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FEDERAL POWER TO PUNISH INDIVIDUAL CRIMES UNDER THE FOURTEENTH AMENDMENT: THE ORIGINAL UNDERSTANDING

Alfred Avins*

I. Introduction

The recent companion cases of *United States v. Guest*¹ and *United States v. Price*² have raised the question of the extent of Congress's power to punish crimes committed by one individual against another. This question has been of considerable public interest as a result of the murders of several northern civil rights workers in southern states which have gone unsolved, and other acts of violence in recent years which, to a greater or lesser extent, have been traceable to racial tensions.

In the *Price* case, a unanimous United States Supreme Court held that private parties who conspired with public officials to murder three persons were equally acting under color of law with the officials in depriving the dead persons of life and liberty without due process of law in violation of the fourteenth amendment, and hence could be punished by federal law enacted to enforce that amendment. In the *Guest* case, on the other hand, there were four different opinions, some of which found a rather tenuous "state action" basis while others deemed it unnecessary. However, *obiter dicta* in the opinions of at least six justices appear to indicate that, to some extent at least, the majority has obliterated the "state action" requirement of the fourteenth amendment for the permissible exercise of congressional power, by holding that private conspiracies or violence designed to deter Negroes from exercising alleged fourteenth amendment rights may be punished by federal legislation enacted pursuant to section five of that amendment as an enforcement of the equal protection clause.³

It is noteworthy that unlike several recent cases which have largely ignored legislative history in construing the fourteenth amendment,⁴ the opinions in the *Guest* and *Price* cases accept the relevancy of original understanding by the Congress, the latter case appending a copious quotation from the remarks of one of the reconstruction senators.⁵ Since the Court itself has accepted the hypothesis that the original understanding of the framers is controlling, an inquiry as to what that understanding was conforms strictly with the Court's own premises. The purpose of this article is to examine the original understanding of the framers of the fourteenth amendment and to determine whether these cases, particularly the *Guest* case, accurately reflect that understanding insofar as the one holds that the federal government may punish crime pursuant to the

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1 383 U.S. 745 (1966).

2 383 U.S. 787 (1966).

3 See the concurring opinions in *Guest* of Justices Clark and Brennan.

4 See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

5 *United States v. Price*, 383 U.S. 787, 807-20 (1966).

fourteenth amendment even though that crime has not been committed under state authority.

II. The Fourteenth Amendment Debates

The equal protection clause has its genesis in the celebrated Hoar incident of *ante-bellum* days. As a result of a conspiracy to incite an insurrection of slaves, South Carolina passed a law which forbade freed Negroes, who were looked on as natural leaders of slave revolts, from entering the state and required the imprisonment of Negro sailors on their ships while the ships were in port.⁶ In November 1844, former Representative Samuel Hoar, a leading Massachusetts lawyer, was sent by that state's officials to South Carolina to test the constitutionality of the law in the federal courts. His arrival caused great public excitement, and he was threatened with personal violence. The state authorities refused, or expressed the inability to protect Hoar against mob violence, and on December 5, 1844, the South Carolina legislature passed a resolution expelling him from the state.⁷ The incident caused great indignation in the North and became a constant subject of reproach by northern members of the Congress against the South.⁸ For example, Representative John A. Bingham, the Radical Republican lawyer from Ohio who drafted the first section of the fourteenth amendment, gave as one of the reasons for introducing his amendment that the guarantee of privileges and immunities in article IV, section 2 of the original Constitution

was utterly disregarded in the past by South Carolina when she drove with indignity and contempt and scorn from her limits the honored representative of Massachusetts, who went thither upon the peaceful mission of asserting in the tribunals of South Carolina the rights of American citizens.⁹

The Justice Department's brief in *Guest* asserted that the Thirty-Ninth Congress, which proposed the fourteenth amendment, had before it testimony of various persons about private as well as official persecution of white southern unionists, northerners in the South, and Negroes.¹⁰ The brief therefore concluded that the "inference is compelling that not only the Joint Committee, but Congress as a whole, and also the ratifying legislatures, regarded the Fourteenth Amendment as empowering Congress to deal effectively with the atrocities depicted in the testimony."¹¹ Apparently, the majority of the Supreme Court agreed with the Justice Department that this meant that Congress would be empowered to deal directly with private individuals who without state sanction commit

6 See CONG. GLOBE, 31st Cong., 1st Sess., app. 1675 (1850). Hereinafter, the Congressional Globe will be cited by congress, session, page, and year, viz: 31 (1) GLOBE app. 1675 (1850).

7 BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS, 1774-1927, at 1103 (1928).
8 See, e.g., 30 (2) GLOBE 418-19 (1849) (remarks of Representative Hudson); 31(1) GLOBE app. 123-24 (1850) (remarks of Senator Clay); *id.* at app. 288-89 (remarks of Senator Butler); *id.* at 1663 (remarks of Senator Davis); 33 (1) GLOBE 1012-13 (1854) (remarks of Senator Sumner); 34 (1) GLOBE 1598 (1856) (remarks of Representative Comins).

9 39 (1) GLOBE 158 (1865).

10 Brief for appellant at 35-36, *United States v. Guest*, 383 U.S. 745 (1966).

11 *Id.* at 37.

crimes against other persons. The historical evidence, however, does not sustain this point of view.

It is true that evidence of crime in the South, of a political or racial nature, was widespread. This was in part brought on by disorganization and virtual anarchy consequent on the termination of the Civil War and the resulting collapse of economic and political institutions. The Justice Department's brief cited testimony before the Joint Committee on Reconstruction¹² and the Schurz report,¹³ both of which were widely circulated. Although much of this material was hearsay, the Republicans in Congress nevertheless believed it, or professed to believe it, and the material is therefore of value in construing congressional intent.

In addition, there were a considerable number of references on the floor of Congress to crime in the South. Even before the termination of the war, Representative William D. Kelley, a Radical Republican lawyer from Pennsylvania, warned the House that the southern state governments, if left on their own, would do nothing to protect the white loyalists or Negroes from private violence.¹⁴ Senator Henry Wilson, a Massachusetts Republican, attacked the murders and outrages being committed on freedmen by southerners to enforce the "black codes," and even Senator Reverdy Johnson, a Maryland Democrat and former Attorney-General of the United States, admitted that "to a certain extent [the report] is true. . . ."¹⁵ Representative Thomas D. Eliot, a Massachusetts Republican, said that houses were being burned and freedmen murdered in Mississippi.¹⁶ Senator Lyman Trumbull, Chairman of the Senate Judiciary Committee and a former state supreme court justice of Illinois, who was virtual leader of the Senate Republicans in matters relating to reconstruction, read dispatches that murder of unionists and Negroes was imminent in the South, and asserted that "the negro really has no protection afforded him either by the civil authorities or judicial tribunals of the State."¹⁷ Wilson added that these murders were going unpunished.¹⁸ Representative Sidney Perham, a Maine Republican, cited the Schurz Report and asserted that all the reports from the South indicated that loyalists, both white and colored, were being "murdered in cold blood," and that northerners and federal officers were being intimidated by threats of violence and murder. He added that these murders were going unpunished, and that in Kentucky the state courts, instead of protecting unionists, were persecuting them at the instance of rebels.¹⁹

Towards the end of the session, Representative William Windom, a Minnesota Republican, made reference to southerners' "violent efforts to drive out the few Union people who remain among them; their murders of Unionists,

12 *Id.* at 36.

13 C. SCHURZ, REPORT ON THE STATES OF SOUTH CAROLINA, GEORGIA, ALABAMA, MISSISSIPPI, AND LOUISIANA, S. EXEC. DOC. NO. 2, 39th Cong., 1st Sess. 2 (1865).

14 38 (2) GLOBE 289 (1865).

15 39 (1) GLOBE 40 (1865).

16 *Id.* at 517 (1866).

17 *Id.* at 941.

18 *Id.* at app. 140. To the same effect, see 39 (2) GLOBE 104 (1866).

19 39 (1) GLOBE 2082-83 (1866).

and destruction of their dwellings, schoolhouses, and churches. . . ."²⁰ Representative George W. Julian, a Radical Republican from Indiana, declared:

A feeling scarcely less intolerant is evinced toward the few loyal white men in these States, who in many localities are living in constant dread of violence and murder, and are frequently waylaid and shot. Quite recently I have received a letter from a gentleman of intelligence and worth in one of the southern States, in which he says that he and his friends and neighbors, who have been hunted in the mountains like deer all through the war because they refused to take up arms against their country, having had their houses plundered or burned, their property destroyed, and themselves reduced to beggary, are still living in constant dread of assassination; and he begs me, if possible, to procure for them from the Secretary of War transportation to the North.²¹

Somewhat later, Senator Oliver P. Morton, an Indiana Republican, stated that

so far from answering the purpose for which governments are intended, they [the southern Johnson governments] failed to extend protection to the loyal men, either white or black. The loyal men were murdered with impunity; and I will thank any Senator upon this floor to point to a single case in any of the rebel States where a rebel has been tried and brought to punishment by the civil authority for the murder of a Union man. Not one case, I am told, can be found.²²

Instances of murder and assault against freedmen, and the burning of schoolhouses and other buildings which they were using, were given by the House Committee on Freedmen's Affairs as one of the reasons for prolonging the life of the Freedmen's Bureau.²³ The Joint Committee on Reconstruction, which proposed the fourteenth amendment, justified it, *inter alia*, because of the "acts of cruelty, oppression, and murder [of freedmen], which the local authorities are at no pains to prevent or punish."²⁴

The Department of Justice was therefore correct in asserting, and the Supreme Court was not in error in accepting, the proposition that the fourteenth amendment was framed to add a measure of protection to persons who would become the victims of crime. The Department's error, and the Court's misapprehension, lie in misconceiving the remedy provided by the Thirty-Ninth Congress in the equal protection clause of the fourteenth amendment. This point will now be examined.

III. The Drafts of the Fourteenth Amendment

On February 26, 1866, Representative Bingham reported, for the Joint Committee on Reconstruction, a proposed constitutional amendment which in

20 *Id.* at 3170.

21 *Id.* at 3210. See also *id.* at app. 296 (remarks of Representative Shellabarger).

22 40 (2) GLOBE 725 (1868).

23 H.R. REP. NO. 30, 40th Cong., 2d Sess. 5, 26-29 (1868).

24 S. REP. NO. 112, 39th Cong., 1st Sess. 11 (1866).

altered form was later to become the first section of the fourteenth amendment except for the declaration as to citizenship. This proposal stated:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.²⁵

Bingham pointed out that this proposal was simply an amalgam of the fifth amendment and the privileges and immunities clause contained in article IV, section 2, coupled with a grant of power to Congress to enforce them. Bingham added that while these obligations already rested on the states, state officers of the southern states had habitually disregarded them.²⁶

About seven weeks earlier, Bingham had protested that northern anti-slavery men were unsafe if they went to the South.²⁷ He demanded security from the South for the future. He said that the guarantees of the existing privileges and immunities clause were not enforced and were disregarded. He added:

I propose, with the help of this Congress and of the American people, that hereafter there shall not be any disregard of that essential guarantee of your Constitution in any State of the Union. And how? By simply adding an amendment to the Constitution to operate on all the States of this Union alike, giving to Congress the power to pass all laws necessary and proper to secure to all persons—which includes every citizen of every State—their equal personal rights; and if the tribunals of South Carolina will not respect the rights of the citizens of Massachusetts under the Constitution of their common country, I desire to see the Federal judiciary clothed with the power to take cognizance of the question, and assert those rights by solemn judgment, inflicting upon the offenders such penalties as will compel a decent respect for this guarantee to all the citizens of every State.²⁸

Bingham's amendment was immediately attacked for giving Congress excessive power.²⁹ Representative Andrew J. Rogers, a New Jersey Democrat and a minority member of the Joint Committee on Reconstruction, attacked it for centralizing the government.³⁰ The longest attack came from Representative Robert S. Hale, an ex-judge and New York Republican. Hale asserted that the proposal gave Congress power to supplant state civil and criminal codes. He rejected the suggestion of Representative Thaddeus Stevens that the provision only gave Congress the right to interfere when state laws were unequal and asserted that Congress would directly be able to assure protection to one individual against acts of another individual.³¹ Hale attacked the amendment for

25 39 (1) GLOBE 1034 (1866).

26 *Id.*

27 *Id.* at 157.

28 *Id.* at 158.

29 See generally C. Tansill, A. Avins, S. Crutchfield and K. Colegrove, *The Fourteenth Amendment and Real Property Rights*, in *OPEN OCCUPANCY VS. FORCED HOUSING UNDER THE FOURTEENTH AMENDMENT* 68, 76-80 (Avins ed. 1963).

30 39 (1) GLOBE app. 133 (1866).

31 *Id.* at 1063-64.

centralizing power in the hands of the federal government.³²

Representative Thomas T. Davis, a New York Republican, echoed Hale's fears. He objected that the proposed amendment "is a grant for original legislation by Congress."³³ Still a third New York Republican lawyer, Representative Giles W. Hotchkiss, asserted that it gave Congress power to establish uniform laws for the protection of life, liberty, and property. Hotchkiss stated that he would be glad to support an amendment prohibiting state discrimination, but he opposed the Bingham draft because he also did not want Congress to have any such direct power. Representative Roscoe Conkling, a New York Republican lawyer who was a member of the Joint Committee on Reconstruction, likewise opposed the proposal as being too radical.³⁴

The view that the Bingham proposal gave Congress direct power to legislate in order to punish individual crimes and conspiracies is supported by a statement of one of its supporters who was not a lawyer. The following colloquy occurring between Representative Hiram Price, an Iowa Republican, and Representative Edwin Wright, a New Jersey Democrat, clearly shows that in Price's view the equal protection portion of the Bingham proposal would have given Congress power to punish private violence directed at preventing persons from exercising their federal constitutional rights:

Mr. PRICE. . . . I have learned within the last two weeks from a man who went from the State of Illinois into the State of Mississippi with seven companions, making eight in all, to work in a machine shop, and that there came back only six of them, the other two having been murdered between the shop and their boarding house. . . .

Mr. WRIGHT. I rise to a question of order. I insist that the gentleman must confine himself to the subject under discussion. We are not trying murder cases.

Mr. PRICE. I say, sir, that the intention of the resolution before the House is to give the same rights, privileges, and protection to the citizen of one State going into another that a citizen of that State would have who had lived there for years.

The SPEAKER. That is clearly in order. . . . The Chair sustains the gentleman from Iowa, as his remarks are clearly in order.

Mr. PRICE. . . . Now, sir, if that is the intention of the resolution, if it is designed to protect a citizen of Pennsylvania, New York, Iowa, or any other free State in going into a southern State . . . then I am most decidedly in favor of it. . . .³⁵

In urging his amendment, Bingham declared that although the federal government could protect American citizens abroad, it was powerless to protect them at home.³⁶ Instead, he acknowledged that "citizens must rely upon the State for their protection."³⁷ However, Bingham did not assert any desire to

32 *Id.* at 1065.

33 *Id.* at 1087.

34 *Id.* at 1095.

35 *Id.* at 1066.

36 *Id.* at 1090.

37 *Id.* at 1093.

punish individual crimes directed at preventing the exercise of constitutional rights. Quite the contrary, through the maze of his high-flown rhetoric runs the aim of punishing state officials who refused to protect citizens, rather than punishing private individuals. For example, Bingham asked how a penal prohibition of state denial of equal protection could impair states' rights if all persons were entitled to such protection. He also added that federal courts did not have authority to redress denial of equal protection "which is being practiced now in more States than one of the Union under the authority of State laws. . . ."³⁸ Bingham asserted that without his proposal the state legislatures might break their oaths to support the Constitution and pass unconstitutional acts as they had done in the past. He said:

The question is, simply, whether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish officials of States for violation of the oaths enjoined upon them by their Constitution? That is the question, and the whole question. . . . If they [state legislatures] conspire together to enact laws refusing equal protection to life, liberty, or property, the Congress is thereby vested with power to hold them to answer before the bar of the national courts for the violation of their oaths and of the rights of their fellow-men.³⁹

Bingham protested that if southerners regained control of their state governments, they would pass the laws of banishment, confiscation, imprisonment, and murder that prevailed in the South during the Civil War. He observed that there was "no law anywhere upon our statute-books to punish penally any State officer for denying in any State to any citizen of the United States protection in the rights of life, liberty, and property."⁴⁰ He added: "where is the express power to define and punish crimes committed in any State by its official officers in violation of the rights of citizens and persons as declared in the Constitution?"⁴¹ The following exchange then occurred:

Mr. HALE. I desire . . . to ask him, as an able constitutional lawyer . . . whether in his opinion this proposed amendment to the Constitution does not confer upon Congress a general power of legislation for the purpose of securing to all persons in the several States protection of life, liberty, and property, subject only to the qualification that that protection shall be equal.

Mr. BINGHAM. I believe it does in regard to life and liberty and property as I have heretofore stated it

Mr. HALE. The gentleman misapprehends my point, or else I misapprehend his answer. My question was whether this provision, if adopted, confers upon Congress general powers of legislation in regard to the protection of life, liberty, and personal property.

Mr. BINGHAM. It certainly does this: it confers upon Congress power to see to it that the protection given by the laws of the States shall be equal in respect to life and liberty and property to all persons.⁴²

38 *Id.* at 1089.

39 *Id.* at 1090.

40 *Id.* at 1093.

41 *Id.*

42 *Id.* at 1094.

At the insistence of the Republican House leadership, the Bingham proposal was indefinitely postponed.⁴³ It was never reintroduced, but rather it was redrafted into the form of the present amendment. Representative James A. Garfield, the Ohio Republican lawyer who later became President, observed several years later that the Bingham draft first introduced was postponed at the instance of the House leadership because "it became perfectly evident . . . that the measure could not command a two-thirds vote of Congress, and for that reason the proposition was virtually withdrawn."⁴⁴ Garfield had earlier observed:

Now, let it be remembered that the proposed amendment was a plain, unambiguous proposition to empower Congress to legislate directly upon the citizens of all the States in regard to their rights of life, liberty, and property. . . . After a debate of two weeks . . . it became evident that many leading Republicans of this House would not consent to so radical a change in the Constitution, and the bill was recommitted to the joint select committee.⁴⁵

When the revised version of the first section of the fourteenth amendment was reported out, Representative Thaddeus Stevens, leader of the House Radical Republicans, observed that this section "allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all."⁴⁶ Bingham, too, referred to the first section as giving Congress the power to protect citizens against unconstitutional state legislation.⁴⁷ Senator Jacob Howard, a Michigan Republican lawyer, reporting the same provision to the Senate on behalf of the Joint Committee on Reconstruction, noted that the equal protection clause was directed at abolishing "all class legislation," and that the fifth section of the amendment was designed to give Congress the power to carry out the guarantees of the first section.⁴⁸ Senator Luke Poland, a Vermont Republican and a former chief justice of that state's supreme court, speaking in favor of the revised and final version of the first section, likewise noted that it was designed to "uproot and destroy all . . . partial State legislation" just as the previously passed civil rights bill was intended to do.⁴⁹ Senator Timothy Howe, a Wisconsin Radical Republican and a former state supreme court justice, in supporting the amendment, also urged that it would correct unjust legislation.⁵⁰ Senator John Henderson, a Missouri Republican, referred to it as a "provision securing equal protection of the laws against inimical State legislation."⁵¹

It is evident from the foregoing that the original intention of the framers was only to permit Congress to enact laws which affected the activities of state officials. The question may be asked, how was this expected to cure the private violence in the South with which Congress was concerned? The answer lies in

43 *Id.* (remarks of Representative Conkling).

44 42 (1) *GLOBE* app. 151 (1871).

45 *Id.*

46 39 (1) *GLOBE* 2459 (1866).

47 *Id.* at 2542.

48 *Id.* at 2766.

49 *Id.* at 2961.

50 *Id.* at app. 219.

51 *Id.* at 3035.

an analysis of the Civil Rights Bill, the substantive principles of which the first section of the fourteenth amendment was designed to incorporate.⁵² In introducing this bill, Senator Lyman Trumbull of Illinois, Republican Chairman of the Senate Judiciary Committee, observed that his bill would not apply in states which had equal laws.⁵³ Indeed, the second section, which was the penal enforcement provision, required that, to be penalized, the person depriving Negroes of their rights would have to be acting under color of law.⁵⁴ Senator Garrett Davis, a Kentucky Democrat, opposed the bill because state judges and officers could be punished for executing state constitutions and laws.⁵⁵ Trumbull replied that since Negroes had been freed under the thirteenth amendment, they were citizens and hence entitled to the privileges and immunities given citizens by article IV, section 2 of the original Constitution.⁵⁶ He later explained that state judges and other officials who refused Negroes the protection of the laws should be punished for not doing their duty under the Constitution, but he added:

These words "under color of law" were inserted as words of limitation, and not for the purpose of punishing persons who would not have been subject to punishment under the act if they had been omitted. If an offense is committed against a colored person simply because he is colored, in a State where the law affords him the same protection as if he were white, this act neither has nor was intended to have anything to do with his case, because he has adequate remedies in the State courts; but if he is discriminated against under color of State laws because he is colored, then it becomes necessary to interfere for his protection.⁵⁷

In the House, Representative William Lawrence, an Ohio Republican and a former state judge, made the same observation. He pointed out that there were two ways in which a state could deprive citizens of their rights, either by the passage of prohibitory laws, or by "a failure to protect any one of them." Thus, if a state should enact laws for the protection of one group of citizens and simply omit to pass a law for the protection of others, this would constitute a denial of equal protection granted by the laws.⁵⁸ Lawrence further noted that the bill did not undertake to punish individual crimes against citizens respecting their life, liberty, or property, but rather constituted an enforcement of the privileges and immunities clause of article IV, section 2 of the Constitution: Lawrence decried states which authorize such offenses against life, liberty, or property, or deny to a class of citizens all protection against them.⁵⁹ He approved the punishment of state officers guilty of such offenses.⁶⁰

The following colloquy between Representative James Wilson, an Iowa Republican lawyer and Chairman of the House Judiciary Committee, who was

52 See Tansill *et al.*, *supra* note 29, at 81.

53 39 (1) GLOBE 476 (1866).

54 *Id.* at 475.

55 *Id.* at 598.

56 *Id.* at 600.

57 *Id.* at 1758.

58 *Id.* at 1833.

59 *Id.* at 1835.

60 *Id.* at 1837. He said: "And if an officer shall intentionally deprive a citizen of a right, knowing him to be entitled to it, then he is guilty of willful wrong which deserves punishment."

in charge of the Civil Rights Bill, and Representative Benjamin F. Loan, a Missouri Republican lawyer, clearly illustrates the framers' intentions:

Mr. LOAN. Mr. Speaker, I desire to ask the chairman who reported this bill, why the committee limit the provisions of the second section to those who act under color of law. Why not let them apply to the whole community where the acts are committed?

Mr. WILSON, of Iowa. That grows out of the fact that there is discrimination in reference to civil rights under the local laws of the States. Therefore we provide that the persons who under the color of these local laws should do these things shall be liable to this punishment.

Mr. LOAN. What penalty is imposed upon others than officers who inflict these wrongs on the citizen?

Mr. WILSON, of Iowa. We are not making a general criminal code for the States.

Mr. LOAN. Why not abrogate those laws instead of inflicting penalties upon officers who execute writs under them?

Mr. WILSON, of Iowa. A law without a sanction is of very little force.

Mr. LOAN. Then why not put it in the bill directly?

Mr. WILSON, of Iowa. That is what we are trying to do.⁶¹

Even though Bingham opposed the Civil Rights Bill for other reasons, his views were exactly the same on this point. He never contemplated punishing private individuals for private crimes, saying that

the care of the property, the liberty, and the life of the citizen, under the solemn sanction of an oath imposed by your Federal Constitution, is in the States, and not in the Federal Government. I have sought to effect no change in that respect in the Constitution of the country. I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations by State officers of the bill of rights. . . . Standing upon this position, I may borrow the words . . . as truly descriptive of the American system: "centralized government, decentralized administration." That, sir . . . is the secret of your strength and power.

I hold, sir, that our Constitution never conferred upon the Congress of the United States the power—sacred as life is, first as it is before all other rights which pertain to man on this side of the grave—to protect it in time of peace by the terrors of the penal code within organized States; and Congress has never attempted to do it. There never was a law upon the United States statute-book to punish the murderer for taking away in time of peace the life of the noblest, and the most unoffending as well, of your citizens, within the limits of any State of the Union. The protection of the citizen in that respect was left to the respective States, and there the power is to-day. What you cannot do by direction you cannot do by indirection.⁶²

The conclusion from the foregoing material is clear. The Thirty-Ninth Congress, in proposing the fourteenth amendment, never contemplated the punishment of private individuals not acting pursuant to state law for crimes committed against other individuals, regardless of the motive. Instead, such

61 *Id.* at 1120.

62 *Id.* at 1292.

law enforcement activities were to be left to state officials, where they had traditionally reposed. The remedy that Congress did propose was that if state officials were derelict in their duty, imposed by the first section of the fourteenth amendment, to protect the lives, liberty, and property of all persons equally, then under the fifth section Congress could enforce the first section by punishing such state officials for their willful dereliction. Thus, the theory was that if state officials carried out their federally-imposed duty of protecting all persons equally, crimes against southern white unionists, northern travelers in the south, and Negroes would be prevented by these state officials exercising their traditional law enforcement powers. But in no event did the framers in the Thirty-Ninth Congress contemplate that private criminals could be punished by federal authority under the fifth section of the fourteenth amendment. The defeat of the original Bingham draft shows that Congress wanted to foreclose even the possibility that such a power might be derived from the proposed amendment.

IV. The First Enforcement Act

In urging that Congress can reach private conspiracies that do not involve public officers, the Justice Department's brief in the *Guest* case relied heavily on section 241 of the Criminal Code,⁶³ which was originally derived from section 6 of the Enforcement Act of 1870.⁶⁴ The Justice Department's brief quoted extensively from the remarks of Senator John Pool of North Carolina,⁶⁵ which the Court appended to its opinion in the *Price* case.⁶⁶ The Justice Department's brief noted:

The most compelling evidence of the intent of the framers of the Fourteenth Amendment is, of course, to be found in the reports and debates of the Thirty-Ninth Congress which drafted the Amendment and proposed it to the States. But, unfortunately, those materials contain nothing really conclusive on the point at issue here.⁶⁷

As shown above, this premise is highly dubious, depending, of course, on what one deems to be "really conclusive." The Justice Department's brief then proceeded to assert that the Enforcement Act of May 31, 1870, which was involved in the *Guest* case, constituted a contemporaneous construction of the fourteenth amendment and the similarly worded fifteenth amendment, since many of the senators and representatives who voted for these amendments likewise voted for the statutes enforcing them. The brief concluded that these members of Congress acted under the belief that the amendments permitted Congress to punish private violence not engaged in by state officials.⁶⁸ This line of reasoning contains several flaws.

The first of these flaws is the assumption that the dominant Radical Republicans were fastidious about constitutional niceties during the reconstruction

63 18 U.S.C. § 241 (1964).

64 Ch. 114, § 6, 16 Stat. 140.

65 Brief for appellant at 14-15, *United States v. Guest*, 383 U.S. 745 (1966).

66 *United States v. Price*, 383 U.S. 787, 807-20 (1966).

67 Brief for appellant at 33-34, *United States v. Guest*, 383 U.S. 745 (1966).

68 *Id.* at 37-40.

so that their legislation in fact represented true contemporaneous construction of the relevant constitutional provisions. We have on record the very frank confession of Representative John F. Farnsworth, an Illinois Republican lawyer who supported these amendments, and who was an experienced representative and prominent Union general, that the contrary was in fact the case. Farnsworth stated

that I had given votes and done things during my twelve years' service in the House of Representatives which I cannot defend, I have no doubt I know we have done things during the war and during the process of reconstruction to save the Republic which could not be defended if done in peace. We were obliged to do some things . . . which will scarcely bear the test of the calm light of peace and constitutional law. We passed laws, Mr. Speaker, and the country knows it, which we did not like to let go to the Supreme Court for adjudication. And I am telling no tales out of school. . . .

Sir, we have done some things under the necessity of the case, and under the war powers, and I am ready to do them again to save the nation's life, which may be a little beyond the verge of the constitutional power possessed by Congress in time of peace.⁶⁹

In regard to the Enforcement Act itself, some remarks of Senator Jacob Howard of Michigan point in the same direction. Howard began by observing that he had been dissatisfied with the fifteenth amendment during its passage and had offered a different version not limited to inhibiting state or federal action.⁷⁰ Indeed, he had been a carping critic of the amendment's phraseology.⁷¹ Howard observed that the amendment as passed inhibited only state and federal legislation:

It is a prohibition upon the two Governments, the Federal and the State Government, by which they are respectively disabled from passing any act by which this evil shall be created or encouraged. It does not, in terms, relate to the conduct of mere individuals, and a very "strict construction" court of justice might, as I can well conceive, refuse to apply the real principles of the amendment to the case of individuals who themselves, as mere individuals, and not as authorized by Governments or Government officers, should undertake to deny or prevent to a colored man the exercise of his right of suffrage; and I have some fear, I confess, that owing to the peculiar phraseology of this amendment some courts may give it that strict, and, in my judgment, narrow construction.⁷²

Howard proceeded to assert that Congress intended a broader purpose than the strict language of the amendment relating to federal or state discriminatory legislation. He said that it intended to assure Negroes the opportunity to vote. But he hesitated to say what the United States Supreme Court would construe the amendment to mean and expressed the fear that the state courts

69 42 (1) GLOBE app. 116 (1871). Bingham himself admitted engaging in unconstitutional hanky-panky in 1866. See 41 (2) GLOBE 1747 (1870).

70 41 (2) GLOBE 3654-55 (1870).

71 See Avins, *The Fifteenth Amendment and Literacy Tests: The Original Intent*, 18 STAN. L. REV. 808, 813-14, 817-18, 820 (1966).

72 41 (2) GLOBE 3655 (1870).

would give it a "narrow construction" which would exclude the punishment of individuals for preventing Negroes from voting, "which was the great objective we had in view in proposing this amendment. . . ." ⁷³ Howard protested against such a construction as being out of harmony with the advocates of the amendment and because it would largely deprive Negroes of remedies "which [were] in the minds of its authors when it was under discussion in these Chambers." ⁷⁴

What was in the minds of the framers of the fifteenth amendment nobody knows, but what was in their speeches is a matter of record. The dominant Republicans, especially in the Senate, presented the apex of discord to the country, and the compromise conference report that was finally hammered out was the subject of keen disappointment. ⁷⁵ But in the proposals, counterproposals, objections, cross-objections, disputes, and solutions, which filled a large portion of the *Congressional Globe* for the third session of the Fortieth Congress, scarcely a word can be found indicating that anyone was interested in private individuals preventing Negroes from voting. There were too many other priority objections to the various drafts of the amendment. There were long discussions about uprooting state laws and constitutions wholesale, ⁷⁶ but none about private conduct. If Congress intended to solve the latter problem it was the best kept secret in the country, and its final product was a peculiarly poor job of legislative drafting.

The only possible conclusion is that everybody overlooked the problem of private violence. This is hardly surprising. Considering the confusion and haste that surrounded the amendment's proposal, it is very believable that Congress in the rush overlooked the matter entirely. This frequently occurs when legislation is enacted under time pressure. It is possible that had the question of private violence to prevent Negro voting been brought up in 1869 when the fifteenth amendment was upon its passage, the draft would have been broadened to give the Congress the power to forbid such violence. However, it is also possible that Howard would have found himself in the minority on this issue as he did in respect to other matters. Such a possibility is fortified by the rejection of the first Bingham draft of the first section of the fourteenth amendment. But whatever may have been in the minds of Howard and others in Congress regarding private violence to bar voting, none of it got into their speeches or into the fifteenth amendment itself. Thus, if the spirit exhibited in Howard's *ex post facto* self-serving declaration pervaded the Enforcement Act of 1870, the statute may be safely disregarded as a contemporaneous construction of either the fourteenth or the fifteenth amendment.

The remarks of Senator Pool, upon which the Justice Department's brief so heavily relied, are also instructive. Pool, not a member of Congress in 1866 when the fourteenth amendment was proposed, was one of the two Republicans

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See Avins, *supra* note 71, *passim*.

⁷⁶ See, e.g., 40 (3) *GLOBE* 1036-37 (1869) (remarks of Senator Trumbull); *id.* at 1039-40 (remarks of Senator Sherman); *id.* at 1427 (remarks of Representative Bingham).

to vote against the fifteenth amendment.⁷⁷ He observed that

these Kuklux . . . mean to render invalid and inefficient in its operation the provisions of the fifteenth amendment; but it is done in an indirect way. . . . I have not the fifteenth amendment before me, but I think it provides that no *State* shall debar a man from the right to vote because of his race, color, or previous condition. Standing at the ballot-box and keeping colored men away by force would hardly be a violation of the laws of the Union. They have not done that; that is not the purpose; the purpose is terrorism and intimidation and thus to prevent the exercise of the right to vote.⁷⁸

In spite of this clear recognition that the fifteenth amendment limited only state action, about one month later Senator Pool proposed provisions purporting to enforce that amendment by punishment of private individuals who interfered with the right to vote, along with a broader provision which became the sixth section of the Enforcement Act and which punished private conspiracies to intimidate citizens in the exercise of their constitutional rights.⁷⁹ On the surface, at least, it appears that Congress was more concerned with securing the Negro vote for the Republican Party in the South⁸⁰ than in the constitutional limitations of the amendments it was purporting to enforce. In an age of notoriously low political morality, one can well credit Representative Farnsworth's confession. There is thus good reason to discredit completely the Justice Department's theory of contemporaneous construction.

However, it would still be instructive to examine the debates on the Enforcement Act of 1870, taking them at face value, to see to what extent they actually did reflect the theory of the framers of the fourteenth amendment. On April 15, 1870, while the readmission of Georgia was under consideration, Senator Pool made a long speech about the activities of the Ku Klux Klan, which was very active in his home state of North Carolina. Pool commenced by admitting that crime was committed all over the country, and asserted that his state was freer of ordinary crimes of violence than most other areas. He added that as a practicing lawyer, he was able to state that ordinary crimes were efficiently punished. But Pool observed that political murders committed by the Ku Klux Klan were not punished because state officials were unable or unwilling to ferret out and punish the offenders. He declared that "[i]f by acts of commission or omission a State will not protect its citizens, then the United States is bound to protect life and property when a case is made for its interference."⁸¹ Pool then observed that the purpose of the crimes committed by the Klan was to deter Negroes from voting or to force them to vote the Democratic ticket. He added that the local law enforcement officers do nothing to stop these political crimes, and indeed, asserted that the local sheriffs and their deputies were "winking at their proceedings."⁸² Pool also charged that the grand juries

77 *Id.* at 1641.

78 41 (2) *GLOBE* 2722 (1870).

79 *Id.* at 3612.

80 Negro votes provided the margin of victory for President Grant's re-election in 1872; see 43 *CONG. REC.* 1314 (1874) (remarks of Representative Ransier).

81 41 (2) *GLOBE* 2718 (1870).

82 *Id.* at 2719.

and petit juries were stacked with Klansmen, so that there was no protection from the law.⁸³ Furthermore, he declared that the large majority of the southern whites were opposed to the congressional reconstruction policy and to the fifteenth amendment and were determined to thwart it by violence.⁸⁴ He then concluded that southern colored Republicans received no protection in life or property from law enforcement agencies of the state.⁸⁵ On May 19, 1870, Pool returned to the same point right before introducing his proposal in a speech quoted in the Justice Department's brief⁸⁶ and in the appendix to the *Price* opinion.⁸⁷ After adverting to his prior speech, Pool asserted that a state might not only "deny" to Negroes the right to vote by enacting positive legislation prohibiting it,

but by acts of omission it may practically deny the right. The legislation of Congress must be to supply acts of omission on the part of the States. If a State shall not enforce its laws by which private individuals shall be prevented by force from contravening the rights of the citizen under the amendment, it is in my judgment the duty of the United States Government to supply that omission, and by its own laws and by its own courts to go into the States for the purpose of giving the amendment vitality there.⁸⁸

Observing that the word "deny" appears not only in the fifteenth amendment but in the equal protection clause of the fourteenth amendment as well, Pool noted:

It shall not deny by acts of omission, by a failure to prevent its own citizens from depriving by force any of their fellow-citizens of these rights. It is only when a State omits to carry into effect the provisions of the civil rights act, and to secure the citizens in their rights, that the provisions of the fifth section of the fourteenth amendment would be called into operation, which is, "that Congress shall enforce by appropriate legislation the provisions of this article."⁸⁹

Pool then asserted that federal legislation could not prevent states from passing unconstitutional laws, and therefore it would have to penalize the individual citizen. He reasoned that if a state official is penalized under the federal law for violation of the constitutional rights of a person, "it operates upon him as a citizen, and not as an officer."⁹⁰ Pool therefore concluded that Congress could just as well penalize a private citizen as a state officer in his private capacity.⁹¹ Of course, this reasoning is exactly contrary to the original reasoning of the Civil Rights Bill and the fourteenth amendment. As previously noted, Bingham was interested in punishing state officers for violation of their oaths to support the Constitution. Necessarily, private citizens could not be punished since they took no such oath. Hence, a state officer who was indicted for violating a

⁸³ *Id.*

⁸⁴ *Id.* at 2718-19.

⁸⁵ *Id.* at 2722.

⁸⁶ Brief for appellant at 14-15, *United States v. Guest*, 383 U.S. 745 (1966).

⁸⁷ *United States v. Price*, 383 U.S. 787, 807-20 (1966).

⁸⁸ 41 (2) *GLOBE* 3611 (1870); *United States v. Price*, 383 U.S. 787, 810 (1966).

⁸⁹ 41 (2) *GLOBE* 3611 (1870); *United States v. Price*, 383 U.S. 787, 811 (1966).

⁹⁰ 41 (2) *GLOBE* 3611 (1870); *United States v. Price*, 383 U.S. 787, 812 (1966).

⁹¹ *Id.*

citizen's constitutional rights could only be indicted as an officer and not, as Pool thought, as a private person. Since Pool was not a member of the Thirty-Ninth Congress, his error is understandable.

Pool continued by discussing the need to penalize conspiracies to violate fourteenth and fifteenth amendment rights.⁹² He also advocated the trial of defendants in federal courts on the ground that state court juries were either friends of the defendants or intimidated by them. Returning to the constitutional point, he reiterated that since Congress could not legislate against the states, it would have to direct its legislation against individuals. Pool concluded:

Mr. President, the liberty of a citizen of the United States, the prerogatives, the rights, and the immunities of American citizenship, should not be and cannot be safely left to the mere caprice of States either in the passage of laws or in the withholding of that protection which any emergency may require. If a State by omission neglects to give to every citizen within its borders . . . enjoyment of his rights it is the duty of the United States Government to go into the State, and by its strong arm to see that he does have the full and free enjoyment of those rights.⁹³

Reading Pool's two speeches together, his meaning seems reasonably clear. He said that there were, in the South, state-wide conspiracies to deprive Republicans, especially if they were colored, of their right to vote, and that local law enforcement officers were collaborating with these conspiracies by not giving colored or other Republicans protection. Accordingly, the state officials were denying equal protection of the laws, in violation of the fourteenth amendment, a position which hardly seems disputable. Pool also observed that the word "deny" appeared in the fifteenth amendment and might also cover state inaction in not affording requisite protection of facilities. This position is also quite plausible. Pool then asserted that the cure for such violations of the constitutional amendments by state officials was to substitute federal enforcement machinery that would bear directly on the private criminals rather than on the negligent state officials, a position not sustainable by the legislative history of the fourteenth amendment, although plausible to a lawyer of the time, as will be noted more fully below. The position that a finding of a state denial of equal protection as a result of a state-wide conspiracy of law enforcement officials could be remedied by substituting federal prosecution for the inactive state machinery is a far cry from the *Guest* case opinions that the federal government can directly prosecute private conspiracies to violate federal rights by violence without an antecedent finding of state violation by wilful neglect to enforce equal protection. The fact that the drafts of Pool's legislation did not mention this assumed antecedent is hardly surprising since it was common knowledge universally assumed.⁹⁴

It might be noted in passing that the Justice Department's brief in *Guest*

92 41 (2) GLOBE 3611-12 (1870); *United States v. Price*, 383 U.S. 787, 812-13, (1966).

93 41 (2) GLOBE 3613 (1870); *United States v. Price*, 383 U.S. 787, 819 (1966).

94 See 42 (1) GLOBE app. 116 (1871), where Representative Samuel Shellabarger, an Ohio Republican lawyer in charge of the anti-Ku Klux Klan bill, answered Representative Farnsworth's assertion that the punishment of conspiracies was not linked to unconstitutional state acts by saying: "it assumes that the State has denied protection to some of its citizens."

only mentioned the second of Pool's two speeches and ignored the first one with which it was linked.⁹⁵ This may have caused confusion in the minds of some of the Supreme Court justices as to its true import.⁹⁶

The assertion that the fourteenth amendment is intended to govern state action only, and not the acts of private individuals, is reinforced by an examination of the other relevant debate on the Enforcement Act of 1870. Senator George F. Edmunds, a Vermont Republican lawyer, pointed out that the real problem in the South was that local law enforcement agencies, namely sheriffs, judges, and jurors, did not want to enforce the law and extend equal protection in political cases.⁹⁷ Senator Timothy Howe, a Wisconsin Republican, noted that in Mississippi a white lawyer who killed a federal tax collector in cold blood for political reasons went unpunished because of community sentiment.⁹⁸ Senator William Stewart, a Nevada Republican lawyer who was in charge of the enforcement bill for the Judiciary Committee, approved of Pool's proposals to deal with Klan-inspired mob violence.⁹⁹

Senator Oliver P. Morton, an Indiana Republican lawyer, observed that the fifteenth amendment left "completely under the control of the several States [the right] to punish violations of the right of suffrage,"¹⁰⁰ except as the fifteenth amendment took away state power to deny the right to vote on the grounds specified, and Edmunds agreed with him.¹⁰¹ Senator William T. Hamilton, a Maryland Democratic lawyer, in speaking against the bill, noted that the fourteenth and fifteenth amendments were phrased like article I, section 10 of the original Constitution, as prohibitions against the states, and not like the thirteenth amendment or the fugitive slave clause of article IV, section 2, which do not in terms address themselves to state action.¹⁰² He added that private violation of the right to vote was not punishable by federal power under the fifteenth amendment.¹⁰³

Senator Howard spoke in favor of enforcing the right to vote by federal instrumentalities since he considered it likely that southern governors would not interfere if Democratic mobs drove Negroes away from the polls.¹⁰⁴ Senator George H. Williams, an Oregon Republican, a former state judge, and later Attorney General in President Grant's cabinet, objected to the bill "because it is indefinite and vague in all or nearly all of its provisions."¹⁰⁵ Williams, who had been a member of the Joint Committee on Reconstruction of the Thirty-Ninth Congress which had reported out the fourteenth amendment, and who had participated actively in the debates on the fifteenth amendment, declared: "Senators upon this floor, grave and learned Senators, whose Republicanism

95 Brief for appellant at 14-15, *United States v. Guest*, 383 U.S. 745 (1966).

96 See 34 U.S.L.W. 3165-66 (U.S. Nov. 16, 1965).

97 41 (2) *GLOBE* 1956 (1870). See also his remarks, *id.* at 3563.

98 *Id.* at 2611-12.

99 *Id.* at 3559.

100 *Id.* at 3571.

101 *Id.*

102 *Id.* at app. 354-55.

103 *Id.* at app. 360.

104 *Id.* at 3655.

105 *Id.* at 3656.

is beyond question, have expressed doubts as to the constitutionality of many of its provisions.¹⁰⁶

Senator Eugene Casserly, a California Democratic lawyer and former corporation counsel of New York City, returned to Hamilton's point by noting that the fifteenth amendment was a limitation only on federal or state power and operated in the same way as the negative limitations of article I, section 10 of the original Constitution. He also felt that the power to enforce the amendment added nothing to the substantive provisions. He therefore concluded that Congress could not penalize the actions of individuals.¹⁰⁷ Casserly conceded that Congress could penalize the actions of state officers acting under state laws, but not private individuals acting on their own volition. Senator Matthew Carpenter, a Wisconsin Republican lawyer and a member of the Senate Judiciary Committee, interrupted him to suggest that Congress might find power to protect voters under the first section of the fourteenth amendment. Casserly replied that the fourteenth amendment also dealt with state action alone and not individual action, so that Congress derived no more assistance from this than from the fifteenth amendment.¹⁰⁸ He concluded that Congress had no power to deal with private violence since such criminal acts were not the acts of the state.¹⁰⁹

Senator Stewart replied that the bill was necessary for the fall elections because the southern Democrats would drive Negroes en masse from the polls.¹¹⁰ Senator Allen G. Thurman, a Democrat and a former chief justice of the Ohio Supreme Court, rose to concur with Casserly. He emphasized that the fifteenth amendment dealt only with the actions of states, or with state officials enforcing state laws, and not with the criminal acts of individuals.¹¹¹ Thurman, too, drew an analogy between the prohibitions laid on the states in article I, section 10 and the fifteenth amendment and pointed out that neither was designed to affect private action. Senator Pool then interrupted him to ask what he would answer if a state passed a law that no election official should be punished for refusing

106 *Id.* at 3657.

107 *Id.* at app. 472-73.

108 *Id.* at app. 473.

109 *Id.* at app. 474.

110 *Id.* at 3658-59.

111 *Id.* at 3661. Thurman observed:

This, then, being simply a limitation on the power of the State, simply withholding from it one of the powers which it heretofore possessed, the power of fixing the qualifications of electors, or restricting that power in a single particular, it is as plain, it seems to me, as the sun at noon-day in a cloudless sky, that this amendment can only be held to speak of a State as a State . . . in her political character, . . . and does not deal with individuals at all.

. . . The prohibition here is upon the State. Can you undertake to punish an individual who is not acting under the authority of the State, but directly against the statute law of the State, and who is punishable under that statute law by indictment in the courts of the State? And yet you undertake to say that that individual, thus acting contrary to the law of his State, liable to punishment by his own State in her own courts, can be taken away from the jurisdiction of his State . . . into a Federal court to be punished under an act of Congress.

It is amazing to me that any lawyer can think for a moment that this bill in this respect where it acts on individuals—not officers of a State at all, mere private individuals, mere trespassers, mere breakers of the peace, mere violators of the State law—that this bill which seizes them and punishes them under this act of Congress and in the Federal Courts is warranted by the fifteenth amendment of the Constitution.

to register or receive the vote of a Negro. Thurman replied that such a law would violate the Constitution, but that it could not be supposed that a state would enact such an unconstitutional law. To this Pool answered that the fifteenth amendment contemplated that a state might by positive legislation or by omission deny the right to vote to Negroes. He added that if a state failed to punish officers who would not receive ballots from Negroes, the efficacy of the amendment would be broken down unless Congress punished them under its power to pass appropriate legislation. Thurman retorted that such laws could be invalidated by the federal judiciary, but that Congress had no power to punish private individuals who did not hold state office.¹¹²

Senator John Sherman, the veteran Ohio Republican lawyer and legislator, then propounded a new theory. He professed agreement with Thurman and asserted that the bill was only intended to limit state action. The following colloquy then occurred:

Mr. SHERMAN. . . . What I mean is that all the provisions of the law are to prevent persons or officers, under the color of State authority, from denying a man the right of suffrage. My colleague cannot deny that we can by appropriate legislation prevent any private person from shielding himself under a State regulation, and thus denying to a person the right to vote on account of race, color, or previous condition of servitude. Our right of appropriate legislation extends to every citizen of a State, the humblest as well as the highest.

Mr. CASSERLY. I should like to ask the Senator from Ohio how a State can be said to abridge the right of a colored man to vote when some irresponsible person in the streets is the actor in that wrong?

Mr. SHERMAN. If the offender, who may be a loafer, the meanest man in the streets, covers himself under the protection or color of a law or regulation or constitution of a State, he may be punished for doing it.

Mr. CASSERLY. Suppose the State law authorizes the colored man to vote; what then?

Mr. SHERMAN. That is not the case with which we are dealing. . . . This bill only proposes to deal with offenses committed by officers or persons under color of existing State law, under color of existing State constitutions. No man could be convicted under this bill reported by the Judiciary Committee unless the denial of the right to vote was done under color or pretense of State regulation. The whole bill shows that.¹¹³

Here we have an interesting theory underlying the legal basis of the bill which is certainly not apparent on its face. Yet the theory is by no means illogical. The fifteenth amendment uprooted many state constitutions and laws forbidding Negroes from voting. The Republicans complained during the debate that Democrats were continuing to follow these state constitutions and laws in spite of the fifteenth amendment.¹¹⁴ Apparently, Sherman envisaged a Democratic mob which turned Negroes away from the polls as a private enforcement of these state laws; the mob was assuming the character of state agents in enforcing state laws.

Senator Garrett Davis, a Kentucky Democratic lawyer, seized on Sherman's

¹¹² *Id.* at 3662-63.

¹¹³ *Id.* at 3663.

¹¹⁴ *See id.* at 3568 (remarks of Senator Sherman), 3658 (remarks of Senator Stewart), 3758 (remarks of Senator Williams).

admission that state action would have to be involved and asserted that a state could only act through its officials and not "by its isolated and straggling citizens."¹¹⁵ He therefore concluded that Congress could not penalize private citizens.¹¹⁶ Davis further asserted that the amendment reached only state legislation,¹¹⁷ a point on which Senator Joseph S. Fowler, a conservative Tennessee Republican concurred.¹¹⁸

Senator Oliver P. Morton, an Indiana Republican, asserted that the debates on the fifteenth amendment would show that Congress, in the second section, did not intend to be confined to legislating against state officials or state laws. He argued that these debates recorded in the *Congressional Globe* of the previous year, indicated that Congress could penalize private persons who interfered with Negro voting.¹¹⁹ Morton, who had participated in these debates, quoted no specific passage therein, and the comments previously made in conjunction with Howard's speech, namely that no such recorded debates dealing with private interference existed, apply here also. The pressing necessity of preserving Negro votes against Klan interference seems to have resulted in conjuring up some non-existent debates.

When voting on the bill commenced, Morton offered an amendment to punish private interference with Negro voting which was carried on a party-line vote. A Democratic-sponsored amendment was then offered to limit this section to acts "under or by color of State authority."¹²⁰ Thurman observed that it had been asserted in debate that this section applied only to persons acting under state authority. He supported the amendment to "show whether the Senate means that that section shall apply only to persons acting under State authority or color of State authority, or whether Congress assumes to punish every ruffian as the embodiment of the State."¹²¹ No doubt Thurman was referring to the theory of his colleague, Sherman. However, this amendment was voted down by a strict party-line vote, with Sherman being absent.¹²²

Thurman then attacked the whole proceeding. He observed that these sections had been adopted in an all-night session, with Senators absent or sleeping on sofas "and only aroused from their slumbers when there was a division of the Senate or when their presence was necessary in order to make a quorum."¹²³ He added that some of the bill was not grounded on the fifteenth amendment, but on Congress' power under the original Constitution to control federal elections. Trumbull also suggested that the bill be printed and postponed. But Stewart declared that the Senate was under time pressure.¹²⁴ The bill was then passed by a party-line vote.¹²⁵

In the House, only a brief objection was made that the bill went beyond

115 *Id.* at 3666.

116 *Id.*

117 *Id.* at 3667.

118 *Id.* at app. 421.

119 *Id.* at 3670-71.

120 *Id.* at 3684.

121 *Id.*

122 *Id.* It is relevant to note that Pool's section had been adopted without a roll-call only a short time before. *Id.* at 3679.

123 *Id.* at 3688.

124 *Id.*

125 *Id.* at 3690.

Congress' power by punishing private individuals.¹²⁶ In his speech supporting the bill, Bingham did not address himself to this point at all.¹²⁷ However, in the next session, when the Supplementary Enforcement Act¹²⁸ was passed, some House Democrats harped on the theme that the fifteenth amendment prohibited only state interference with Negro voting and did not authorize enforcement against private individuals.¹²⁹ Bingham merely replied that the fourteenth amendment gave Congress power "to correct and restrain by law the abuses of State authority."¹³⁰ He added that the Enforcement Act of 1870 was principally designed to enforce the similarly worded fifteenth amendment without addressing himself at all to the question of whether Congress could punish private individuals.¹³¹

Democratic Senators likewise reiterated the point that the fifteenth amendment only prevents state discriminatory action and does not restrain private individuals. They therefore concluded that the second section of the amendment, which gives Congress the power to enforce it, being ancillary to the first section, would not allow Congress to pass a law penalizing purely private action.¹³² Thus, Senator Francis P. Blair of Missouri observed that the fifteenth amendment was worded in the same way as the negative prohibitions of article I, section 10 of the original Constitution, and no one had suggested that these were enforceable against individuals.¹³³

The debates on the Enforcement Act of 1870, upon which both the Justice Department and the majority of the Supreme Court so heavily relied, show, first of all, a considerable willingness to stretch the terms of the fifteenth amendment to cover the problem of private violence, which was overlooked when the amendment was upon its passage. To this extent, the act cannot be deemed a contemporaneous construction of that amendment or the fourteenth amendment, and rather represents action by Congress outside of its constitutional powers to meet what was felt to be a pressing political necessity. Also, such action was predicated upon what was deemed to be an intentional denial of equal protection to southern Republican voters, especially Negroes, by local state authorities, even though this basis for congressional action was not stated in terms in the bill. To that extent, Congress was indeed curing unconstitutional state inaction. The question presented to Congress was the punishment of private conspiracies to violate federal rights only when sheltered by intentional state refusal to afford protection to the victims. This latter constitutional underpinning was wholly overlooked in the *Guest* case opinions.

With the presence of unconstitutional state refusal to act as the basis for federal intervention, the question was narrowed to what remedy was permissible and appropriate to enforce the amendments. Instead of directing its penalties to inactive state officers, Congress chose to substitute federal officers and

126 *Id.* at app. 416 (remarks of Representative Smith).

127 *Id.* at 3883.

128 Enforcement Act of 1871, ch. 99, 16 Stat. 433.

129 41 (3) GLOBE 1272 (1871) (remarks of Representative Eldridge); *id.* at app. 123-24 (remarks of Representative Woodward).

130 *Id.* at 1283.

131 *Id.*

132 *Id.* at 1635 (remarks of Senator Vickers), *id.* at app. 162 (remarks of Senator Bayard).

133 *Id.* at app. 158.

machinery to afford direct protection to victims. How this remedy came to be used will now occupy our attention.

V. The Influence of *Prigg v. Pennsylvania*

The use by Congress of a remedy for unconstitutional state inaction by substituting federal machinery, although not warranted by the terms of the fourteenth and fifteenth amendments, can only be understood in light of the profound influence the case of *Prigg v. Pennsylvania*¹³⁴ had on lawyers of the period. The Justice Department's brief in the *Guest* case cited this case, in passing, for the proposition that Congress may enforce rights secured in the Constitution even without a specific grant of power.¹³⁵ The Justice Department did this without noticing the crucial significance of Bingham's disagreement with this point which led him to vote against the civil rights bill in 1866.¹³⁶

The Supreme Court's opinion in *Prigg v. Pennsylvania* was delivered by Mr. Justice Story at the apex of his reputation. He held that the fugitive slave clause of article IV, section 2 of the Constitution could be enforced by federal legislation and in dictum declared that states could not be required to enforce it.

If, indeed, the constitution guarantees the right, and if it requires the delivery upon the claim of the owner (as cannot well be doubted), the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it. The fundamental principle, applicable to all cases of this sort, would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist, on the part of the functionaries to whom it is entrusted. The clause is found in the national constitution, and not in that of any state. It does not point out any state functionaries, or any state action, to carry its provisions into effect. The states cannot, therefore, be compelled to enforce them; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist, that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or entrusted to them by the constitution. On the contrary, the natural, if not the necessary, conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the constitution.¹³⁷

The impact of this opinion on the then existing legal view of federal-state relations stemmed from two primary sources. First, it constituted the constitutional basis for the Fugitive Slave Law of 1850,¹³⁸ which as part of the Compromise of 1850 had vast political consequences and served as a political irritant that led to war. Second, it was in the same section of the original Constitution as the privileges and immunities clause, which for twenty years the North had been

134 41 U.S. (16 Pet.) 539 (1842).

135 Brief for appellant at 23, *United States v. Guest*, 383 U.S. 745 (1966).

136 39 (1) GLOBE 1291 (1866).

137 *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 615-16 (1842). The dictum that states lacked concurrent power to enforce the fugitive slave provision was denied in *Weaver v. Fegely & Brother*, 29 Pa. 27, 30 (1857).

138 Act of Sept. 18, 1850, ch. 60, 9 Stat. 462. See *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859).

attempting to enforce in favor of freed Negroes.¹³⁹ Like this clause, it was a general declaration of constitutional right not in terms phrased as a limitation on state action.

When the slaves were freed by the thirteenth amendment, it was not surprising that the machinery used in the Civil Rights Act of 1866¹⁴⁰ to enforce the privileges and immunities clause in their favor should be borrowed from the familiar machinery of the Fugitive Slave Law which enforced a similarly worded constitutional provision found in the same section. As Senator Trumbull, who drafted the bill and who was in charge of it as Judiciary Committee Chairman, observed: "Most of [the provisions of the bill] are copied from the late fugitive slave act, adopted in 1850 for the purpose of returning fugitives from slavery into slavery again."¹⁴¹ Notwithstanding Trumbull's long-winded perorations on the need to make freedmen really free by enforcement of the thirteenth amendment, as Senator Lot M. Morrill, a Maine Republican lawyer later observed, the civil rights bill was deemed to be supported under the old privileges and immunities clause and not the thirteenth amendment at all.¹⁴² Trumbull himself recognized this by citing cases interpreting that clause in his opening speech,¹⁴³ as he later virtually admitted.¹⁴⁴

Examination of the House debates is even more illuminating. Representative James F. Wilson, the Iowa Republican lawyer in charge of the bill for the House Judiciary Committee, stated that the bill was merely enforcing the privileges and immunities clause.¹⁴⁵ Wilson, like Trumbull, linked the substantive pro-

139 See, e.g., 30 (2) GLOBE 418 (1849) (remarks of Representative Hudson); 31 (1) GLOBE app. 124 (1850) (remarks of Senator Davis, Mass.); *id.* at app. 1655 (remarks of Senator Winthrop); 33 (1) GLOBE app. 1012 (1854) (remarks of Senator Sumner); 35 (1) GLOBE 1964 (1858) (remarks of Senator Fessenden); *id.* at 1966-67 (remarks of Senators Fessenden and Wilson); 35 (2) GLOBE 952 (1859) (remarks of Representative Granger); *id.* at 980 (remarks of Representative Cochrane); *id.* at 984 (remarks of Representative Bingham).

140 Ch. 31, 14 Stat. 27 (1866).

141 39 (1) GLOBE 475 (1866). See also Trumbull's defense of using the Fugitive Slave Law for enforcement machinery, *id.* at 605. He declared that "we propose to use the provisions of the fugitive slave law for the purpose of punishing those who deny freedom . . ." *Id.*

142 42 (2) GLOBE 730 (1872) Morrill said:

. . . the honorable Senator from Massachusetts is utterly mistaken if he supposes that the civil rights bill was drawn from the thirteenth amendment at all. . . . I did not question the constitutionality of the civil rights bill; but it would have been constitutional before the thirteenth amendment; it was not drawn under that amendment, nor does it look to that at all as its source of authority. It looks to that other provision of the Constitution in the fourth article, which provides for the equal privileges and immunities of the citizens in the several States. That is where its authority is found.

143 39 (1) GLOBE 474-75 (1866).

144 *Id.* at 600, where Trumbull said:

[t]he cases were . . . introduced . . . for the purpose of ascertaining, if we could, by judicial decision what was meant by the term "citizen of the United States;" and inasmuch as there had been judicial decisions upon this clause of the Constitution, in which it had been held that the rights of a citizen of the United States were certain great fundamental rights, such as the right to life, to liberty, and to avail one's self of all the laws passed for the benefit of the citizen to enable him to enforce his rights; inasmuch as this was the definition given to the term as applied in that part of the Constitution, I reasoned from that, that when the Constitution had been amended and slavery abolished, and we were about to pass a law declaring every person, no matter of what color, born in the United States a citizen of the United States, the same rights would then appertain to all persons who were clothed with American citizenship.

145 *Id.* at 1117-18. He declared:

Mr. Speaker, I think I may safely affirm that this bill, so far as it declares the

visions of the privileges and immunities clause with the enforcement provisions of the second section of the thirteenth amendment because of serious constitutional doubts that Congress had the power to enforce the original constitutional provision unaided. He, too, observed that most of the enforcement machinery was "based on the act of September 18, 1850, commonly known as the 'fugitive slave law,' the constitutionality of which has been affirmed over and over again by the courts."¹⁴⁶ Furthermore, to quiet the very serious constitutional doubts of a number of fellow Republicans,¹⁴⁷ Wilson read the passage previously quoted from *Prigg* which interpreted the companion fugitive slave clause as showing the power of Congress to enforce the rights of citizens in the privileges and immunities clause and the due process clause of the fifth amendment. He then declared that this case showed that Congress already had the power to do what Bingham's previously introduced constitutional amendment would have given them the power to do, namely, to enforce the rights of citizens.¹⁴⁸

Bingham, on the other hand, although agreeing wholeheartedly with the objects of the civil rights bill, was of the opinion that *Prigg* was inapplicable and that enforcement of the rights of citizens was left to the good faith of the states. Such a position was certainly an arguable one, since Mr. Justice Story had indicated that the federal government could not only set up machinery to return fugitive slaves, but that states could not be required to do so. Bingham noted, however, that

the Constitution does not delegate to the United States the power to punish offenses against the life, liberty, or property of the citizen in the States, nor does it prohibit that power to the States, but leaves it as the reserved power of the States, to be by them exercised.¹⁴⁹

To remedy this want of power to enforce the existing Constitution, Bingham introduced his first draft amendment.¹⁵⁰ The effect of this draft would have been to embody the rule of *Prigg* into a constitutional amendment. But as previously noted, many Republicans were opposed to giving Congress power to pass a uniform law to protect life, liberty, and property, similar to the uniform law for the return of the fugitive slaves.¹⁵¹ Hence, as Bingham himself later declared, when he came to redraft the first section of the fourteenth amendment, he

equality of all citizens in the enjoyment of civil rights and immunities, merely affirms existing law. We are following the Constitution. We are reducing to statute form the spirit of the Constitution. We are establishing no new right, declaring no new principle. It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen. . . . If the States would all practice the constitutional declaration, that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," (Article four, section two, Constitution of the United States,) and enforce it, . . . we might very well refrain from the enactment of this bill into a law.

146 *Id.* at 1118.

147 *Id.* at 1266-67 (remarks of Representative Raymond); *id.* at 1291-93 (remarks of Representative Bingham); *id.* at 1293 (remarks of Representative Shellabarger); *id.* at app. 156-59 (remarks of Representative Delano).

148 *Id.* at 1294.

149 *Id.* at 1291.

150 *Id.* at 1033-34.

151 *See, e.g., id.* at 1095 (remarks of Representative Hotchkiss).

imitated the framers of the original Constitution in article I, section 10, by imposing negative limitations on the powers of the states.¹⁵² As Bingham wrote in 1871:

The fourteenth amendment, it is believed, did not add to the privileges or immunities before mentioned [in the original Constitution], but was deemed necessary for their enforcement as an express limitation upon the powers of the States. It had been judicially determined that the first eight articles of amendment of the Constitution were not limitations on the power of the States, and it was apprehended that the same might be held of the provision of the second section, fourth article.¹⁵³

Of course, the first section of the fourteenth amendment, after the declaration as to citizenship, is so obviously similar to article I, section 10 that Democratic lawyers, in casting about for grounds to oppose Republican bills, guessed that the former was patterned after the latter. But there was no public evidence of this until Bingham's 1871 statement, and the inferential evidence from the two drafts was not noted in any of the speeches, even by Democrats, and apparently was forgotten. Considering the times, this is not as improbable as it might at first seem. In the four years between 1866 and 1870 the country had gone through a legal and political revolution. The exciting events of the times, such as the reconstruction acts pressed on the South, the impeachment of President Andrew Johnson, and the extension of the franchise to Negroes, would have necessarily drawn so much attention as to push more technical questions into the background. The redrafting of the relatively noncontroversial first section of the fourteenth amendment, which was deemed "surplusage"¹⁵⁴ because it merely re-enacted what was already in the Constitution, was by comparison a very technical matter; if it was overlooked, or its significance was unnoticed, it cannot be considered surprising.

Indeed, it is of significance that the first time this redrafting was brought up in debate was in 1871. Representatives Farnsworth and Garfield, both Republican lawyers who had participated in the debates preceding the proposal of the fourteenth amendment and who had spoken in its favor as well as voted for it,¹⁵⁵ brought up the redrafting by reading extensively from the 1866 *Globe* to refresh their recollection.¹⁵⁶ If the very participants had to read from the *Globe* to aid their memory, it is hardly to be wondered that senators and later members of Congress who were not participants might have forgotten this fact.

Accordingly, Republicans who had forgotten about the redraft or were unfamiliar with it continued to act as if *Prigg* applied to the fourteenth amendment, and by analogy to the fifteenth amendment, even though Bingham's revisions, by converting the fourteenth amendment into a negative limitation on state action, had made it inapplicable. The constant citation of this case by both

152 42 (1) *GLOBE* app. 84 (1871).

153 *REPORTS OF COMMITTEES*, H.R. REP. NO. 22, 41st Cong., 3rd Sess. 1 (1871).

154 J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT*, 123-24, 134-35, 145 (1956).

155 39 (1) *GLOBE* 2462-63 (1866) (remarks of Representative Garfield); *id.* at 2539 (remarks of Representative Farnsworth).

156 42 (1) *GLOBE* app. 115-16, 150-52 (1871).

Republicans and Democrats during the reconstruction period shows that many members of Congress were following this familiar, although wholly inapplicable, constitutional landmark.¹⁵⁷ Insofar, therefore, as the Republicans were acting bona fide, their mistake was a completely reasonable one. No better illustration of this point can be made than the fact that Senator Pool himself, in urging his section which was to go into the Enforcement Act of 1870, referred at length to the enforcement machinery of the Civil Rights Act of 1866, passed under the authority of *Prigg*, as a guide to the interpretation of the fifth section of the fourteenth amendment.¹⁵⁸

VI. Conclusion

The majority of the opinions in the *Guest* case rest on two errors, one piled on top of the other. The first error was that of the Republican senators during the reconstruction period in applying the theory of *Prigg* to interpret the fifth section of the fourteenth amendment. The error of the United States Supreme Court was in taking the product of that erroneous interpretation and applying it without noticing its limitation, namely, that as an antecedent a state or its officials would have to refuse equal protection. The result has been to revert back to the first Bingham draft and to read the word "state" right out of the fourteenth amendment.

The fourteenth amendment does not give Congress the power to punish private individuals violating the rights of others whatever their motive. Nor does

157 See, e.g., 39 (1) GLOBE 1270 (1866) (remarks of Representative Kerr); *id.* at 1836 (remarks of Representative Lawrence); 41 (2) GLOBE 3485 (1870) (remarks of Senator Thurman); *id.* at 3804 (remarks of Senator Bayard); 41 (3) GLOBE app. 166 (1871) (remarks of Senator Bayard); 42 (1) GLOBE app. 231 (1871) (remarks of Senator Blair); *id.* at app. 219 (remarks of Senator Thurman); *id.* at app. 229 (remarks of Senator Boreman); *id.* at 795 (remarks of Representative Blair); 43 (1) RECORD 414 (1874) (remarks of Representative Lawrence).

It is interesting to note that when Representative Benjamin F. Butler, a Massachusetts Republican lawyer, reported a bill for the Committee on Reconstruction to protect southern Republicans, as an enforcement of the fourteenth amendment, he modeled the legal machinery "almost exactly upon the fugitive-slave law of 1850." See REPORTS OF COMMITTEES H.R. REP. NO. 37, 41st Cong., 3rd Sess. 4 (1871). Representative Samuel Shellabarger, an Ohio Republican lawyer who had participated in the debates on the Civil Rights Act of 1866 and the fourteenth amendment, declared that the latter amendment, in its first section, was similar to the Fugitive Slave Clause of article IV, section 2, and that under the authority of *Prigg*, Congress could enforce the fourteenth amendment with its own machinery. He did not mention the Bingham redraft in 1866. 42(1) GLOBE app. 70 (1871). For a further example of Shellabarger's views, see Memorial for Chief Justice Waite, 126 U.S. 585, 600 (1888).

Similarly, Representative David P. Lowe, a Kansas Republican ex-judge, declared:

Again, the second section of the fourth article of the Constitution further provides that — [Fugitive Slave Clause quoted]

The similarity in expression of this section to the one quoted in the fourteenth amendment [first section] is so apparent that its construction must lead to a just understanding of the latter. . . . Under the second section of the fourth article a statute was enacted in 1793 providing for the capture and surrender of fugitive slaves, and in the case of *Prigg vs. Pennsylvania* . . . Mr. Justice Story uses the following language in reference to the fugitive slave law of 1793, as affected by the Constitution. . . . [quotation omitted]

Here, therefore, the doctrine is squarely enunciated by one of the purest and ablest of the eminent jurists that have adorned our Supreme bench that where a State refuses to comply with the requisitions and demands of the supreme law the Federal Government may give effect to its Constitution and laws through its own agency. This doctrine is ample for the exigencies of the present bill. The decision of the Supreme Court in this case has been followed in very numerous cases, and the doctrine must be considered settled, if any thing can be settled by adjudication. *Id.* at 375.

158 41 (2) GLOBE 3611 (1870).

it permit Congress to punish conspiracies to violate federal rights. Any such action is beyond the constitutional power granted to Congress under the fifth section. The remedy given to Congress by the framers to assure equal protection lies in its right to proceed against state law enforcement officers who refuse to accord equal protection to all persons. It is the duty of the states, by their officials, to afford all persons the same protection that the laws grant to any person in the states. If a state official willfully neglects to afford such protection, he violates the constitutional right of the person so affected. Congress may, under the fifth section, enforce the first section by punishing such official for this willful refusal. But it may not proceed directly to punish private individuals who violate the rights of citizens. Insofar as the majority of the opinions in the *Guest* case hold to the contrary, they are inconsistent with the original understanding of the framers and are erroneous.