Epilogue
The Enduring Legacy of the Thirteenth Amendment

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I have presented these views elsewhere, so I will simply summarize some of them

here in order to suggest alternative theories one might use to deal with some of the current issues raised in this collection of essays. In short, my view is that the framers of the Civil Rights Act of 1866 and the Fourteenth Amendment interpreted the Thirteenth Amendment as an affirmative constitutional guarantee of liberty that delegated to Congress plenary power to enforce the rights of freemen, which they equated to the privileges and immunities of U.S. citizens.[2]

In my view, perhaps the most important sources of the framers' understanding of Congress's plenary legislative authority to enforce constitutional rights of freemen, ironically, were the Fugitive Slave acts, the statutes Congress enacted in 1793 and 1850 to enforce the Fugitive Slave Clause, and the Supreme Court's interpretation of the Fugitive Slave Clause affirming Congress's plenary power to enforce it. The text of the clause provided congressional Republicans with a model for the language of the Thirteenth, Fourteenth, and Fifteenth amendments. Congressional Republicans modeled the civil remedies, the criminal penalties and the federal enforcement structure they adopted in the Civil Rights Act of 1866, the Enforcement Act of 1870, and the Ku Klux Klan Act (1871) on the provisions of the 1793 and 1850 Fugitive Slave acts. Republicans based their understanding of the Thirteenth and Fourteenth amendments as delegations of plenary constitutional authority to enforce Americans' fundamental rights on the U.S. Supreme Court's interpretation of the Fugitive Slave Clause in *Prigg v. Pennsylvania* and, more generally, the Court's theory of implied powers affirmed in *McCulloch v. Maryland*. A brief review will clarify.

On its face, the Fugitive Slave Clause prohibited the states into which a fugitive slave escaped from enacting any laws that interfered with the service or labor the slave owed in the slave state from which s/he fled. It provided that "no Person held to Service or Labour 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."[3]

Remarkably, the second Congress of the United States enacted a statute, in 1793, to enforce the Fugitive Slave Clause, the first statute enacted by Congress to enforce a constitutional right. Congress's action was remarkable because the Fugitive Slave Clause was located in Article IV, and it did not expressly delegate enforcement authority to Congress. Nevertheless, acting at the behest of President George Washington, President Washington's secretary of state, Thomas Jefferson, and Attorney General Edmund Randolph, Congress enacted three federal causes of action to assist owners of slaves who fled into another state to recapture them and to sue anyone who assisted in the slaves' escape or interfered with their recapture for tort damages and a civil fine.[4]

Slaveholders availed themselves of the remedies the 1793 Fugitive Slave Act afforded them. Every constitutional challenge to the statute in state and federal

courts was rejected, and claimants successfully sued for certificates of removal, the civil fine, and tort damages. This contributed to the emergence of a class of professional slave catchers and the abuse of kidnapping free blacks on the claim that they were fugitive slaves. Free states enacted antikidnapping statutes, which provided due process rights for those accused of being fugitive slaves. State antikidnapping laws directly conflicted with the Fugitive Slave Act. State and federal courts uniformly upheld the 1793 act, but interested parties sought the final authority of the U.S. Supreme Court to resolve the legal issues these cases presented.[5]

In a test case agreed to by the states of Maryland and Pennsylvania, the U.S. Supreme Court unanimously struck down the Pennsylvania Anti-Kidnapping Act (1825) and upheld the constitutionality of the 1793 Fugitive Slave Act. Speaking through Justice Joseph Story in the 1842 decision of *Prigg v. Pennsylvania*, the Supreme Court interpreted the Fugitive Slave Clause's prohibition on the states from discharging the fugitive slave from the service or labor owed in another state as a constitutional guarantee "of a positive, unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control or restrain."[6]

More important, the Court interpreted the prohibition on the states as "a positive and unqualified recognition" of the slave owner's "positive and absolute right" of property in the slave, which the owner could enforce against anyone who interfered with it. Speaking through Justice Story, the Court declared that this constitutional recognition of the slaveholder's property right in his slave "puts the right to the service or labor upon the same ground, and to the same extent, in every other state as in the state from which the slave escaped." Moreover, "all the incidents to that right attach also." The Court based its interpretation of the Fugitive Slave Clause on its wording and on Chief Justice John Marshall's theory of broad implied powers in *McCulloch v. Maryland*.[7]

Story further explained that whenever a slave owner judicially enforced his property right pursuant to the Fugitive Slave Clause, his action was a case or controversy arising under the Constitution of the United States. Since the slave owner's right to reclaim the slave "is a right of property," it was "capable of being recognized and asserted by proceedings before a court of justice, between parties adverse to each other," which "constitutes, in the strictest sense, a controversy between parties, and a case 'arising under the constitution of the United States,' within the express delegation of judicial power given by [the Constitution]." Story concluded that "Congress . . . may call that power into activity, for the very purpose of giving effect to that right; . . . it may prescribe the mode and extent in which it shall be applied, and how, and under what circumstances, the proceedings shall afford a complete protection and guarantee to the right." Story asserted that "Congress has taken this very view of the power and duty of the national government" when it enacted the Fugitive Slave Act of 1793, which

conferred on the owner the right to seize the fugitive slave and to secure a warrant of removal, the right to sue for the civil penalty, and the "right of action for or on account of such injuries."[8]

Congress enacted an even more sweeping and effective statute in 1850. The Fugitive Slave Act of 1850 created a federal enforcement structure to discharge the duty the act imposed on federal officials to enforce the slaveholders' property right, under penalty of a civil fine payable to the slave owner if the officials failed to discharge their duty to enforce the statute. It also made it a federal crime to assist a fugitive slave to escape or to interfere with her/his recapture, and it created an additional federal tort remedy with statutory damages in cases where the slave could not be recovered. The federal government enforced this statute, and the Supreme Court upheld its constitutionality in the 1850s.[9]

During the Civil War, Congress repealed the Fugitive Slave acts of 1793 and 1850. The Thirty-eighth Congress adopted and sent to the states for ratification in 1864 its proposal for an amendment abolishing slavery. The Thirteenth Amendment was ratified in December 1865 as the Thirty-ninth Congress convened. Many of the framers and supporters of the Thirteenth Amendment who served in the new Congress expressed their belief that it revolutionized the Constitution of the United States by transforming it from a fundamental guarantee of slavery to a universal guarantee of liberty. These legislators were the framers of the Civil Rights Act of 1866 and the Fourteenth Amendment.[10]

In the debates leading to the enactment of the Civil Rights Act of 1866, the framers of the Fourteenth Amendment interpreted the Thirteenth Amendment as a universal guarantee of liberty delegating to the Thirty-ninth Congress as much constitutional authority to protect and enforce the natural rights and equality of all American citizens as earlier Congresses had exercised to protect and enforce the property right of slaveholders in their slaves. The "badges and incidents of slavery" interpretation the Supreme Court engrafted onto the Thirteenth Amendment in 1883 was hardly mentioned in the Civil Rights Act debates in 1866. Republican leaders affirmed the theory of broad implied powers the Marshall Court adopted in *McCulloch v. Maryland* and the Taney Court applied in *Prigg v. Pennsylvania*. Just as Justice Story interpreted the Fugitive Slave Clause's prohibition against the states from interfering with the master's right to the service or labor of his slave as a positive and absolute constitutionally secured property right, so the framers of the Civil Rights Act, quoting from Story's *Prigg* opinion, interpreted the Thirteenth Amendment's prohibition against slavery as an affirmative guarantee of liberty, which delegated to Congress the same plenary authority to define and enforce the civil rights of all Americans, not just the civil rights of the former slaves.[11]

Thus, the principal author of the Civil Rights Act, Senator Lyman Trumbull, of Illinois, proclaimed that "liberty and slavery are opposite terms; one is opposed to the other." In prohibiting slavery, "the Constitution secures freedom to all Americans," he insisted. The Thirteenth "amendment declared that all persons in the United States should be free. This [civil rights] measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom." With the Thirteenth Amendment in the Constitution, Trumbull opined, "I hold that we have a right to pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view, secure freedom to all people in the United States." The floor manager of the Civil Rights bill in the House of Representatives, Representative James Wilson, of Iowa, quoted from *McCulloch v. Maryland* and *Prigg v. Pennsylvania* to support the same conclusion. Representative Wilson proclaimed that "the end" of the Thirteenth Amendment "is the maintenance of freedom to the citizen." Wilson thus asserted that the enforcement of the constitutionally secured rights of freedom is one of the ends for which Congress possesses plenary power.[12]

The Republican leaders' theory of plenary congressional power was also premised on their belief that equality and the natural rights of life, liberty, and property proclaimed in the Declaration of Independence constituted the civil rights of all Americans as citizens of the United States. Thus, Senator Trumbull declared that "the liberty which a person enjoys in society" is "the liberty to which a citizen is entitled; that is the liberty which was intended to be secured by the Declaration of Independence and the Constitution of the United States originally, and more especially by the amendment which has recently been adopted." Many of the framers reasoned that the social contract between the national government and the people of the United States not only empowered Congress but also obligated it to secure citizens' inalienable natural rights in return for their allegiance. Equating the Thirteenth Amendment's guarantee of liberty to the principles of the Declaration of Independence, Trumbull declared that the Thirteenth Amendment put the principles of the Declaration of Independence into the Constitution by establishing the status of all Americans as that of freemen, that is, as citizens, and thereby imposed on Congress the duty to secure to them "as United States citizens the rights that all free men enjoy, namely, the inalienable rights to life, liberty, property and equality before the law."[13]

Representative Wilson expressed the same views in the House. He declared that the rights of U.S. citizens are "the absolute rights of individuals" and include "the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and inalienable." Asserting the social contract principle of Congress's power to enact the Civil Rights bill, Wilson declared: "Now, sir, I reassert that the possession of these rights by the citizen raises by necessary implication the power in Congress to protect them."[14]

Wilson based Congress's power to enact the Civil Rights Act on two premises: that the civil rights it secured constitute some of the natural rights of U.S. citizenship and that the sovereign nature of the national government encompassed not only the power but also the duty proclaimed in the Declaration of Independence to protect the rights of its citizens. He declared that he based his "justification of this bill" on the "broad principle" that *"we possess the power to do those things which Governments are organized to do,"* namely, "to protect a citizen of the United States against a violation of his rights," even if the violation is attributable to "the law of a single State." Consequently, the people of the United States, "being entitled to certain rights as citizens of the United States, were entitled to protection in those rights, and [Congress's] power to protect them [in their inalienable rights] is necessarily implied from the entire body of the Constitution, which was made for the protection of these rights, and upon the duty of the Government to enforce and protect all those rights."[15]

The Republicans' theory of Congress's civil rights enforcement power was grounded on their theory of U.S. citizenship. The power to "intervene" by "our laws and our courts" to "maintain the proud character of American citizenship . . . ," Wilson proclaimed, "permeates our whole system, is a part of it, . . . *the right to exercise this power depends upon no express delegation, but runs with the rights it is designed to protect.*" Wilson insisted that Congress possessed "the same latitude in respect to the selection of means through which to exercise this power that belongs to us when a power rests upon express delegation; and that the [judicial] decisions which support the latter maintain the former." Congress also possessed the power "to select the means in accordance with the doctrines laid down in the case of McCulloch vs. The State of Maryland."[16]

Many of the framers and supporters of the Civil Rights Act of 1866 applied the broad theory of Congress's implied powers articulated by Chief Justice John Marshall in *McCulloch v. Maryland* and Justice Story in *Prigg v. Pennsylvania* and argued not only that the Thirteenth Amendment delegated to Congress the constitutional authority to enforce the natural rights of United States citizens, but also that the Privileges and Immunities Clause of Article IV, § 2, cl. 1, the Bill of Rights, and especially the Fifth Amendment's explicit guarantee of life, liberty, and property delegated this authority. Thus, Wilson declared: "Now, sir, in relation to the great fundamental rights embraced in the bill of rights, the citizen being possessed of them is entitled to a remedy." Referring to *McCulloch* and *Prigg*, Wilson admonished: "That is the doctrine . . . as laid down by the courts. There can be no dispute about this. The possession of the rights by the citizen raises by implication the power in Congress to provide appropriate means for their protection; in other words, to supply the needed remedy." Since "the citizen is entitled to the right [*sic*] of life, liberty, and property," Wilson admonished, "the power is with us to provide the necessary protective remedies." In

a resounding assertion of the social contract, Wilson proclaimed that these remedies "must be provided by the government of the United States, whose duty it is to protect the citizen in return for the allegiance he owes to the Government." Other participants in the Civil Rights bill debates acknowledged the supporters' intent to enforce rights guaranteed in the Bill of Rights.[17]

More probative of the framers' understanding of Congress's legislative authority to secure Americans' constitutional rights than what they said is the legislative action they took to secure these rights. In enacting the Civil Rights Act of 1866 into law, not only did the framers of the Fourteenth Amendment say they were exercising the plenary power to enforce the constitutional rights of American citizens that earlier Congresses had exercised to protect the property right of slave owners, but they also demonstrated, through the Civil Rights Act, their exercise of this plenary power. The framers modeled the Civil Rights Act's civil and criminal remedies and enforcement structure on the Fugitive Slave acts, and incorporated into the Civil Rights Act sections of the Fugitive Slave Act of 1850.[18]

In introducing the Civil Rights bill in the House of Representatives, Representative Wilson proclaimed that the Civil Rights bill was intended to enforce the constitutionally secured right of freedom through the power Congress had previously exercised to enforce the constitutionally secured right of slavery, and he noted that the enforcement provisions of the Civil Rights bill "are made up of the several sections of the old fugitive slave law," "the constitutionality of which has been affirmed over and over again by the courts." Declaring that he was "not willing that all of these precedents, legislative and judicial, which aided slavery so long, shall now be brushed into oblivion when freedom needs theirs assistance," Wilson was determined to use them to "work out a proper measure of retributive justice by making freedom as secure as they once made slavery hateful." Underscoring the irony here, Wilson asserted: "I cannot yield up the weapons which slavery has placed in our hands now that they may be wielded in the holy cause of liberty and just government. We will turn the artillery of slavery upon itself."[19]

Congress exercised plenary civil rights enforcement power in enacting the Civil Rights Act and supplanted the states' police power over civil rights in several ways. First, Congress supplanted the states' power to determine the status of inhabitants of the United States when it defined and conferred citizenship on all Americans in every state and territory of the United States; second, Congress supplanted the states' power to determine the rights individuals shall enjoy when it defined some of the civil rights all Americans were to enjoy as U.S. citizens; and third, Congress supplanted the states' power to discriminate on the basis of race when it guaranteed that all U.S. citizens were to enjoy these civil rights on the same bases as the most-favored class of citizens enjoyed them, that is, as whites enjoyed them.[20]

Although Congress supplanted the states' police power in the ways just described, it nevertheless preserved concurrent state jurisdiction over civil rights to regulate the extent to which different classes of citizens enjoyed these rights and the manner in which they exercised them. For example, the states were still empowered to determine that married women, minors, and the insane would not have the same right to make and enforce contracts or to hold property that adult men and unmarried adult women enjoyed. The framers' understanding of equal rights was grounded in a class-based theory of equality. However, the Civil Rights Act rendered illegal racially discriminatory denials of the civil rights it secured. The Civil Rights Act demonstrates that the framers expressed in law their view that race, color, or previous condition of servitude were no longer legal classes or legitimate bases for excluding individuals from the enjoyment of these civil rights. But the statute also secured the civil rights of whites against unreasonable civil rights infringements and denials, such as infringements based on religion, country of origin, and political affiliation.[21]

Like the framers of the Fugitive Slave Act of 1850, the framers of the Civil Rights Act of 1866 and the Fourteenth Amendment exercised plenary power to enforce citizens' civil rights by enacting civil and criminal remedies for violations. They made it a federal crime to violate a citizen's civil rights. However, they limited federal criminal penalties to civil rights violations committed by individuals acting under color of law or custom and motivated by racial animus in order to preserve state jurisdiction over ordinary crimes and to impose criminal penalties on state and local executive and judicial officials in the Southern states who were failing or refusing to enforce or were denying the civil rights of black Americans. Through this criminal provision, Republicans sought to compel state judges and law-enforcement personnel to enforce the civil rights of all Americans regardless of race. They also intended to punish Southerners who, acting in their private capacities as landowners and employers of black laborers, violated the civil rights of blacks when they engaged in practices formerly used by slave owners to control and discipline their slaves authorized by state Black Codes and local ordinances and customs for subordinating and subjecting free blacks to the economic and social control of whites.[22]

The framers of the Civil Rights Act conferred exclusive jurisdiction on federal courts to remedy violations of the civil rights the statute conferred and secured. Because the act secured civil rights on the same bases as whites enjoyed them, rather than the absolute enjoyment of these rights, federal civil jurisdiction was limited to violations motivated by some animus the framers considered impermissible, such as racial, religious, or ethnic prejudice or political partisanship. Federal *criminal jurisdiction* under section 2 of the act was limited to violations motivated by racial animus and committed under color of law or custom.

Nevertheless, within these limitations, the framers conferred on the federal courts jurisdiction directly to remedy violations of substantive rights.[23]

The framers created a radical remedy for civil rights violations caused by state action or state inaction: they conferred on federal courts, to the exclusion of the states, jurisdiction to try civil actions and criminal prosecutions arising under state law. Whenever a party in a civil action, a victim of a crime, or a defendant in a criminal prosecution arising under state law was unable to enforce within state law enforcement institutions or was denied by the state any of the rights secured by the Civil Rights Act, the framers conferred on the federal courts original jurisdiction to try the civil action or criminal prosecution. Section 3 of the act authorized federal courts and federal legal officers to supplant state courts and state legal officers and to administer civil and criminal justice to remedy civil rights violations caused by state action or inaction. This section demonstrates that the framers of this statute, like those of the Fugitive Slave Act of 1850, exercised plenary remedial power and authorized the displacement of state systems of justice whenever the federal government was required to enforce citizens' civil rights because of the state's failure to do so. In addition, the framers authorized the removal to a federal court of any civil or criminal action commenced against any officer or other person for any actions "committed by virtue or under color of authority derived from" the Civil Rights Act or the Freedmen's Bureau Acts or for refusing to do any act because it would be inconsistent with the Civil Rights Act.[24]

From 1866 to 1871, the federal district court in Louisville, Kentucky, exercised this jurisdiction and administered criminal justice in cases involving blacks, either as defendants or as the victims of crimes committed by whites who would have otherwise gone unpunished. Black Kentuckians could not get civil or criminal justice in Kentucky's courts because the state's rules of evidence prohibited blacks from testifying in any case in which a white person was a party. Consequently, the U.S. attorney in Louisville, Benjamin H. Bristow, asserted jurisdiction in cases involving blacks and prosecuted whites accused by blacks of having committed crimes against them. The federal court upheld the constitutionality of this provision and dispensed criminal justice in these cases until 1871. In that year, the U.S. Supreme Court affirmed the constitutionality of this jurisdiction but interpreted the language of section 3 as authorizing federal criminal prosecutions only against black defendants, and the Kentucky legislature repealed the racially discriminatory testimony statute and permitted black witnesses to testify on the same basis as white witnesses. Section 3 also authorized the federal courts to protect the civil rights of white unionists and Union soldiers in the South from civil rights violations committed by private individuals motivated by political animus. Former Confederates persecuted unionists and Union soldiers with violence, economic harassment, and with

vexatious lawsuits and criminal prosecutions for actions they had taken during and after the Civil War and under the authority of federal law.[25]

Not only did the framers of the Civil Rights Act and Fourteenth Amendment incorporate the kind of civil and criminal remedies earlier Congresses had adopted in the Fugitive Slave acts, but they also incorporated the enforcement structure from the Fugitive Slave Act of 1850. Like the 1850 act, the 1866 statute authorized federal judges to appoint U.S. commissioners to enforce the act and the rights it secured, and it imposed a duty on federal officers "to institute proceedings against all and every person" who violated the act, enforcing the duty by requiring federal officials to pay a fine of $1,000 to the victim of a civil rights violation on their failure diligently to enforce the statute. Again like the 1850 act, the Civil Rights Act authorized federal commissioners to summon to their aid "the bystanders or posse comitatus of the county" as they thought necessary to perform their duties under the act and "to insure a faithful observance of" the Thirteenth Amendment. As the Fugitive Slave Act of 1850 imposed criminal penalties of a fine and imprisonment against anyone who prevented the arrest or harbored, concealed, rescued, or assisted the escape of fugitive slaves, the Civil Rights Act imposed analogous criminal penalties against anyone who hindered or prevented a federal officer from executing a warrant or process issued pursuant to the act or prevented the arrest or harbored, concealed, rescued, or assisted the escape of anyone subject to arrest under the act. The 1866 act authorized the president of the United States to reassign federal judges and legal officers to where they were most needed to redress violations of the statute and to deploy the armed services or state militia "as shall be necessary to prevent the violation and enforce the execution of this act."[26]

The Civil Rights Act of 1866 represents, at the very least, the constitutional power the framers of the Fourteenth Amendment understood the Thirteenth Amendment delegated to Congress to enforce constitutional rights and they actually exercised to enforce constitutional rights, since they were the legislators who enacted the Civil Rights Act. Furthermore, the framers repeatedly expressed their intention to incorporate the provisions of the Civil Rights Act into the Fourteenth Amendment to ensure the statute's constitutionality and to put the statute's rights guarantees into the Constitution to protect against their possible repeal by a future Congress. The framers thus intended to incorporate into the Fourteenth Amendment their interpretation of the Thirteenth Amendment's plenary power to secure and protect "the [natural] rights that all free men enjoy" as promised by the Declaration of Independence. Opponents of the Civil Rights Act and the proposed Fourteenth Amendment repeatedly acknowledged this connection between the statute and the amendment. The framers necessarily intended the Fourteenth Amendment to delegate to Congress the plenary power to define and enforce in the federal courts the substantive

constitutional rights of U.S. citizens they had just exercised in enacting the Civil Rights Act. The Fourteenth Amendment is therefore an amplification of the rights enforcement authority the framers exercised when they enacted the Civil Rights Act of 1866 to implement the Thirteenth Amendment.[27]

Congress's power to enforce individuals' rights pursuant to the Thirteenth Amendment is much broader according to this interpretation than the "badges and incidents of slavery" interpretation. It offers a potentially more efficacious approach to enforcing the rights this volume's scholars argue the Thirteenth Amendment secures, or should secure today. On this view, the Thirteenth Amendment's guarantee of liberty necessarily encompasses all the rights the Supreme Court has decided are protected by the right to liberty guaranteed in the Fourteenth Amendment's Due Process Clause under the substantive due process doctrine. Furthermore, because these fundamental rights are secured as rights of U.S. citizenship, the federal government's authority to secure these rights is plenary and not limited to correcting state violations. Congress is authorized to legislate to enforce these rights directly against any violation.

It has long been my view that the framers of the Civil Rights Act of 1866 and the Fourteenth Amendment intended to make more explicit the nationalization of civil rights achieved by the Thirteenth Amendment, albeit while also preserving concurrent state jurisdiction. Although the historical evidence supports this interpretation, it presents a problem. Even though the framers supplanted the states' police power over civil rights only to the extent they deemed necessary to protect them and sought to preserve state jurisdiction over ordinary civil and criminal civil rights violations, their theory of civil rights as constitutionally secured rights of U.S. citizenship gives to Congress the authority to supplant the states' police power completely.[28]

In its 1873 decision in the *Slaughterhouse Cases*, the Supreme Court recognized that this interpretation of the Thirteenth and Fourteenth amendments entailed the recognition of Congress's plenary power to enforce constitutional rights. The Court rejected the petitioners' argument that the Thirteenth and Fourteenth amendments secured the fundamental rights in which liberty consists as rights of U.S. citizenship precisely because it would have recognized plenary congressional authority to secure fundamental constitutional rights. In this five-to-four decision that liberal and conservative legal scholars agree was inconsistent with the framers' intent, Justice Samuel Miller declared that this understanding would "transfer the security and protection" of "nearly every civil right for the establishment and protection of which organized government is instituted" "from the States to the federal government." It would "bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States." It "would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens," which would

"fetter and degrade the State governments by subjecting them to the control of Congress" in the exercise of their powers of the "most ordinary and fundamental character." In short, this view of federal constitutional rights would change "the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people." The Court rejected such far-reaching changes "in the absence of language which expresses such a purpose too clearly to admit of doubt." Even a Court dominated by justices committed to interpreting the text of the Constitution according to the understanding of its framers is not likely to adopt such a far-reaching interpretation of the Thirteenth Amendment.[29]

Later Reconstruction Congresses continued the approach to constitutional rights enforcement adopted in the Fugitive Slave acts of 1793 and 1850 and the Civil Rights Act of 1866. They exercised plenary power to enforce Fourteenth Amendment and Fifteenth Amendment rights when they enacted the Enforcement Act of 1870 and the 1871 Ku Klux Klan Act. These statutes explicitly imposed civil liability and criminal penalties on state officials and private individuals who interfered with or prevented citizens from exercising their constitutionally secured rights, such as the right to vote in state and federal elections and the First Amendment rights to freedom of speech and freedom of assembly for political purposes, the right to life and the right to the equal protection of the law. These statutes went beyond the 1866 act by establishing federal criminal jurisdiction to punish constitutional rights violations committed by private individuals without regard to state action or inaction. Furthermore, the 1870 Enforcement Act reenacted the Civil Rights of 1866 pursuant to the recently ratified Fourteenth Amendment, to ensure its constitutionality, and it also extended to all persons in the United States the same specific civil rights as are enjoyed by white citizens that the Civil Rights Act of 1866 originally conferred on U.S. citizens. The 1870 Enforcement Act extended to all persons the federal remedies and processes the 1866 act secured to U.S. citizens to enforce their civil rights, and it expressly criminalized deprivations of these civil rights under color of law or custom and because of "such person being an alien, or by reason of his color or race." Thus, Congress expressly declared that, in addition to race, color, and previous condition of servitude, alienage was no longer a legitimate basis for denying or infringing civil rights.[30]

The federal attorneys and federal judges who were charged with enforcing the 1866, 1870, and 1871 statutes accepted their charge and enforced them. The Department of Justice directed U.S. attorneys to prosecute all violators, and government attorneys followed the attorney general's directives and vigorously enforced these statutes and brought prosecutions against thousands of defendants with surprising success. Federal judges uniformly upheld the constitutionality of these statutes against constitutional challenges filed by defendants' attorneys. All three branches of the federal government shared a common understanding that the government of the United States possessed plenary power to fulfill its duty to enforce the fundamental constitutional rights of all Americans, and they joined together in a heroic effort to protect American citizens by prosecuting violators of these statutes.[31]

The intertwined history of slavery and freedom reveals a profound moral anomaly in U.S. constitutionalism. Whereas the U.S. Supreme Court affirmed the plenary power that Congress, the federal executive, and the federal courts exercised before the Civil War to secure and enforce the constitutionally secured property right of slave owners in their slaves, the Court refused to affirm the same plenary power that Congress, the federal executive, and the lower federal courts exercised to secure the fundamental rights of freemen after the Civil War. In its interpretations of the Thirteenth Amendment as a guarantee against the badges and incidents of slavery and of the Fourteenth Amendment as a guarantee against state action, the Supreme Court perpetuates the morally problematic principle that these amendments do not authorize as much constitutional authority to protect the human rights and equality of all Americans as the original Constitution authorized to protect the property rights of slave owners. Aware of this history, we are confronted as a society with the moral dilemma the framers of the Thirteenth and Fourteenth amendments confronted and resolved in 1866 when they acted to secure fundamental individual rights. The question is whether the Supreme Court is willing to confront and resolve this troubling moral question as did the framers of the Thirteenth and Fourteenth amendments, or will choose to ignore it and thereby perpetuate this moral anomaly of U.S. constitutionalism.

NOTES

1. *Bailey v. Alabama*, 219 U.S. 219, 241 (1911).

2. *See, e.g.*, Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187 (2005) (hereafter Kaczorowski, 42 HARV. J. ON LEGIS.); Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORDHAM L. REV. 153 (2004) (hereafter Kaczorowski, 73 FORDHAM L. REV.); Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986) (hereafter Kaczorowski, 61 N.Y.U. L. REV.); Kaczorowski, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866–1876 (1985) (hereafter, Kaczorowski, THE POLITICS OF JUDICIAL INTERPRETATION).

3. U.S. CONST. art. IV, § 2, cl. 3.

4. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302. §§ 3, 4. The legislative history of the 1793 Fugitive Slave Act is recounted in William R. Leslie, *A Study in the Origins of Interstate Rendition: The Big Beaver Creek Murders*, 57 AM. HIST. REV. 63 (1952); Paul Finkelman, *The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793*, 56 J.S. HIST. 411 (1990).

5. Robert J. Kaczorowski, *Fidelity Through History and to It: An Impossible Dream?* 65 FORDHAM L. REV. 1663, 1673–85.

6. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 612 (1842).

7. *Id.* at 613; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) and its relationship to Justice Story's opinion in *Prigg* is analyzed in Kaczorowski, 73 FORDHAM L. REV. 168–81.

8. *Prigg*, 41 U.S. (16 Pet.) At 616–17.

9. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462. *Ableman v. Booth*, 62 U.S. (21 How.) 506, 526 (1858); *see* Kaczorowski, 73 FORDHAM L. REV. 191–204.

10. Kaczorowski, 73 FORDHAM L. REV. 204–5; Kaczorowski, 42 HARV. J. ON LEGIS. 199.

11. Kaczorowski, 42 HARV. J. ON LEGIS. 200–202; Kaczorowski, 73 FORDHAM L. REV. 209–16. CONG. GLOBE, 39th Cong., 1st Sess. 474–75, 1118, 1294 (1866) (hereafter CONG. GLOBE).

12. CONG. GLOBE at 474–75, 504, 1118, 1294 (1866). *See* Kaczorowski, 73 FORDHAM L. REV. 211–15.

13. CONG. GLOBE at 474; *see* Kaczorowski, 73 FORDHAM L. REV. 223–30.

14. CONG. GLOBE at 1118.

15. CONG. GLOBE at 1119; *id.* app at 157.

16. *Id.* at 1119; *id.* app at 157; *see also id.* at 570, 1151–53,1293–95, 1832–33.

17. *Id.* at 1294; *see also id.* at 1291–92, 1152,1153, 1270, 1833, 476, 500, 1120, 1156–57, app 158–59; Kaczorowski, 73 FORDHAM L. REV. 216–30.

18. Kaczorowski, 73 FORDHAM L. REV. 205–9.

19. CONG. GLOBE at 1118.

20. Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Kaczorowski, 42 HARV. J. ON LEGIS. 204–30.

21. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 §§ 1–3; Kaczorowski, 42 HARV. J. ON LEGIS. 216–19, 250–54.

22. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 § 2; Kaczorowski, 42 HARV. J. ON LEGIS. 230–46.

23. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 §§ 2, 3; Kaczorowski, 42 HARV. J. ON LEGIS. 230–60, 281–82.

24. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 § 3; Kaczorowski, 42 HARV. J. ON LEGIS. 246–49.

25. *United States v. Rhodes*, 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151); *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 592–93; Kaczorowski, 42 HARV. J. ON LEGIS. 248–49, 250–60; Kaczorowski, THE POLITICS OF JUDICIAL INTERPRETATION 8–13, 108–16; ROSS A. WEBB, BENJAMIN HELM BRISTOW: BORDER STATE POLITICIAN 51–58 (1969); Ross A. Webb, *Benjamin Helm Bristow: Civil Rights Champion, 1866–1872*, 15 CIVIL WAR HIST. 39, 39–42 (1969); Victor B. Howard, *The Black Testimony Controversy in Kentucky, 1866–1872*, 58 J. NEGRO HIST. 140, 146–53 (1973).

26. Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 28–29, §§ 4–9; Kaczorowski, 42 HARV. J. ON LEGIS. 260–63.

27. CONG. GLOBE at 474; Kaczorowski, 42 HARV. J. ON LEGIS. 263–80.

28. Robert J. Kaczorowski, THE NATIONALIZATION OF CIVIL RIGHTS: CONSTITUTIONAL THEORY AND PRACTICE IN A RACIST SOCIETY, 1866–1883 (1987) (submitted as a doctoral dissertation to the University of Minnesota [1971]); Kaczorowski, 61 N.Y.U. L. REV. 863.

29. Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 76, 77, 78 (1873).

30. Act of May 31, 1870, ch. 114, 16 Stat. 140; Act of Apr. 20, 1871, ch. 22, 17 Stat. 13. The Civil Rights Act of 1866 was reenacted in the Act of May 31, 1870, ch. 114, 16 Stat. 140, 144, § 18; civil rights were extended to "all persons within the jurisdiction of the United States," *in id.*, § 16, and criminal penalties were imposed on persons acting under color of law or custom who deprived aliens of their civil rights, in *id.* § 17.

31. Kaczorowski, THE POLITICS OF JUDICIAL INTERPRETATION is a systematic history of the federal government's enforcement of these federal civil rights statutes during Reconstruction.