with strong dissension, but they consented to allowing the bill's introduction on the House floor.²⁰⁰

Immediately after the bill was introduced, the Democrats objected that one day's notice was required for new bills,²⁰¹ and Speaker James Blaine sustained the objection.²⁰² During a roll call vote on another of the Democratic motions, Blaine pulled aside some Republican leaders and hastily put together a resolution establishing a special thirteen-member committee to investigate the violence in the South and report back to the House in December.²⁰³ Blaine, who had recently been the target of an attempt by Butler to have him removed from the office of Speaker, made no effort to hide his personal animosity

¹⁹⁹ In fact, the only section that would reappear later in the Select Committee bill was Section 14, which had been authored by Shellabarger.

²⁰⁰ See Cong. Globe, 42nd Cong., 1st Sess. 115-6 (1871).

²⁰¹ Cong. Globe, 42nd Cong., 1st Sess. 116 (1871).

²⁰² Cong. Globe, 42nd Cong., 1st Sess. 116 (1871).

²⁰³ Cong. Globe, 42nd Cong., 1st Sess. 117, 124 (1871).

for Butler,²⁰⁴ and he used every means at his disposal to thwart Butler's goals. In effect, the Blaine resolution would accomplish what the failed attempts to adjourn had sought – a nine-month delay before any passage of Klan legislation was possible. In a dramatic display of anger, Butler shouted on the floor that all members of the Republican caucus were “honor bound” to oppose the resolution.²⁰⁵ But a majority of Republicans voted to cut off debate, approved the resolution, and then voted to adjourn sine die.²⁰⁶ Adding insult to injury, the Speaker then appointed Butler to chair the Committee of Thirteen charged with conducting the investigation.²⁰⁷ Butler retaliated with a vicious letter, accusing pro-tariff Republicans with having blood on their hands, which he had delivered to each of the major newspaper and placed upon the desks of all Republican members. The next day produced an unusually personal and hostile exchange between Blaine and Butler on the floor of the House.²⁰⁸ Newspapers reported the exchange as the most vicious since Johnson's impeachment,²⁰⁹ and Butler was on the receiving end of most of the criticism.²¹⁰ It appeared that the prospects for enacting Klan legislation were growing increasingly dim.

When confronted with the news that the House had rejected the Morton-Butler bill and had voted to adjourn sine die, the Senate Republican caucus debated what its

²⁰⁴ Butler was evidently disliked by many of his Republican colleagues. After a Republican member of the House delivered a speech on the floor accusing Butler of embezzling millions of dollars from a home for crippled veterans, Butler objected that the attack was out of order. Nevertheless, the House Republicans voted almost unanimously to allow the speech to continue. Cong. Globe, 42nd Cong., 1st Sess 840 (1871).

²⁰⁵ Cong. Globe, 42nd Cong., 1st Sess. 116-7 (1871); *see also* (Achtenberg 1999)(citing news reports describing the exchanges on the floor of the House).

²⁰⁶ (Achtenberg 1999: 27-8); Cong. Globe, 42nd Cong., 1st Sess. 117 (1871).

²⁰⁷ Cong. Globe, 42nd Cong., 1st Sess. 117-8 (1871).

²⁰⁸ Cong. Globe, 42nd Cong., 1st Sess. 124-6 (1871).

²⁰⁹ (Achtenberg 1999: 30)(quoting the New York Times, March 17, 1871, at 1, which described the exchange as “one of the most extraordinary and remarkable scenes in House history”).

²¹⁰ Cong. Globe, 42nd Cong., 1st Sess. 126-130 (1871); *see also* (Achtenberg 1999: 31, n. 250)(citing the article entitled “A Breeze in Washington,” from the New York Times, March 17, 1871, which described the language in Butler's letter as “monstrous” and concluding that Butler deserved as a result the “greatest possible discredit” for the “courseness” of his conduct).

response should be. On March 16th, the Senate caucus decided to pass a set of resolutions designed to ensure that Klan legislation would be quickly enacted. After agreeing on a resolution rejecting the House motion to adjourn, the caucus then endorsed Senator John Sherman's resolution that instructed the Senate Judiciary Committee to report promptly a new Klan bill. The caucus also agreed that no other bills would be considered until the Klan legislation was passed. Finally, to appease the House, the caucus voted to recommend a joint committee, consisting of seven representatives and five senators, that would be charged with investigating Ku Klux Klan violence and issuing a report.²¹¹

On March 16, Senator Sherman presented to the Senate the resolution instructing the Committee on the Judiciary to report bills addressing the Klan atrocities. Sherman argued that conditions in the South presented a "state of affairs unexampled, in modern or ancient times." Even without a detailed and comprehensive investigation, he argued, it is already clear, from letters and telegrams, from newspaper reports throughout the South, and sworn testimony before congressional committees, that immediate attention is required.²¹² Sherman's passionate characterization of the crisis did not go unchallenged. Democrats often simply denied that this violence was occurring, and charged Republicans with trumping up these stories in order to justify new legislation to shore up their increasingly precarious political position in the South. For example, when Sherman noted that "in Kentucky, there is a state of horror unequalled almost by any of the late rebel states," Senator Garrett Davis of Kentucky retorted that "that statement is simply

²¹¹ (Achtenberg 1999: 32-4) (citing news coverage of caucus debates in N.Y. newspapers).

²¹² Cong. Globe, 42nd Cong., 1st Sess. 152-4 (remarks of Sen. Sherman).

the phantom of a distempered imagination.”²¹³ Senator Francis Blair, a Democrat from Missouri, similarly impugned the Republicans’ motives:

“Now, there is great anxiety here for the tranquility of the South. The fact is that the bulk of the outrages spoken of and said to have been proved in the majority report of the investigating committee are outrages which occurred eighteen months ago, or a year ago, and very few if any have occurred within any recent period. Why were not these gentlemen anxious for the tranquility of North Carolina at the time when these outrages took place? Why, sir, an election took place last summer in North Carolina and the Radicals were turned out of power. They want some law to put them back into power.”²¹⁴

Although the debate on these measures took weeks, they eventually all passed.²¹⁵

However, events that occurred in the meantime made much of the Senate caucus strategy largely irrelevant.²¹⁶

²¹³ *Id.* at 153.

²¹⁴ *Id.* at 222; *and cf.* the retort by Republican Senator John Pool of North Carolina in *id.* at 223 (“Because I ask for legislation to put down assassination, murder, and crime, he fears that I want his party legislated out. Sir, if his party is in by assassination and murder, it ought to be legislated out. I might, with the same propriety, charge the Senator with being opposed to putting down assassination, murder, and crime, in order that he may keep his party in power in North Carolina and other States.”).

²¹⁵ The debate on Sherman’s resolution instructing the Senate Judiciary Committee to issue a report was unusually long; the measure was not passed until April 5. *Cong. Globe*, 42nd Cong., 1st Sess. 152-67, 194-211, 219-24, 227, 236-40, 346-49, 358-9, 406, 432-36, 464-68; *see also id.*, app. at 27-40, 100-110, 117-34, 247-54. The proposal for the joint investigative committee was first passed by the Senate on March 17, *see id.* at 134-5, but the House amended it, *see id.* at 180-182, and sent it back to the Senate on March 20. *See id.*, at 180-2. After briefly debating the amended resolution on March 21, *id.* at 189-92, the Senate did not debate the issue again until April 5, *id.* 468-9, 498-506, and the measure was finally passed on April 7, *id.* 534-7.

It worth noting that the resolution call for a joint committee investigation was finally passed just as the Senate was scheduling its own debates on Shellabarger’s H.R. 320, which eventually became the Ku Klux Act. Many Democrats objected to this order of business, arguing that Congress was passing legislation before a full investigation was completed. *See, e.g., id.*, at 535 (remarks of Sen. Davis); *see also id.*, at 537 (remarks of Sen. Casserly) (objecting to the statements of fact in the preamble of Sen. Sherman’s Judiciary Committee amendment resolution, on the grounds that, given the formal joint investigation had not yet commenced, they were unjustifiably accusatory towards the Southern states).

²¹⁶ (Achtenberg 1999: 35). In his careful review of the early Senate debates, Achtenberg argues that, although some of the resolutions were ultimately not consequential, the debates themselves are nevertheless important, because during the debates, particularly those that took place after Grant’s March 23 speech, senators began discussing various options for Klan legislation, including the new Select Committee Bill, H.R. 320, which later became the Ku Klux Klan Act. For this reason, Achtenberg offers an important correction to the influential interpretation of the legislative history offered by Professor Eric Zagrans, who has argued that the Supreme Court in *Monroe v. Pape* inappropriately took senators’ statements out of context, when quoting from statements made in March before H.R. 320 was officially introduced in the

E. President Grant's Call for Action

The most important event was President Grant's speech to Congress on March 23. After the House voted on March 20 to adjourn sine die for the fourth time, many predicted that no Klan legislation could be produced when the party remained so divided.²¹⁷ Radicals in the Republican Party knew that only a strong message from the President would unite the party and commit the House Republicans to the legislation. Grant was extremely concerned about Klan violence, but he was also wary of publicly supporting any legislation that would invite accusations that the president was becoming a military dictator. Although in his early, private February letter to the House caucus,²¹⁸ and in other private communications with members of Congress,²¹⁹ Grant made clear his support for outrage legislation, in terms of the public debate, the president preferred to remain a spectator during the legislative skirmishes in March. He had yet to issue a decisive public statement that would put the prestige of his office behind the push for Klan legislation. Samuel Shellabarger became convinced that the only way to force action would be to enlist Grant's help, in the form of a statement to Congress requesting legislation. After consulting with Shellabarger, Representative Perce of Mississippi gathered together a group to meet with Grant in the White House. During their meeting on March 22, Shellabarger, along with Representative George Hoar and Representative Horace Maynard, each presented their arguments to Grant. At the end of the meeting,

Senate in April. See (Achtenberg 1999: 35, n. 280); and *cf.* (Zagrans 1985: 528, n. 150, 534, n. 189). For further discussion of *Monroe*, see Ch. 4, *infra*.

²¹⁷ See, e.g., Cong. Globe, 42nd Cong., 1st Sess. 220 (1871) (remarks of Sen. Trumbull, predicting stalemate in the Senate Judiciary Committee), and (Achtenberg 1999: 36-7) (citing newspaper articles and editorials).

²¹⁸ (Achtenberg 1999: 19).

²¹⁹ (Achtenberg 1999: 39-40) (citing letter from Ulysses S. Grant to James Blaine (March 9, 1871)).

Grant promised to follow their advice.²²⁰ The group gathered later that evening to decide how to proceed once Grant delivered his message. They decided that the message would be referred immediately to a select committee.²²¹

Grant reconsidered his decision the next morning. He even went to Congress to tell the radicals personally that he had changed his mind, but Shellabarger and Hoar were able to convince Grant to deliver the speech. Responding to Grant's concerns about using military force, Hoar argued that when violence escalated as the 1871 reelection campaign approached, Grant would be faced with demands to use military force. At that point, it would be better to rely on express authorization by Congress. Convinced by this argument, Grant handwrote his message, and then sent it to the floor of each house of Congress.²²²

Grant's message to Congress on March 23 emphasized that Congress needed to clarify the President's authority to respond to this state of affairs:²²³

A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States. It may be expedient to provide that such law as shall be passed in pursuance of this recommendation shall expire at the

²²⁰ Achtenberg emphasizes Grant's reluctance, which is often underestimated by historians and biographers who typically give Grant too much credit for "requesting" an anti-Klan bill. *See, e.g.*, (Smith 2001: 545-6).

²²¹ (Achtenberg 1999: 42-3).

²²² (Achtenberg 1999: 43-4).

²²³ Achtenberg states that Grant carefully avoided the suggestion that current law did not give the President enough authority, because the president had already sent troops to South Carolina to deal with the upsurge in Klan violence. (Achtenberg 1999: 45-6).

end of the next session of Congress. There is no other subject upon which I would recommend legislation during the present session.²²⁴

F. The House Passes a Ku Klux Klan Bill

After Grant's speech was read to the House, Shellabarger moved to suggest the message be referred to a nine-member select committee.²²⁵ His motion passed, despite some maneuvering by Democrats,²²⁶ and Speaker Blaine appointed the members of the committee. For the Republicans, he chose Shellabarger, Butler, Dawes, Austin Blair, Glenn Scofield, and Charles Thomas. To represent the Democrats, George Morgan, Michael Kerr, and Washington Whitthorne were chosen to serve.²²⁷ Blaine's choice of members made it more likely that the committee recommendations would be more similar to the moderate approach adopted by Shellabarger in House Bill 7 than the sweeping legislation favored by Butler.²²⁸ Shellabarger convened an organizational meeting of the committee the very same evening Grant's message had been read to the House.²²⁹ Although the committee could not formally meet until Butler and Thomas returned from out of town on the following Monday, Shellabarger took advantage of Butler's absence by holding a series of informal meetings over the weekend. By Sunday, March 26, Shellabarger had developed a new proposal for a bill. Three of the proposed bills' sections were authored by Shellabarger. Section 2, the criminal conspiracy section,

²²⁴ Cong. Globe, 42nd Cong., 1st Sess. 244 (1871).

²²⁵ Cong. Globe, 42nd Cong., 1st Sess. 244 (1871).

²²⁶ Cong., Globe, 42nd Cong., 1st Sess. 245-249 (1871). Even some Republicans argued that it would be prudent to wait until the investigation was completed, but their colleagues retorted that evidence was mounting every day with each batch of mail or delivery of a telegram. *Id.* at 248.

²²⁷ Cong. Globe, 42nd Cong., 1st Sess. 249 (1871).

²²⁸ Recall that Shellabarger proposed in H.R. 7 to give the president more authority to use the military, while Butler's H.R. 3011, in addition to defining as federal crimes most Klan-related tactics and proposing communal liability for civil rights violations, proposed a large system of federal commissioners to process the cases.

²²⁹ Details about these informal meetings and preliminary discussions can be found in (Achtenberg 1999: 46-8) (citing reports from New York newspapers).

was derived from an earlier bill, House Bill 224, which Shellabarger had presented to the House on March 20, 1871.²³⁰ Section 3 of the Select Committee bill, the military provisions, was derived from Shellabarger's first proposal, House Bill 7. Section 4, authorizing the suspension of habeas corpus and the use of martial law, was a new provision.

Another new provision, and the most important for the future of constitutional torts law, was Section 1 of the Select Committee bill. Shellabarger based Section 1 on the first section of Senator Frederick Frelinghuysen's Senate Bill 243.²³¹ Of all the measures contemplated thus far to deal with Klan violence, Frelinghuysen's bill was the first to propose a civil cause of action for plaintiffs whose rights were infringed upon by person acting "under pretense of" state law. When incorporating Frelinghuysen's Section 1 into the Select Committee bills, Shellabarger made some changes. For example, while Frelinghuysen's bill focused on rights protected by Sec. 1 of the 14th Amendment, Shellabarger expanded the coverage in the Select Committee bill to include all

²³⁰ Cong. Globe, 42d Cong., 1st Sess. 176 (1871) (proposing criminal conspiracy provisions, and authorizing the President to use the military when state enforcement is lacking). For a reprint of the bill, see Library of Congress, American Memory, *A Century of Lawmaking for the New Nation: U.S. Congressional Documents and Debates, 1774-1875*, <http://memory.loc.gov/cgi-bin/ampage?collId=llhb&fileName=042/llhb042.db&recNum=1218>.

²³¹ Cong. Globe, 42d Cong., 1st Sess. 121 (1871). Frelinghuysen participated in the Morton-Butler Committee, where he rejected Butler's approach on the grounds that it would place the South under military rule. After the Morton-Butler Committee Bill was defeated in the House (due to Speaker Blaine's maneuvering), Frelinghuysen decided to introduce Senate Bill 243, to promote his preferred approach. In the Senate, Frelinghuysen's bill received much warm praise, for offering a "fair" and "practicable" approach to Klan legislation. For a reprint of the bill, see Library of Congress, American Memory, *A Century of Lawmaking for the New Nation: U.S. Congressional Documents and Debates, 1774-1875*, <http://memory.loc.gov/cgi-bin/ampage?collId=llsb&fileName=042/llsb042.db&recNum=898>.

Bill 243 had four sections. Section 1 established a civil cause of action for anyone who was deprived of constitutional rights by a person acting "under pretense of" state law. Section 2 provided for the use of military force to deal with state government's inaction or failure to control violence or conspiracies infringing upon federal rights. It also made the acts of violence and related conspiracies federal crimes. Section 3 required that defendants arrested by the military (pursuant to the authority granted to it under Section 2) receive a civilian trial. Section 4 stated that nothing in the bill should be interpreted as replacing existing laws. (Achtenberg 1999: 49-50).

constitutional rights. In addition, rather than use the phrase “under pretense of,” Shellabarger substituted the phrase “under color of.”²³²

When the Select Committee officially met on Monday, the committee approved Shellabarger’s new proposal, and the following day, March 28, he introduced the Select Committee resolution, now House Bill 320, on the floor of the House.²³³ In his opening remarks, after describing the importance of the bill,²³⁴ Shellabarger argued that the “warrant” for Sec. 1 – the liability provision – was the Civil Rights Act of 1866. The second section of that act set forth criminal penalties for the same offenses, “except that the deprivation under color of State law must, under the civil rights act, have been on account of race, color, or former slavery.” Shellabarger went on to emphasize the general purposes of H.R. No. 320, stating that this new bill would provide a civil damages remedy to “all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship.”²³⁵ Shellabarger suggested that there should be no objection to the constitutionality of Section 1, because the corresponding criminal provision in the Civil Rights Act of 1866 was accepted as being constitutional under the Thirteenth

²³² (Achtenberg 1999: 51-60)(addressing the question of whether the change was merely stylistic or substantive, and - once concluding that the change was a matter of style only - discussing the implications for contemporary doctrine interpreting the “color of law” component of § 1983).

²³³ 42 Cong., 1st Sess. 317 (1871).

²³⁴ 42 Cong., 1st Sess., part II, app. at 67 (1871). Shellabarger also emphasized the importance of the issues raised for constitutional law:

The measure is one, sir, which does affect the foundations of the Government itself, which goes to every part of it, and touches the liberties and rights of all the people, and doubtless the destinies of the Union. And more than that, Mr. Speaker, it involves questions of constitutional law of importance absolutely vital. And more still, there is a domain of constitutional law involved in the right consideration of this measure which is wholly unexplored. We enter upon it now for the first time in the history of the Government.

Id.

²³⁵ *Id.*, at 68.

Amendment, and because now supporters of the new legislation are relying on the additional authority of the Fourteenth Amendment.²³⁶ Furthermore, he argued, because the purpose of the new Klan bill is remedial, it ought to be given a liberal construction:

This act is remedial, and in the aid of the preservation of human liberties and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficially construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation.²³⁷

Shellabarger next turned to a discussion of the remaining sections. Section 2 of the proposed bill was, he argued, designed to address and remedy the problems associated with Section 6 of the Enforcement Act of 1870. Because there had been questions about whether the Section 6 conspiracy provisions only applied in the context of voting,²³⁸ Shellabarger contended that a new conspiracy provision was necessary. In addition, rather than generally refer to deprivations of rights, the new Section 2 specifically defined the actions to be prevented by stating that they include all acts that would constitute the crimes of murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of legal duty, arson, or larceny.²³⁹ What about the constitutional authority for this provision? Shellabarger suggested that it goes no further than the 1870

²³⁶ Cong. Globe, 42d Cong., 1st Sess., Appendix at 68 (1871). Shellabarger's comparison to the 1866 Civil Rights Act provides Zagrans with his theory of the "original understanding" of the scope of the phrase "under color of law." According to Zagrans, because (in his view) the 1866 Act was intended only to prohibit discriminatory state statutes, the term "color of law" in § 1983 should be applied only to state legislation, not state officials' failure to act to prevent private violence or unauthorized actions. *See* (Zagrans 1985), and Ch. 4 *infra*.

²³⁷ Cong. Globe, 42d Cong., 1st Sess., Appendix at 68 (1871).

²³⁸ Some of his Republicans disagreed with this narrow view of the Enforcement Act. Rep. Burchard, for example, argued that other sections of the Act provide ample grounds for federal intervention to contain the Klan. Cong. Globe, 42nd Cong., 1st Sess., part II, app. at 312-3 (1871). Although Rep. Burchard was not quite convinced that new legislation was necessary, he nevertheless was persuaded to vote in support of the 1871 Civil Rights Act.

²³⁹ Cong. Globe, 42d Cong., 1st Sess., Appendix at 68-9 (1871).

Act, and he emphasized the fact that, although Section 6 of the 1870 Act was a more general provision referring to deprivations of all rights, it was still deemed constitutional even though it was done so under the narrower authority of the 15th Amendment. The case for the proposed Section 2 is much stronger, especially because protecting citizens is the central purpose of the Fourteenth Amendment:

[W]hen the United States inserted into its Constitution that which was not in it before, that the people of this country, born or naturalized therein, are citizens of the United States and of the States also in which they reside, and that Congress shall have the power to enforce by appropriate legislation the requirement that their privileges and immunities as citizens should not be abridged, it was done for a purpose, and that purpose was that the United States thereby were authorized to directly protect and defend throughout the United States those privileges and immunities which are in their nature ‘fundamental’ – and I use my words cautiously when I say ‘in their nature fundamental’ – and which inhere and belong of right to the citizenship of all free Governments.²⁴⁰ The making of them United States citizens and authorizing Congress by appropriate law to protect that citizenship gave Congress power to legislate directly for enforcement of such rights as are fundamental elements of citizenship.

This, sir, is the foundation idea on which this section and the whole bill rest for their constitutional warrant.²⁴¹

²⁴⁰ Shellabarger quotes directly the definition of privileges or immunities from Judge Washington’s opinion in *Corfield v. Coryell*, placing special emphasis on the phrase “protection by the Government.” *Id.* at 69.

²⁴¹ Cong. Globe, 42d Cong., 1st Sess., Appendix at 69 (1871). Shellabarger goes on to argue with passion that, if these aims cannot be pursued, then the amendment is no more than a inkblot:

Putting all these constitutional elements together, Mr. Speaker, where is the doubt Congress may, by appropriate legislation, protect those rights of American citizenship so solicitously and so abundantly guarded and guaranteed and made eternal as the Constitution itself? If, after all this transcendent profusion of enactment in restraint of the States and affirmative conferment of power on Congress, the States still remain unrestrained, the complete, sole arbiters of power, to defend or deny national citizenship – to make laws abridging or not abridging, to protect or to destroy, by banded murder, these United States citizens as the State may please, and the United States must stand by a powerless spectator of the overthrow of the rights and liberties of its own citizens, then not only is the profusion of guards put by the fourteenth amendment around our rights a miserable waste of words, but the Government is itself a miserable sham, its citizenship a curse, and the Union should not fit to be.

Id. at 69.

Shellabarger rejected out of hand the likely objection that the bill, particularly in Section 2, would displace states' authority over the administration of the criminal laws. These kinds of objections, Shellabarger argued, "assume[] that in attempting this legislation Congress blots out the jurisdiction and power of the States. It also seems to assume that there are no classes of acts which both the State governments and the national Government may define and punish concurrently as constituting a crime against each government."²⁴² When crimes involve conspiracies to commit actions that also deprive individuals of their constitutional liberties, then the 14th Amendment is implicated and Congress may act under Section 5 to ensure that these liberties are protected.

Toward the end of his speech, Shellabarger argues further that Section 5 of the Fourteenth Amendment is not even a necessary prerequisite. He offers an extended comparison of the similarities of the restrictions placed upon the states in Section 1 of the 14th Amendment and the Fugitive Slave Clause, in Article IV, Section 2 of the Constitution. The Fugitive Slave Clause contained no express enforcement provision, yet the Court clearly held in *Prigg v. Pennsylvania* that Congress had the authority to legislate in this area, by passing the Fugitive Slave Act, and forbidding states from interfering with the guarantees established in Article IV.²⁴³ The Fugitive Slave Act also provided precedent for the new bill because it offered an example of congressional legislation reaching private individuals in order to secure constitutional rights.²⁴⁴

²⁴² *Id.*, at 69.

²⁴³ *Id.*, at 70.

²⁴⁴ The Fugitive Slave Clause in Article IV, section 2 provides that "No Person held to Service or Labor in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due." When the Fugitive Slave Act of 1793 was debated, there was no controversy concerning whether Congress had the authority to act, despite the lack of a specific enforcement clause (as there is in sections 1 and 3 of Article IV), nor was there any doubt expressed concerning the authority of Congress to reach private persons. Act of Feb. 12, 1793, Ch. 5, 1 Stat. 302.

Shellabarger concluded by forcefully arguing it would be a cruel irony if “those decisions which were invoked and sustained in favor of bondage shall be stricken down when first called upon and invoked in behalf of human rights and American citizenship...”²⁴⁵

Finally, Shellabarger defended the final sections which authorized the president to provide military assistance, even when not yet requested to do so by the states, in cases of insurrection or domestic violence targeting a class of persons in order to deprive them of their civil rights, and also to suspend the writ of habeas corpus in those jurisdictions, until order is restored.²⁴⁶

The House debate that followed Shellabarger’s introductory remarks was extensive, with over eighty different members spoke for or against the measure during the course of the debate. Representative Kerr, a Democratic lawyer from Indiana, offered the first extensive rebuttal.²⁴⁷ Kerr defended a typical states’ rights approach to constitutional law, arguing that states possessed exclusive jurisdiction over the

The 1793 Act gave slaveholders two civil remedies. With the first, slaveholders could sue anyone, for an action of debt with a penalty of five hundred dollars, who interfered with the owners’ recapture or assisted in the slaves’ escape. The second remedy was a tort action for damages. In *Prigg v. Pennsylvania* 41 U.S. (16 Pet.) 539 (1842), Justice Story argued that the Fugitive Slave Clause contained two constitutional guarantees. The first, by prohibiting states from freeing fugitive slaves, was viewed by Story as nationalizing the slaveowner’s right to his slaves. In addition, the section of the Clause stating that slaves “shall be delivered up on Claim” of the slaveowner was another constitutional guarantee of the slaveowner’s property right, one that Congress could enforce. Story wrote: “If, indeed, the Constitution guarantees the right, and if it requires the delivery upon the claim of the owner, (as cannot be doubted,) the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it.” *Id.* at 615.

The Fugitive Slave Act of 1850 went much further, adding criminal penalties for knowingly and willingly violating the statute. Act of Sept. 18, 1850, Ch. 50, 9 Stat. 462. When the Wisconsin Supreme Court declared the 1850 Act unconstitutional, Justice Taney’s opinion in *Ableman v. Booth*, 62 U.S. (21 How.) 477, 478 (1858), upheld the constitutionality of the Act.

The Fugitive Slave Act of 1793 may constitute an exercise of “constitutional construction,” establishing the plenary authority of Congress to enforce the Constitution that was, nearly five decades later, endorsed by the Supreme Court. *Cf.* (Whittington 1999).

²⁴⁵ *Id.* at 70. *See also id.* at 375 (remarks of Rep. Lowe)(listing the Fugitive Slave Act as precedent); *id.* at 441-51 (remarks of Rep. Butler) (same).

²⁴⁶ *Id.*, at 70-1. (Shellabarger argued that the habeas provision complied with Justice Davis’ dicta in *Ex Parte Milligan*, suggesting that martial rule can be applied whenever “it is impossible to administer criminal justice according to law...”).

²⁴⁷ Representative Kerr would later become the first Democratic Speaker of the House in the post-reconstruction era.

administration of the criminal law,²⁴⁸ claiming that the Fourteenth Amendment did nothing to expand congressional authority over traditional state matters, and sternly criticizing the habeas provisions as a violation of the text of Art I, Section 9.²⁴⁹ With respect to the civil damages provisions in Section 1 of the bill, Representative Kerr argued that they would give rise to “vexatious” litigation, “inspired by mere mercenary considerations,” and “more reckless and dangerous to society than the alleged offenses out of which the cause of action may have arisen.”²⁵⁰ He ended his discussion of these provisions by asserting:

[Section 1] is a covert attempt to transfer another large portion of jurisdiction from the State tribunals, to which it of right belongs, to those of the United States. It is neither authorized nor expedient, and is not calculated to bring peace, or order, or domestic content and prosperity to the disturbed society of the South.²⁵¹

²⁴⁸ Cong. Globe, 42nd Cong., 1st Sess., part II, app. at 46-7 (1871) (citing a pre-14th Amendment opinion, *Fox v. Ohio* 46 U.S. 510 (5 How.) (1847), for the “true doctrine of the division of power between the Federal and the State governments, which concedes to all the States the exclusive regulation and control of all their domestic and police affairs in their own way, according to their own judgment, under their own constitutions and laws”). Given his general views about states’ responsibility for criminal law, it is not surprising that Kerr offered harsh criticism when evaluating what were clearly the most controversial provisions in H.R. 320, those in Section 2 authorizing federal criminal prosecutions of conspiracies to violate individuals’ constitutional rights. *See id.* at 50 (“This section is pregnant in every line with vice, usurpation, and danger.”).

²⁴⁹ *Id.*, at 47-8, 49-50. In contrast to Shellabarger’s reliance on the more expansive justifications announced in *Ex Parte Milligan*, Kerr emphasized Art I, Section 9’s explicit limitations to cases of invasion or rebellion. With respect to the habeas provisions in Sec. 3, Rep. Kerr further declared:

Observe the monstrous powers that are by this section proposed to be conferred on the Federal Government and its chief officer! Who is to determine when the combination is so great as to obstruct or hinder the execution of the laws, or to deprive any persons of any of these rights, privileges, or immunities, or when the State authorities fail, or are unable to give protection, or what shall constitute a denial of equal protection? The President of the United States! What king, queen, or potentate, in any great nation on earth, possesses such power today? I know of none. Is it safe to commit such vital issues to any one human head or heart.

. . . [The President] enforce his conclusions by the use of every physical arm of the Government . . . He may subvert civil law and State jurisdiction at his pleasure. . . . Are not such powers imperial? No. I say they are despotic and revolutionary.

Id. at 50.

²⁵⁰ *Id.*, at 50.

²⁵¹ *Id.*, at 50.

Many of the subsequent speeches by Democrats consisted of tirades charging the Republicans of despotism and of conspiracies to exaggerate the extent of the Klan violence,²⁵² but of the Democrats who offered a constitutional analysis of the bill, almost all of them presented arguments echoing those introduced by Kerr.

At the core of these debates were two issues: defining the scope of the rights protected by Sec. 1 of the Fourteenth Amendment, and determining the proper method of enforcement. The first issue was debated at great length, and thus the debates in the 42nd Congress offer an excellent resource for those seeking more guidance about the meaning of Section 1. What were the rights of personal security protected by the privileges or immunities clause? What constituted “equal protection” of the laws? Non-discriminatory legislation only, or was there a substantive right to protection by the government? It was obvious that one way of implementing the 14th Amendment was by citizens challenging discriminatory state laws in federal courts. But what if the issue was

²⁵² For examples of speeches describing the new legislation as despotic, see 42nd Cong., 1st Sess. 361-4 (1871) (remarks of Rep. Swann); *id.* at 364-7 (remarks of Rep. Arthur); *id.* at 371-4 (remarks of Rep. Archer); *id.* at app. 135-9 (remarks of Rep. McCormick); *id.* at 415-18 (remarks of Rep. Biggs); *id.* at 418-20 (remarks of Rep. Bright); *id.* at app. 88-94 (remarks of Rep. Duke); *id.* at 421-5 (remarks of Rep. Winchester); *id.* at 430-1 (remarks of Rep. McHenry); *id.* at app. 131-41 (remarks of Rep. Vaughn); *id.* at app. 155 (remarks of Rep. Young); *id.* at 440-1 (remarks of Rep. Price); *id.* at 451-54, 456 (remarks of Rep. Cox); *id.* at 461 (remarks of Rep. Roberts); *id.* at app. 157-62 (remarks of Rep. Golladay); *id.* at app. 257-9, 261 (remarks of Rep. Holman).

A few Republicans expressed, in much milder terms, concerns about the provisions authorizing the president to suspend the writ of habeas corpus. Representative Burchard, for example, emphasized that such authority was not even contemplated by Representative Butler in his two earlier, much-criticized bills providing for military assistance in the South. Cong. Globe, 42nd Cong., 1st Sess., part II, app. 315 (1871).

For the claim that the reports of Klan violence are exaggerated, *see, e.g.*, Cong. Globe, 42nd Cong., 1st Sess. 335 (1871) (remarks of Rep. Whittehorne); *id.* at 351 (remarks of Rep. Beck); *id.* at app. 74-75 (remarks of Rep. Wood); *id.* at 357 (remarks of Rep. Eldridge); *id.* at 376-8 (remarks of Rep. Waddell); *id.* at 378-80 (remarks of Rep. Shober); *id.* at 384-7 (remarks of Rep. Lewis).

The Republicans replied to these Democratic charges with considerable anger, pointing out that the Senate’s Committee on Southern Outrages (which included 23 Democrats) had already conducted an extensive investigation of the violence in North Carolina, that the President had confirmed many of these reports, and that the stream of letters and please from the South demonstrated that these attacks were widespread and ongoing. *See, e.g.*, *id.* at 312-3 (remarks of Rep. Burchard); *id.*, at app. 153-4 (remarks of Rep. Cobb); *id.* at 441-51 (remarks of Rep. Butler); *id.* at 457-9 (remarks of Rep. Coburn).

not discriminatory statutes, but rather discriminatory enforcement of the laws? There was much debate on this first issue of whether Section 1 was targeting state legislation only, or also inadequate administration of the laws.²⁵³

The second main issue had also been left unresolved in 1866. The basic question was the extent of Congress's enforcement authority under Section 5 of the 14th Amendment. There was some precedent to support the position that the federal government could take action against state or local officials, who, by their action or inaction, violated constitutional rights.²⁵⁴ Could the federal government also pass legislation establishing federal crimes in order to target *private* perpetrators of violence, when the purpose of groups like the Klan was to deprive citizens of their constitutional rights?²⁵⁵

These two issues were mostly debated with reference to the criminal provisions reaching private conduct in Section 2.²⁵⁶ The liability provisions in Section 1, however, were not the focus of the Democrats' extensive attacks. Nevertheless, it is important to emphasize that the constitutional objections to Section 2 touched on issues that would impact the interpretation of the liability provisions in Section 1 of the proposed bill. For

²⁵³ For Democrats arguing that the 14th Amendment only reached discrimination state legislation, see 42nd Cong., 1st Sess., part II, app. 86-7 (1871) (remarks of Rep. Storm); *id.* at 396 (remarks of Rep. Rice); *id.* at 430-1 (remarks of Rep. McHenry).

²⁵⁴ 42nd Cong., 1st Sess. Part II, app. 314-15 (remarks of Rep. Burchard, a Republican lawyer from Illinois, stating that federal courts had in numerous cases held that they could require local officials to levy taxes when they were required to satisfy judgments against their city or town).

²⁵⁵ Numerous Republican representatives defended the position that Congress can legislate directly over individuals in order to enforce the guarantees of Section One of the 14th Amendment. See, e.g., 42nd Cong., 1st Sess., part II app. at 81-2 (remarks of Rep. Bingham); *id.* at 375 (remarks of Rep. Lowe); *id.* at app. 141 (remarks of Rep. Shanks); *and id.* at 441-451 (remarks of Rep. Butler). But a vocal minority of Republican representatives disagreed with this position. See, e.g., *id.* at app. 114 (remarks of Rep. Farnsworth); *id.* at app. 149-150 (remarks of Rep. Garfield); *id.* at app. 110-113 (remarks of Rep. Moore); *id.* at app. 208-9 (remarks of Rep. Blair); *id.* at 514 (remarks of Rep. Poland).

²⁵⁶ Examples of Democrats' speeches rejecting the position that Section 5 legislation can reach individuals, see *id.* at 304-5 (remarks of Rep. Slater); *id.* at 455 (remarks of Rep. Cox); *id.* at app. 160 (remarks of Rep. Golladay); *id.* at app. 259 (remarks of Rep. Holman).

example, when debating whether Congress could punish individuals directly for Klan related violence, supporters of Section 2 argued that the failure of states to protect citizens from this violence constituted one way to “deprive” individuals of their rights.²⁵⁷ Some referred specifically to Justice Washington’s definition of privileges and immunities in *Corfield v. Coryell*, which included in the list “protection by the government.” Given this precedent, the notion that the privileges or immunities clause included affirmative duties of protection was deemed a credible one.

This expansive interpretation of Section 1 of the 14th amendment matters for any interpretation of the liability provisions in Section 1 of the Ku Klux Klan Act. If affirmative duties are considered to be an element of the protections afforded by the privileges or immunities clause, then the scope of the government’s liability under the Klan Act would be much broader. Conversely, a very narrow view of Section 1 of the 14th Amendment, which would suggest that only state *legislation* that discriminates or infringes upon the privileges and immunities of citizens would give rise to a violation of the Amendment,²⁵⁸ would mean that the phrase “under color of law” in Section 1 of H.R. 320 would apply only to unconstitutional legislation or official acts undertaken pursuant to such legislation.²⁵⁹ It is therefore essential to determine what understanding of the 14th Amendment prevailed in the debates about Section 2, because it will affect the scope of the liability provisions in Section 1 of the Act.

With respect to the first issue, the Republicans offered a strong defense of their position that “no state shall” was intended to encompass inadequate enforcement as well

²⁵⁷ See, e.g., *id.* at 322 (remarks of Rep. Stoughton); *id.* at app. 73-4 (remarks of Rep. Austin Blair); *id.* at 334 (remarks of Rep. Hoar); *id.* at 374 (remarks of Rep. Lowe).

²⁵⁸ For a Republican defense of that narrow interpretation of Section 1, in the context of the debates over the Klan legislation, see, e.g., *id.* at app. 115-6 (remarks of Rep. Farnsworth).

²⁵⁹ For a defense of this position, focusing on the arguments in the 42nd Congress, see (Zagrans 1985).

as discriminatory legislation. Representative Hoar argued that, although there were criminal remedies available in state statutes, they were not being enforced because the Klan was so powerful in the community that prosecutors knew juries would acquit. He argued that his position would not permit federal intervention whenever there is a slight “imperfection” in the administration of the laws, but only when the failure to protect amounted to “the destruction, the overthrow, to the denial of large classes of the people the blessings of republican government altogether.”²⁶⁰ He concluded:

If the jurors of South Carolina constantly and as a rule refuse to do justice between man and man where the rights of a particular class of its citizens are concerned, and that State affords by its legislation no remedy, that is as much a denial to that class of citizens of the equal protection of the laws as if the State itself put on its statute-book a statute enacting that no verdict should be rendered in the courts of that State in favor of this class of citizens.²⁶¹

Representative Lowe argued that if the 14th Amendment was designed only to negate state statutes, then no enforcement power under Section 5 would even be necessary.²⁶² For most of the Republicans, it was obvious that the 14th Amendment protections would be violated whenever the states failed to enforce their laws. The phrase “no state shall,” they argued, encompasses more than the legislature alone, it also includes the executive and judicial branches. Whenever the executive branch fails to enforce the laws or prosecute criminals, and whenever the judicial branch fails to apply the laws impartially, or systematically fails to bring criminals to justice, then there is a potential violation of the 14th Amendment. The fact that impartial laws remain on the statute books means nothing, if they are enforced in an inequitable way or not at all.

²⁶⁰ Cong. Globe, 42nd Cong., 1st Sess. 333-4 (1871)(remarks of Rep. Hoar).

²⁶¹ Cong. Globe, 42nd Cong., 1st Sess. 334 (1871)(remarks of Rep. Hoar).

²⁶² Cong. Globe, 42nd Cong., 1st Sess. 375 (1871) (remarks of Rep. Lowe).

A small but vocal group of Republicans agreed with the Democrats' constitutional objections to the criminal provisions in Section 2. Representatives Farnsworth and Garfield emphasized that Bingham's first proposal for an amendment was rejected precisely because it was thought to allow Congress to displace state criminal codes.²⁶³ Farnsworth noted that Representative Hale had argued in the 39th Congress that Bingham's proposed amendment not only gave Congress the authority to step in and correct unequal state legislation; it also granted to Congress plenary authority to pass legislation to protect life, liberty, and property.²⁶⁴ Just as federalism concerns likely

²⁶³ Cong. Globe, 42nd Cong., 1st Sess., part II, app. at 115-117 (1871)(remarks of Rep. Farnsworth). Shellabarger kept interrupting him during his speech to emphasize that the final proposal for the Amendment was thought to cover enforcement as well as discriminatory statutes. Farnsworth remained unconvinced, and he argued further that, because Section 1 of the 14th Amendment only prohibited discriminatory state legislation, Section 5 was unnecessary. *Id.* Other opponents of H.R. 320 offered similar analogies to the rejected Bingham proposal. Cong. Globe, 42nd Cong., 1st Sess., part II, app. 114 (remarks of Rep. Farnsworth); *id.* at app. 149-50 (remarks of Rep. Garfield). For Bingham's defense of the proposal in the 39th Congress, *see* Cong. Globe, 39th Cong., 1st Sess. 157-8 (1866). The Joint Committee revised some of Bingham's wording and reported the following proposed constitutional amendment:

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

Cong. Globe, 39th Cong., 1st Sess. 1033-34 (1866).

See also id. at app. 150-51 (remarks of Rep. Garfield). Bingham interrupted Garfield's speech, but Garfield persisted in arguing that Thaddeus Stevens, who was the House chair of the Joint Committee, thought the final version of Section 1 was weaker than Bingham's original proposal. Bingham objected that Steven's comments had nothing to do with a comparison between Bingham's original proposal and the final version of Section 1, but Garfield dismissed him and concluded that Section 1 was meant to apply only to discriminatory state legislation. *Id.* Yet then Garfield went on to concede later in his speech that "the laws must not only be equal on their face, but they must be so administered that equal protection under them must not be denied to any class of citizens, either by the courts or by the executive officers of the State." *Id.* at app. 153. Garfield concluded by urging an amendment to Section 2 that would make clear that it was targeting only private criminals seeking to disrupt the state's enforcement machinery, which would provide the necessary link to Section 1's state action limitation. *Id.* at app. 153. Shellabarger interrupted to ask Garfield how would he have justified the Section 6 enforcement provisions in the Enforcement Act of 1870, which were equally as general. Garfield responded that the 1870 Act could be justified on the grounds that Congress had separate authority in Article I to regulate the times, manners, and places of federal elections. *Id.*

²⁶⁴ 39th Cong., 1st Sess 1063-4 (1866).

derailed Bingham's proposed amendment,²⁶⁵ Farnsworth argued, they should also inform the debates over the constitutionality of the enforcement legislation.²⁶⁶ They concluded that Section 5 of the 14th Amendment could not be understood as allowing Congress to legislate directly to criminalize private conduct.

Both Democratic and Republican opponents also paid careful attention to the language included in the final version of Section 1, contending that, because the text clearly limited the Amendment's coverage to state action ("No state shall..."), it should not be interpreted as reaching private conduct.²⁶⁷ Representative Burchard, a Republican lawyer from Illinois, who did not serve in the 39th Congress, further argued that Section 1 of the 14th Amendment was meant to apply only to state legislation, and he quoted Representative Bingham's final statement, just prior to the vote on the measure: "That great want of the citizen and stranger protection by national law from unconstitutional State enactments is supplied by the first section of amendments. That is the extent; it hath no more."²⁶⁸

Bingham vigorously rejected that he had intended Section 1 to apply only to state legislation.²⁶⁹ Indeed, he claimed that Congress had always been given, long before the

²⁶⁵ Other Republican opponents of Bingham's first proposal, like Rep. Hotchkiss, were worried about the potential for Congress to abuse its grant of authority and displace states laws; but they also argued that it did not do *enough* to secure rights. They were concerned that establishing a mere grant of power to Congress to secure rights would leave those rights vulnerable as the makeup of Congress changed. On this view, judicially enforceable guarantees were also necessary. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1095 (remarks of Rep. Hotchkiss); (Zuckert 1986: 137-8)(emphasizing the importance of Hotchkiss' speech);(Curtis 2003: 648)(same).

²⁶⁶ Bingham himself quickly disposed of that comparison, by arguing that the authority granted in Section 5 was "full and complete." In response to suggestions that it did not go as far as his first proposal, Bingham retorted: "It is different in this: that it is, as it now stands in the Constitution, more comprehensive than as it was first proposed and reported in February, 1866. It embraces all and more than did the February proposition." *Id.* at app. 83.

²⁶⁷ *See, e.g. id.* at 429 (remarks of Rep. McHenry).

²⁶⁸ *Id.*, app. at 315 (emphasis added by the author).

²⁶⁹ Bingham argued that he included the "no state shall..." language to mimic the Article I, section 10 language, in order to make it abundantly clear that the Amendment overturned *Barron*. *Id.* app. at 85.

passage of Section 5, the implied power to enforce the Constitution against private individuals. Although Bingham, unlike Shellabarger and other defenders of the Klan bill, did not discuss the *Prigg* analogy,²⁷⁰ he did recite passages from Justice Marshall's opinion in *Cohens v. Virginia*, where Marshall declared that:

America has chosen to be, in many respects and to many purposes, a nation; and for all these purposes, her Government is complete; to all these objects it is competent. The people have declared that in the exercise of all powers given for these objects it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the territory. The constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire.²⁷¹

In addition, Bingham also called attention to a 1795 law giving the president the authority to call forth the militia to execute the laws when these laws could not be executed, because of mob violence, by ordinary judicial proceedings.²⁷² Indeed, one of the problems members of the 39th Congress mentioned as being a reason for supporting the

Despite the existence of that isolated quote recited by Rep. Burchard, Bingham insisted that he did not intend for that language to imply that the Amendment's coverage was limited to discriminatory state legislation.

²⁷⁰ See *id.* at 441-41 (remarks of Rep. Butler) (discussing fugitive slave laws); (Curtis 1986: 159-9) ("To support legislation reaching private conduct, some supporters of the 1871 bill pointed to the decision of the Supreme Court in *Prigg v. Pennsylvania*. Just as the Court in *Prigg* had read the fugitive slave clause to allow Congress to pass laws operating directly on private individuals within the state, the Fourteenth Amendment, these congressmen insisted, should be read to reach private conduct."). One of the only direct objections to the *Prigg* analogy came from Representative James Blair, who argued that unlike the 14th Amendment, the Fugitive Slave Clause in Article IV, section 2 was phrased in the passive voice and contained no explicit reference to the state. See *id.* at 208-9 (remarks of Rep. James Blair). Bingham effectively rebutted this point by explaining why he included the "no state shall . . ." language in the 14th Amendment.

²⁷¹ *Id.* at app. 81 (quoting *Cohens v. Virginia*); see also *id.* at 459-60 (remarks of Rep. Coburn) (discussing *Cohens*).

²⁷² 1 Stat. 424, ch. 36 (1795). For a reprint, see Library of Congress, American Memory, *A Century of Lawmaking for the New Nation: U.S. Congressional Documents and Debates, 1774-1875*, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=547>. See also Cong. Globe, 42nd Cong., 1st Sess., part II, app. at 85 (1871) (remarks of Rep. Bingham) ("If I am not right in asserting that the negative limitations imposed by the Congress on States can be enforced by law against individuals and States, then the Government was wrong from the administration of Washington down . . ."). See also *id.* at 380-1 (remarks of Rep. Hawley) (referring to laws empowering the President to call out the militia to protect citizens).

14th amendment was the same kind of mob violence the Klan was now inflicting on the South. In 1866, proponents of the proposed 14th Amendment pointed to a recent massacre in New Orleans and a race riot in Memphis as events demonstrating the necessity of a new amendment. Supporter in the 39th Congress evidently believed the 14th Amendment authorized Congress to deal with these problems.

After Shellabarger realized a minority within his party remained concerned about Section 2,²⁷³ he offered a new amendment with a minor adjustment in language.²⁷⁴ Rather than refer to definitions of crimes specifically, the new amendment had lengthier and more statements regarding violence, intimidation, or threats against government officials, potential witnesses, and jurors. Although the two provisions covered the same types of Klan activities,²⁷⁵ the amendment of Section 2 made an explicit effort to link the Klan violence to disruption of the government's enforcement duties. This change was enough to persuade the Republicans who were concerned about the possibility of displacing the states' criminal codes.²⁷⁶ Now the Republican critics offered their support of the bill, even as they were also stating that they were of necessity working at the "extreme verge" of fair construction of the Constitution.²⁷⁷ By the end of the debates,

²⁷³ See, e.g., *id.* at 380-3 (remarks of Rep. Hawley) (suggesting amendment); *id.* at app. 86-7 (remarks of Rep. Storm)(same).

²⁷⁴ *Id.* at 477-8.

²⁷⁵ One supporter of the amendment, Representative Cook, argued that it only covered violence directed against state officials or designed to intimidate state officials, and not crimes against private citizens. See *id.* at 486. This appears to be a strained reading of the amendment, which includes an explicit provision regarding intimidation against jurors (and which might be presumed to cover potential jurors also).

²⁷⁶ Farnsworth suggested an additional amendment, limiting Section 2 to interference with *federal* officers, and explicitly excluding threats or intimidation of *state* officers, but this proposal was not adopted. *Id.* at 515.

²⁷⁷ *Id.* at 312 (remarks of Rep. Burchard) ("In a matter of doubt I am ready to go to the extreme verge of fair construction that will justify Federal intervention.") *But see also, id.* at 312 (remarks of Rep. Burchard) (suggesting that the amendment to Section 2 would, "without impairing the [the bill's] efficiency," "bring this legislation clearly within the constitutional powers of Congress...") *See also, id.* at app. 79-80 (remarks of Rep. Perry); *id.* at 481-2 (remarks of Rep. Wilson); *id.* at 514 (remarks of Rep. Poland); *id.* at 513 (remarks of Rep. Farnsworth).

even the Republicans offering the harshest criticisms of the bill, including Representatives Farnsworth and Garfield, decided to vote for the revised bill, and it passed the House on April 7 by a party-line vote of 118 for to 91 against.²⁷⁸

G. The Senate Debate

Like the House debates, the Senate debate²⁷⁹ regarding criminal enforcement focused on two constitutional issues: (1.) whether Section 1 was limited to discriminatory state statutes, and (2.) whether Section 5 authorized Congress to pass legislation directed to private individuals.

With respect to the first issue, Democrats like Francis Blair offered the narrowest possible reading of Section 1, arguing that it was limited to discriminatory state statutes, and therefore Congress lacked any power to address Klan violence.²⁸⁰ Republicans like Senator Morton quickly rejected that argument, arguing that the equal protection clause “is in its nature an affirmative provision, and not simply a negative on the power of the States,” and pointing to the precedent of the Enforcement Act of 1870, which reached private individuals despite the existence of similar “no state shall . . .” language in the 15th Amendment.²⁸¹ Senator Frelinghuysen stated succinctly that “[a] State denies equal protection whenever it fails to give it. Denying includes inaction as well as action. A State denies protection as effectively by not executing as by not making any laws.”²⁸² But he also emphasized that federal authority to protect the privileges and immunities of citizens was designed to be a supervisory authority: “The Federal Government should

²⁷⁸ Cong. Globe, 42nd Cong., 1st Sess. 522 (1871).

²⁷⁹ As noted above, the Senate began debating the merits of H.R. 320 before it was officially reported.

²⁸⁰ *Id.* at app. 114-134; *see also id.* at app. 231 (remarks of Sen. Blair).

²⁸¹ Cong. Globe, 42^d Cong., 1st Sess., Part II, app. at 251 (1871) (remarks of Sen. Morton).

²⁸² *Id.* at 501.

only interfere to protect the citizen of the United States in his privileges when the State clearly and persistently fails to do so.”²⁸³

With respect to the second constitutional question – addressing the scope of congressional authority under Section 5 of the 14th Amendment – many Republican senators expressed the view that Congress already had the authority to reach private individuals to enforce the Constitution, using *Prigg* as the authority establishing this proposition.²⁸⁴ Senator Edmunds made the closing speech in support of the bill, citing *Cohens v. Virginia* and *Prigg* to support the Republicans’ position that Congress had ample authority to enforce the Constitution directly against individuals.²⁸⁵

The Senate passed the amended bill on April 14,²⁸⁶ with a large majority of Republicans voting for it, and a few liberal Republicans, including Senators Schurz and Trumbull, joining the Democrats in opposition.²⁸⁷

H. The Sherman Amendment

Compared to the House, the Senate focused much more of its attention to the provisions in Section 1, and offered numerous amendments to alter the liability provisions in the House bill. Because of their prominence in subsequent Supreme Court opinions, the most famous of the rejected amendments are those proposed by Senator

²⁸³ *Id.* at 501; *see also id.* at 604-7 (remarks of Senator Pool) (emphasizing supervisory nature of federal role).

²⁸⁴ *Id.* at app. 209 (remarks of Sen. Boreman). Senator Blair pointed out that the Fugitive Slave Clause in Article IV did not contain the “no state shall” language. *Id.* at app. 231. Bingham, of course, was not present to correct Blair’s interpretation of the import of that language.

²⁸⁵ *Id.* at 692.

²⁸⁶ The Senate considered numerous amendments. Some of the amendments were designed to clear up some of the lengthier provisions in Section 2, but they did not change the effect of the provision or narrow its scope. For example, Senator Edmunds added an amendment to Section 2 punishing conspiracies to interfere with the administration of justice when the criminals had an intent to deny equal protection. This was to replace the vaguer passage referring to conspiracies to prevent state authorities from rendering equal protection. The separate intent element of the crime was simply made more explicit. *Id.* at 567-8.

²⁸⁷ *Id.* at 709.

Sherman, who sought to hold communities liable for the violence committed by the Klan. The first version of Sherman's proposal created a cause of action if any property was destroyed or persons physically injured or killed by persons "riotously and tumultuously assembled together." The claim could be brought by the injured party or their survivors against any individual inhabitant of the county wherein the violence occurred.²⁸⁸

Such an approach was not unheard of. Recall that other failed Klan bills incorporated similarly traditional forms of strict communal liability.²⁸⁹ Butler's House Bill 3011 and the Morton-Butler Committee Bill both contained provisions for causes of action against individual citizens for violence committed within the county. The theory behind these provisions was derived from English law. If the richest men in the community were targeted with legal suits, then they and other leaders of the community would have a greater incentive to contain the Klan violence.²⁹⁰ The Senate passed this version with a vote of 38 to 24.²⁹¹ In the House, Shellabarger urged members to reject the amendment,²⁹² and it was defeated by a vote of 132 to 45.²⁹³

²⁸⁸ Cong. Globe, 42d Cong., 1st Sess. 663 (1871).

²⁸⁹ By 1871, some species of communal liability could be found in statutes of fifteen states, although majority of these held municipalities rather than individual inhabitants liable. In most of these statutes, the purpose was to prevent property losses caused by urban riots or labor actions. At least four states introduced communal liability laws in response to violence resulting from racial tensions. During the debate over whether slavery would be extended, Kansas introduced a communal liability law. The South Carolina Constitution included a cause of action against municipalities for individuals whose civil rights had been violated. Arkansas's more traditional community liability law allowed for fines between \$500 and \$5,000 to be assessed against any and all inhabitants of a community that failed to turn over Klan members to the authorities. Alabama's law provided a cause of action against municipalities and a \$5,000 fine for the families of victims of lynchings, unless the perpetrator had been convicted. These statutes incorporated strict liability rules, rather than negligence or dereliction of duty standards, so the *ability* of the municipality or community to prevent the violence or destruction was not an essential component of liability. For more on the history of communal liability doctrines in England and the United States, *see* (Glazer 1992: 1377-1394).

²⁹⁰ For Sherman's defense of his original proposal, *see* Cong. Globe, 42d Cong., 1st Sess. 705, 760-1, 820 (1871).

²⁹¹ Cong. Globe, 42d Cong., 1st Sess. 707 (1871).

²⁹² Cong. Globe, 42d Cong., 1st Sess. 723 (1871).

²⁹³ Cong. Globe, 42d Cong., 1st Sess. 725 (1871).

The second version of Sherman's proposal was introduced after the first conference committee convened. It provided that victims of "persons riotously and tumultuously assembled . . . with the intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States" could file a cause of action in federal court to seek damages from "the county, city, or parish" in which the violence occurred.²⁹⁴ The most significant difference between the two versions is that the latter authorized suits against the government. Individual inhabitants were no longer liable for damages. The measure was still based on strict liability; the only purpose of the change appears to be to provide for a more equitable distribution of liability across the community.²⁹⁵

The Senate passed this version of Sherman's proposal by a vote of 32 to 16,²⁹⁶ but the House rejected it by a vote of 106 to 74.²⁹⁷ One key objection was based on federalism concerns: if state charters did not impose such sweeping obligations to keep the peace, then the Federal Government could not hold them liable for failing to do so.²⁹⁸ Other House members defended the authority of Congress to impose liability on municipalities,²⁹⁹ but still opposed the amendment on other grounds. Their main objection appeared to be the extensive scope of strict liability (not the fact that municipalities themselves would be liable). Holding the municipality responsible for *all* violence, even when without notice or control over the perpetrators, was deemed far too

²⁹⁴ Cong. Globe, 42d Cong., 2d Sess. 749, 760 (1871).

²⁹⁵ *Id.* at 752. Of course, with the original proposal, the inhabitant held liable retained the option of suing the true culprit to try and recover damages. Still, the hassle of being involved at all in the process was deemed inequitable.

²⁹⁶ *Id.* at 779.

²⁹⁷ *Id.* at 800-01.

²⁹⁸ *See, e.g., id.* at 795 (remarks of Rep. Blair); *id.*, at 762 (remarks of Sen. Stevenson).

²⁹⁹ *Id.* at 752-2 (remarks of Rep. Shellabarger).

extensive and would overwhelm their treasuries and threaten their existence.³⁰⁰

Representative Kerr represented this view when he argued that the “monstrous and outrageous” amendment “punishes the innocent for the guilty. It takes the property of one and gives it to another by mere force, without right, in the absence of guilt or knowledge, or the possibility of either. It violates all just principles of law.”³⁰¹

After a second conference committee was convened, the amendment was again revised extensively – and in the process losing the support of the original sponsor, John Sherman. The final version applied only to conspiracies to deprive individuals of their civil rights, and rather than hold municipalities liable, the proposal extended liability to those individuals who both knew of the conspiracy and possessed the means to stop it, but nevertheless failed to intervene.³⁰² The Senate passed this proposal by a vote of 36 to 13,³⁰³ and the House also finally approved by a vote of 93 to 74.³⁰⁴

I. The Ku Klux Klan Act of 1871

The Civil Rights Act of 1871³⁰⁵ became popularly known as the Ku Klux Klan Act. The language in Section 1 remained largely the same as in Shellabarger’s H.R. 320, despite the lengthy attempts in the Senate to add to the liability provisions. The final, enacted version of Section 2, which was considered the core of the bill, did undergo

³⁰⁰ See, e.g., *id.* at 771 (remarks of Sen. Thurman); *id.* at 799 (remarks of Rep. Farnsworth).

³⁰¹ *Id.* at 788. For further discussion of the House rejection of the second Sherman amendment, and its implications for § 1983 doctrine, see Ch. 3 *infra*. See also (Glazer 1992: 1415)(noting that almost all of the House members maintained their opposition to the liability amendments until the introduction of the third version, which eliminated strict liability, and emphasizing that, based on the voting patterns, “no more than five House members voted against the [second version of] the Sherman Amendment strictly because it targeted municipalities”).

³⁰² *Id.* at 819-20.

³⁰³ *Id.* at 831.

³⁰⁴ *Id.* at 808.

³⁰⁵ Civil Rights Act of 1871, 17 Stat. 13. For a reprint of the legislation, see Library of Congress, American Memory, *A Century of Lawmaking for the New Nation: U.S. Congressional Documents and Debates, 1774-1875*, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=017/llsl017.db&recNum=54>.

some changes. The final version of Sec. 2 provided for civil and criminal sanctions against public and private conspiracies, including efforts to (a.) challenge federal authority; (b.) deprive persons of the “equal protection of the law,” or (c) prevent states from protecting persons against deprivations of their rights. Sections 3 and 4 authorized the use of federal force to redress a state’s inability or unwillingness to deal with the Klan or other violence. Sections 3 and 4 went so far as to state that state complicity against anti-federal combinations would be deemed “rebellion against the government of the United States,” with a resulting suspension of the writ of habeas corpus. Section 5 included a juror oath in federal courts, which required jurors to declare that they had “never, directly or indirectly, counseled, advised, or voluntarily aided” any Klan activities. Section 6 introduced penalties for those aiding conspiracies as defined in Sec. 2. Section 7 stated that the bill would not supercede other enforcement acts.

The first four sections of the Act demonstrate the seriousness of purpose felt by Congress in the face of the widespread violence in the South. Republicans united around their recognition that the full authority of Congress under the 14th Amendment to protect the rights of U.S. citizens trumped all competing concerns about states’ rights or the values of federalism. The sheer scope of the Klan reign of terror convinced Republicans to rally around the most radical understanding of the 14th Amendment. The Radical Republicans’ “Revolutionary Constitutionalism” reached its zenith with the Civil Rights Act of 1871.³⁰⁶

³⁰⁶ (Kaczorowski 1986).

J. Tort versus Criminal Enforcement Strategies

Although members of Congress thought it important to include tort provisions in enforcement legislation, hoping that it would provide an indirect way to encourage leaders of communities to help suppress the Klan, it was at that point an unrealistic option.³⁰⁷ Impoverished, intimidated blacks, and their Republican sympathizers, could hardly be expected to take up the responsibility and fund the cost of civil lawsuits against those officials who had already demonstrated they were unable to assist them, or were, at worst, collaborators with the Klan.³⁰⁸ The primary responsibility for enforcement was therefore given to the federal government, where the Department of Justice,³⁰⁹ itself burdened by inadequate resources and funding, would supervise the federal criminal prosecutions.³¹⁰

The Attorney General in charge of enforcement, Amos T. Akerman, was a moderate Republican, but his experiences in Georgia convinced him that the Klan would not be suppressed without an aggressive enforcement policy.³¹¹ The already burdened U.S. Attorneys stationed across the South were given the task of implementing these laws, and they continued to file reports to Washington, supplementing the volumes of

³⁰⁷ The Attorney General observed that “the sufferers of the crimes punishable by these Acts [of Congress] are, for the most part, poor and ignorant men, who do not know how to put the law in motion, or who have some well-grounded apprehension of danger to themselves from the attempt to enforce it.” (Hyman 1973: 480)(quoting letter from Amos T. Akerman to C. Cole, Jan. 31, 1871).

³⁰⁸ The group that was in the position to rely on civil damages suits during Reconstruction was southern whites, who sued Freedmen Bureau officials and military officers in such large numbers following the war that Congress included a removal provision in the 1863 Habeas Corpus Act (and later revised and expanded in 1866 and 1867), in order to guarantee to federal officer defendants the option of removal the case from state to federal court. (Hyman 1973: 452, 471-4).

³⁰⁹ Congress created the Department of Justice in 1870, in order to increase efficiency and also to assist with the Klan prosecutions. (Kaczorowski 1985: 79). For a succinct overview of the history of the Office of the Attorney General leading up to the creation of the Department of Justice, *see* (Goldman 2001: 25-31).

³¹⁰ Although there were criminal provisions in the 1866 Civil Rights Act, the Johnson Administration had discouraged their use. (Kaczorowski 1985: 49).

³¹¹ *Id.* at 79-80.

testimony the Joint Committee in Congress was gathering, describing the Klan violence. After reviewing the reports, Ackerman concluded that “these combinations amounted to war,” and, one federal judge in the south, Judge Bond, became convinced that only military force could bring down the Klan.³¹²

Ackerman nevertheless pursued a policy of enforcement in federal courts. He had issued a circular soon after taking office in June 1870, urging all federal legal officers to prosecute every reported civil rights violation. The goal was to demonstrate to the Klan and its supporters that the federal government was taking its criminal enforcement powers seriously, and thereby intimidate them into submission. The federal officials faced incredible obstacles. There was little or no funding available for investigations. Each U.S. Attorney was responsible for a vast geographical area, and would have to travel hundreds of miles to meet with witnesses. The federal prosecutors were completely overwhelmed.³¹³

Making matters worse were the definitions of crimes included in Section 2 of the Civil Rights Act of 1871. After much debate in the Senate, the conference committee finally settled on a private conspiracy provision that included an intent element. This change greatly complicated the investigative tasks of the U.S. Attorneys, who now were required to conduct interviews and complete the necessary investigations to meet their burden of proof with respect to intent. The indictments had to be drafted with precision, because in order to support federal jurisdiction, the prosecutors had to establish the intent to deprive someone of a constitutional rights.³¹⁴

³¹² (Kaczorowski 1995: 159).

³¹³ *Id.* at 57-8, 83-4.

³¹⁴ *Id.* at 59.

Working without any clerical or administrative assistants, these prosecutors settled into a routine of trial appearances during the day, and research and preparation every night. They were responsible for trials and conducting other grand jury investigations simultaneously.³¹⁵ The U.S. Attorneys sent numerous requests for assistance from the Department of Justice, and Akerman in turn lobbied Congress for additional support. Although Congress made special appropriations for civil rights enforcement, the level of funding remained far below what was needed.³¹⁶

The Klan presented special obstacles. Many of those facing charges were leading members of their communities, and they received a tremendous amount of assistance from their local communities. Their neighbors, for example, often led funding drives for their defense.³¹⁷ The leading members of the Klan were able to hire the best legal talent in the South to serve on their defense.

Judges were burdened by the unprecedented expansion of their dockets. The federal judges supervising the Klan prosecutions did not have clerks to assist them, nor did they have at their disposal legal libraries or research materials. One new federal judge arrived at his court in Memphis, Tennessee to discover a docket backlog of over 400 cases.³¹⁸

Despite these pressures, all of the southern district judges voted to uphold the constitutionality of the enforcement acts. Kaczorowski states: “That these unsympathetic judges accepted or attributed such broad power to Congress under the Reconstruction Amendments is revealing evidence of contemporaries’ understanding of

³¹⁵ *Id.* at 59.

³¹⁶ *Id.* at 84-7.

³¹⁷ *Id.* at 58.

³¹⁸ *Id.* at 60-1.

the expansive scope of legislative intent and the authority of the national government under the Thirteenth and Fourteenth Amendments.”³¹⁹ In 1871, the total number of enforcement cases exploded, from 43 in the previous year to 271 – an enormous 630% growth rate. Although the conviction rate dropped as the number of cases expanded, the rate was still comparable to the conviction rate in other, less complex criminal cases (41 % for the civil rights cases, 51 % for other criminal cases).³²⁰ Some U.S. Attorneys were more productive than others. For example, the successes in North Carolina far exceeded the record in the other states, and most of the credit for these prosecutions was due to the combined efforts of the U.S. Attorney, D.H. Starbuck, and the federal circuit judge, Hugh Bond.³²¹

The U.S. Attorney in South Carolina, on the other hand, did not fare so well. Democrats decided to focus their constitutional challenges to the enforcement acts in South Carolina, because the federal government’s enforcement effort had been so aggressive there. In October 1871, Akerman was able to convince Grant to issue a proclamation declaring a “condition of lawlessness” in nine upcountry counties of South Carolina, and to suspend the writ of habeas corpus (pursuant to Sec. 4 of the Ku Klux Klan Act). After federal troops entered these counties, arresting hundreds of Klansmen, an estimated 2,000 or more quickly fled the state. In the trials that followed, the U.S. Attorney, Daniel Corbin was outmatched by the opposing counsel. On behalf of the defendants, Wade Hampton raised the funds to hire Senator Reverdy Johnson and former Attorney General Henry Stanberry, each of whom were widely considered to be among

³¹⁹ *Id.* at 72.

³²⁰ *Id.* at 87.

³²¹ *Id.* at 87-8.

the leading constitutional lawyers in the country, to serve as their counsel.³²² Although, after a month long trial, the five defendants were convicted, the trial left the Attorney General skeptical about the prospects of a criminal enforcement strategy: “If it takes a court over a month to try five offenders, how long will it take to try four hundred, already indicted, and many hundreds who deserve to be indicted?”³²³

By the end of 1871, in order to conserve extremely scarce resource, Akerman had decided to pursue a policy focusing on prosecuting only the highest-ranked leaders, whose fate at the hand of the federal government would serve as a deterrent to the rank and file Klansmen. Those who confessed and identified the Klans’ leaders would escape prosecution.³²⁴ One of the major goals of the federal enforcement policy was to use prosecutions as a means of publicizing the Klan’s atrocities, in order to maintain public support in the North for a strong enforcement policy.³²⁵ Akerman resigned soon after announcing this policy shift. Although the circumstances prompting his resignation are unknown, some speculated that he was growing impatient with the lack of support from the Grant Administration, which was becoming increasingly preoccupied with accusations of corruption and economic concerns. Akerman himself denied that was true, and in fact the number of prosecutions under his successor, George H. Williams,³²⁶ increased the following year.³²⁷ By the beginning of 1872, the effects of the enforcement policy were becoming apparent. Although judges and prosecutors remained burdened by

³²² *Id.* at 59. This case, challenging the constitutionality of the Enforcement Act of 1870, reached the Supreme Court in 1871. *U.S. v. J.W. Avery et al.*, 13 U.S. 251 (1871). For a narrative account of the South Carolina trials, see (Williams 1996).

³²³ (Swinney 1987: 195)(quoting from the Attorney General’s Report of 1871).

³²⁴ (Foner 1988: 458; Kaczorowski 1985: 89-91).

³²⁵ *Id.* at 92.

³²⁶ Grant later nominated Williams to the Supreme Court, but his nomination failed after corruption allegations surfaced.

³²⁷ *Id.* at 93. 100-102.

the backlogs of cases, reports of new violence were dwindling. Fear of prosecution ended much of the violence, and many Klan members began pleading guilty or offering information in the hopes of receiving leniency from the government.³²⁸ But Williams' resolve soon faded away, and he began moving the Department away from a strong enforcement policy.³²⁹ By early 1873, the federal government had completely abandoned its criminal enforcement policy.

The short-term legacy of the enforcement legislation consisted of the hard lessons learned about the institutional and financial prerequisites of a successful federal criminal enforcement policy, but the long-term legacy of these statutes, especially Section 1 of the Civil Rights Act of 1871, would come from the liability provisions allowing civil suits against persons acting under color of law to deprive citizens of their constitutional rights. Although Klan victims were not then in a position to make use of these liability mechanisms, other citizens soon would. The Supreme Court, however, thwarted these developments. In a series of opinions offering narrow interpretations of the scope of the Reconstruction Amendments, the Court created a near century-long delay in the development of a civil rights enforcement strategy, based on liability rules, and led by citizen plaintiffs.

³²⁸ *Id.* at 93.

³²⁹ *Id.* 110-11.